

NCD

National Council on Disability

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Negative Media Portrayals of the ADA

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SYNOPSIS

This policy brief seeks to identify some prevalent myths and misconceptions about the ADA that media coverage of the law has propagated. The following is a concise outline of the policy brief for easy reference. It lists each of the myths addressed in the paper and gives a summary version of the rebuttal that follows. If accessing this document electronically, click on the myth to link to the relevant section of the policy brief.

MYTH: It is too easy to qualify as having a disability under the ADA.

REBUTTAL: Although Congress intended the ADA to provide broad coverage so that discrimination on the basis of disability could be addressed comprehensively, the courts have construed the ADA's definition of disability very narrowly to make it quite onerous to satisfy. The current legal standard established by the Supreme Court is a strict and demanding one that makes it difficult, and, at times, nearly impossible to prove that one has a disability under the ADA.

MYTH: The ADA permits fringe lawsuits by persons who should not be protected by the Act.

REBUTTAL: There is a widespread public misconception that a really good law can prevent frivolous or marginal lawsuits, when, in fact, access to the courts is a fundamental American liberty, so that frivolous suits must be weeded out by the courts. The media tend to publicize claims involving obscure, marginal, spurious, or unpopular conditions, while devoting little attention to the reality that complaints involving such conditions almost never get very far.

MYTH: The definition of disability under the ADA should be more narrow and specific, like eligibility criteria applied under the Social Security disability program.

REBUTTAL: Social Security disability laws are based on the medical model approach, which considers disability to be a person's deviation from the "norm" – a defect, infirmity or ailment – and are designed to be limited to a restricted group of eligible recipients. The ADA is based on a social or civil rights model and its protections should be available to all who experience discrimination on the basis of disability.

MYTH: There are two distinct groups in society – those with disabilities and those without.

REBUTTAL: There is a spectrum of abilities, meaning that for every human function, some individuals excel, some perform minimally or not at all, and others perform at all gradations in between. Any attempt to draw a line across the spectrum of individual abilities and to label those on one side disabilities and those on the other not, by regarding a certain degree of impairment of particular functions as constituting disabilities, is bound to involve artificiality and arbitrariness.

MYTH: The ADA was intended primarily to protect persons who are blind, deaf, or do not have the use of their legs or arms.

REBUTTAL: Congress intended the definition of disability to be comprehensive, and knowingly chose to use the same broad definition of disability it had inserted in the Rehabilitation Act in 1974.

MYTH: Some types of impairments, such as psychiatric conditions, drug addiction, and alcoholism, are less deserving of protection than others.

REBUTTAL: Pitting any subgroup of people with “undeserving” disabilities against those who have “deserving” ones is at heart a selection of certain disabilities as unworthy or undesirable, based upon just the sort of ignorance, discomfort, or inaccurate stereotypes about the conditions that the ADA condemns.

MYTH: The ADA protects troublemakers; obnoxious and insufferable persons qualify as persons with disabilities under the ADA.

REBUTTAL: Improper behavior does not in itself constitute a disability. And the existence of a disability neither excuses employees from performing essential job tasks nor gives them the right to engage unrestrainedly in offensive or disruptive behavior.

MYTH: Under the ADA, an employer is not permitted to fire an employee who has a disability.

REBUTTAL: The ADA permits employers to terminate workers with disabilities in at least three situations: (1) the termination is unrelated to the disability; (2) the employee does not satisfy qualification standards the employer has imposed, which standards either do not screen out workers because of disability, or, if they do, are job-related and consistent with business necessity; and (3) because of the employee’s disability, he or she poses a direct threat to health or safety in the workplace.

MYTH: The ADA gives job applicants with disabilities an advantage over other applicants, and forces employers to hire unqualified workers with disabilities.

REBUTTAL: The ADA does not contain any affirmative action requirement or any sort of hiring preference, and only requires that employers not discriminate because of disability.

MYTH: The ADA prevents employers from holding workers with disabilities to standards prohibiting unacceptable forms of behavior in the workplace.

REBUTTAL: The courts have consistently ruled that “common sense” conduct standards, including getting along with supervisors and co-workers and obeying orders of supervisors, are legitimate job-function requirements that may be enforced by employers upon employees with disabilities.

MYTH: Under the ADA, administrative complaint and court proceedings are loaded in favor of people with disabilities.

REBUTTAL: Statistical studies indicate that complainants ultimately prevail in only about one out of ten ADA complaints. Succeeding in an ADA suit is hardly a sure thing.

MYTH: The ADA imposes extreme, unrealistic requirements that defy common sense.

REBUTTAL: Throughout the ADA, statutory requirements are balanced with limitations, such as undue burden; exemptions, such as that for private clubs; floors on coverage; exceptions, such as not requiring elevators in small buildings; linkages to size and resources; phase-ins; defenses, such as direct threat to others; and low-level obligations, such as the readily achievable standard.

MYTH: The ADA’s requirements are too hard on small businesses.

REBUTTAL: Each of the major requirements of the ADA was tailored in some way to address the needs of the small business operator; to wit, the exemption for employers with fewer than 15 employees, the undue hardship limitation, the elevator exception for small buildings, and the limits on damages for employers.

MYTH: The ADA’s accessibility requirements are extreme and exorbitantly costly.

REBUTTAL: Examination of the ADA’s requirements regarding accessibility reveals that each of them sets a reasonable, attainable standard. If accessibility is designed in from the beginning, the costs are quite small. When a public accommodation is undertaking renovations or alterations of an existing facility, it must, to the “maximum extent feasible,” make the alterations in “such a manner” that the facility is accessible, but only to the extent that costs are not “disproportionate.” The overall accessibility standard under the ADA does not require total accessibility of all parts of buildings, nor that of all parking spaces, bathrooms, stalls, etc. but only a reasonable number. For existing facilities not undergoing alterations, the ADA requires only accessibility changes that are “readily achievable,” defined to mean easy and cheap.

MYTH: Unlike other civil rights laws, the ADA does not mandate equal treatment, but goes beyond that to require expensive and disruptive special privileges in the form of “reasonable accommodations” for people with disabilities.

REBUTTAL: Letting every employee have an identical opportunity to use a restroom located up a flight of stairs may be “identical” treatment but it is hardly equal treatment for a worker who uses a wheelchair. Where people’s disabilities do situate them differently regarding opportunities, identical treatment may be a source of discrimination, and different treatment may be required to eliminate it.

MYTH: The ADA unjustifiably intrudes on the prerogative of business owners to operate their businesses as they see fit, and improperly imposes unfunded mandates on state and local governments.

REBUTTAL: No federal civil rights laws would ever be necessary if the private sector and state and local entities did not engage in discrimination. The entities subject to the requirements of the ADA had in the past and were continuing to engage in unfair and unnecessary discrimination on the basis of disability.

INTRODUCTION

Media accounts of the Americans with Disabilities Act (ADA) have not been uniformly negative, but all too often they have portrayed the Act in a misleading and very unfavorable light. Frequently, they have placed an unfavorable “spin” on the ADA, on the court decisions interpreting it, and on the impact it has had on American society. Such media perspectives have exaggerated and thus magnified the effect of inhibitive court decisions, and have frequently subjected the ADA to misunderstanding, confusion, and even derision. Negative impressions of the ADA fostered by media mischaracterizations have fostered widespread misunderstanding of the Act’s purposes and vision, as well as the actual content of the Act in terms of its requirements, scope, and the defenses it provides.

In its report on the first ten years of ADA enforcement, the National Council on Disability (NCD) included a chapter addressing “Media Coverage and Depiction of the ADA.” The report noted a persisting problem of “negative stories that distort or misrepresent the purposes of the ADA” (NCD, *Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act* 379 (2000)). It concluded that “muddled reporting and erroneous conclusions about the law’s utility” could be traced to “[w]idespread misunderstanding and confusion about the ADA’s history and purpose” A law journal article catalogued various examples of inflammatory newspaper articles about the ADA that “portrayed a law ... run wildly amuck, granting windfalls to unworthy plaintiffs and forcing employers to ‘bend over backwards’ to accommodate preposterous claims” (Linda Hamilton Krieger, Foreword — Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies, 21 *Berkeley Journal of Employment and Labor Law* 9 (2000)). The author, Professor Linda Krieger of University of California at Berkeley’s Boalt Hall School of Law, noted that this was despite the reality that the ADA’s operation administratively and in the courts was “in fact precisely the

opposite.” The article observed that “[t]he ADA’s ‘image problem’ was not confined to the print media” as “the Act was pilloried in television news and sitcom programming as well” (p. 10).

Cary LaCheen of the New York University School of Law conducted a systematic study of television and radio portrayals of the ADA, discussing numerous specific examples and examining themes in the coverage. Her overall conclusion was that “the media doesn’t ‘get’ the ADA” (Cary LaCheen, Achy Breaky Pelvis, Lumber Lung, and Juggler’s Despair: The Portrayal of the Americans with Disabilities Act on Television and Radio, 21 *Berkeley Journal of Employment and Labor Law* 223 (2000)). Professor Krieger described LaCheen’s study as presenting a “well-documented claim that television coverage of the ADA has been overwhelmingly negative, one-sided, and substantially misleading” (p. 15).

The media section of NCD’s *Promises to Keep* report and the two law journal articles mentioned provide many specific examples of negative media characterizations of the ADA. This policy brief seeks to identify some prevalent themes and misperceptions about the ADA that such media coverage has propagated and to explain why they are erroneous and harmful.

OVERALL PATTERNS AND DEFICIENCIES OF MEDIA COVERAGE

One preliminary observation is that the ADA and most other disability issues have received too little media attention overall. A study of news coverage of disability issues conducted by a media research consultant and funded by the National Institute on Disability and Rehabilitation Research found that “disability is rarely presented in television news,” and “that TV news is neglecting coverage of issues affecting ... Americans with ... disabilities” (Beth A. Haller, Ph.D., *News Coverage of Disability Issues: Final Report for The Center for an Accessible Society 2* (1999)). The study reviewed network news programs for the calendar year 1998 and found that “the four major television networks presented only 34 disability-related news stories, many of which were clustered around two or three news events.” The author highlighted the significance of the scarcity of disability issue coverage on network news by noting that “television news ... has been identified as most credible and most watched disseminator of news for many years.” Daniel Schorr of National Public Radio reportedly once observed, “If you don’t exist in the media, for all practical purposes you don’t exist.”

News coverage of the ADA increased somewhat in the years 1999 and 2002 because those years were ones in which the Supreme Court of the United States issued several decisions under the Act. This raises another problematic aspect of media coverage of the ADA — that such coverage is heavily focused on court actions. NCD has previously observed that “[o]verwhelmingly, news reports and entertainment features focus on ADA litigation rather than showing voluntary compliance or explaining the benefits of the law for people with disabilities” (*Promises to Keep*, p. 379). LaCheen’s study found that “[m]ost of the television and radio coverage about the ADA is about litigation” and that “[t]he stories have focused on the ADA decisions in the Supreme

Court, ... and a handful of other cases” (21 *Berkeley Journal of Employment and Labor Law* at p. 224). She observed, however, that:

[t]here are plenty of other possible stories that could be told: stories about voluntary compliance and how the law has changed the practices of employers, businesses, and state and local government agencies; stories about how the ADA has altered people’s lives by enabling them to work, complete school, and participate in public life; and even stories about the persistence of barriers to access and other forms of discrimination despite the ADA.
(p. 225)

Moreover, LaCheen noted that “television and radio coverage of ADA litigation rarely strays beyond the parameters of the lawsuit to explore the nature of the problem that gave rise to the litigation or profile the people who will be affected by the court decision.” She concluded that “the media focus on litigation is a problem for the disability rights community and contributes to backlash against the ADA” In part, this is because, as LaCheen put it, “it sends a message that all the disability community does is sue,” despite the fact that lawsuits are frequently brought by private attorneys and the organized disability rights community usually “doesn’t choose the parties, legal theories, venue, or decisions to appeal” (pp. 225-226).

LaCheen noted that “[a]nother problem with the media’s focus on litigation is that it increases the likelihood that the media will frame the debate in the same way the courts do” (p. 226). As other papers in this policy brief series discuss, the courts have focused most of their attention on restricting the class of persons afforded protection by the ADA instead of addressing the acts of discrimination they allege. Therefore, simply following the courts’ formulation of ADA cases presents a distorted picture. As NCD stated in its *Promises to Keep* report, “[m]any reports about the ADA protections emphasize who is protected rather than focusing on conduct giving rise to discrimination”; such “persistent emphasis on disability instead of discriminatory actions” produces “[a] crucial disconnect between media reports on the law and the real intent of the ADA” (p. 379). Similarly, in regard to media acceptance of the courts’ framing of ADA issues, LaCheen declared, “Given the approach taken by the overwhelming majority of courts in ADA cases, this is a serious problem. The courts have focused heavily on the question of who comes within the ambit of the ADA instead of on the nature of the discriminatory treatment experienced by people with disabilities, which has had a devastating effect on the outcome of litigation” (21 *Berkeley Journal of Employment and Labor Law* at p. 226). She concluded that uncritical media recitation of ADA court decisions is, accordingly, “devastating” to the disability community, putting it on the defensive and making it difficult to get its message across.

These problems are exacerbated by a media tendency not merely to report on lawsuits under the ADA, but to pay disproportionate attention to extreme and unsuccessful lawsuits. As NCD has observed, “[e]mphasis by the media on controversial litigation far outweighs reports about solid victories reached in the courts, or other aspects of ADA enforcement and compliance, thus

negatively influencing the public's perception of the law" (*Promises to Keep*, p. 383). Likewise, one of LaCheen's findings was that media tend to focus ADA coverage on "difficult cases and cases lacking merit" (21 *Berkeley Journal of Employment and Labor Law* at p. 227). She observed that cases that "receive the most publicity are often those with weak claims or claims that lack merit" (p. 228). Incidents involving purported ADA claims in unusual or extreme situations, such as a charge that a strippers' stage was not accessible, a claim that a horse was a service animal that should be permitted in city traffic, a claim that a person's offensive smell constituted a disability, or a wheelchair user's claim that stairs prevented accessibility to a "lap dance" area of an adult club, whatever their underlying legal merit may or may not be, get lots of press; while charges relating to inaccessibility of a drugstore or book shop, or blatant acts of employment discrimination often go unreported in the media.

Such media approaches to the ADA foster a view of the law that is greatly at odds with its actual content and intent. Together they produce a quite negative notion of the ADA, along the following lines: the ADA is a poorly written, vague law that lets undeserving people sue businesses and government entities on flimsy or nonsensical grounds and places heavy and unreasonable burdens and financial liabilities on businesses and public instrumentalities. In other words, the media-generated misimpression is that (1) the ADA is a sloppily drafted statute; (2) it is too easy to qualify as having a disability under the Act (it protects too many people); (3) it is too easy for claimants to prevail under the Act (it is too biased in favor of plaintiffs); and (4) too much is required of covered entities under the Act (the obligations imposed by the ADA are unjustified, unreasonable, and devastating).

The first of these misconceptions — that the ADA's language is sloppy and vague — has been previously addressed by NCD. In particular, a prior paper in the Righting the ADA series (<http://www.ncd.gov/newsroom/publications/carefullyconstructedlaw.html>) documents the meticulous study, conceptualization, drafting, consideration, review, negotiation, compromise, and repeated revision that went into the enactment of the ADA. It describes the 25 years of methodical study Congress and executive branch agencies had devoted to the problem of discrimination on the basis of disability that enlightened the development of the ADA, and the conceptual basis and prior legislation on which the ADA proposal was based. It recounts the intensive hearings and debates Congress subjected the legislation to, and the extensive negotiations with the George H. W. Bush Administration and representatives of affected industries that went into crafting compromise language to produce the final version of the law. It describes how the major concepts and terms used in the ADA, including its definition of "disability," were drawn from prior federal laws, and how such concepts and terms had been tested over years of implementation of the predecessor laws. It demonstrates that the language of the ADA was not vague or muddled, and had been found sufficiently clear and workable as interpreted and applied by court decisions and administrative regulations in effect at the time the ADA was enacted.

In its *Promises to Keep* report, NCD observed that “[m]any ADA news reports and entertainment features contain the mistaken belief that Congress enacted the law without fully understanding who it intended to cover” (p. 379). NCD traced this misperception to two factors: (1) that “[m]any in the media assume that the provisions of the ADA were first created in 1990, when the law was enacted [and] ... appear totally unaware that ADA extended the basic requirements of a predecessor law, Section 504 of the 1973 Rehabilitation Act, to private businesses”; and (2) that there is “a poor comprehension by journalists of the basic provisions of the statute.”

The remainder of this policy brief addresses the other three categories of misleading media depictions of the statute — misconceptions regarding the scope of the concept of disability under the ADA, the consequences of having a disability under the ADA, and ADA substantive requirements. Within these three broad categories, the paper discusses several specific misconceptions or “myths” about the ADA that have been fueled by media accounts.

MEDIA-FED MISCONCEPTIONS REGARDING THE SCOPE OF THE ADA’S DEFINITION OF DISABILITY

A number of popular misunderstandings fed by media reports and commentary have arisen in regard to whom the ADA protects — who can invoke the protection from discrimination the Act establishes. Eligibility for ADA protection is determined by reference to the definition of disability set out in the statute, and by regulations and court decisions interpreting and applying it.

Myth: It is too easy to qualify as having a disability under the ADA.

Despite media characterizations and popular misconceptions that it is too easy to qualify as having a disability under the ADA, in reality it is a highly daunting proposition. The Act itself was crafted very carefully to establish specific standards for what constitutes a disability, based on experience with prior disability nondiscrimination laws. The courts have gone overboard in restricting ADA protection by devising judicial standards that make it very difficult and, at times, nearly impossible to qualify as having a disability. The impression that establishing disability is too easy — that, as one commentator put it, “[a]lmost any condition can now be claimed as a disability”¹ — evidences a lack of awareness of ADA provisions and the difficult burdens a complainant must shoulder to satisfy the statutory definition. As applied in the courts and administrative enforcement processes, demonstration of the existence of a physical or mental impairment will, unless the condition is visible and obvious, necessitate the presentation of professional, often medical, documentation of the nature and extent of the impairment. Moreover, the ADA requires a complainant also to prove that the physical or mental impairment “substantially limits” a “major life activity,” such as walking, seeing, hearing, speaking, breathing, and working. Minor incapacities or impairments do not meet the statutory definition.

Prior to the ADA, the primary experience with the concept of disability of many courts was in the context of Social Security disability benefits eligibility determinations. After the ADA was enacted, numerous lower courts persisted in applying a technical culling process under the new law, and imposed highly restrictive standards of what constitutes a disability under the Act. The courts dismissed numerous cases because they ruled that the plaintiff had not satisfied the standards for meeting the definition of disability. Studies of ADA cases, several of which are discussed in the LaCheen and Krieger articles, revealed that most (90 percent or higher in some studies) of complainants of employment discrimination had their cases dismissed at preliminary stages without ever getting to their claims of being discriminated against, and a large percentage of the dismissals were because the courts ruled the plaintiffs had not established that they had a disability. The *Disability Compliance Bulletin*, for example, reported that a 1997 review of 110 ADA decisions revealed only 6 findings of disability.

In three cases decided in 1999, the Supreme Court of the United States joined the unfortunate trend in lower courts by taking a restrictive view of the ADA definition of disability. More recently, in 2002, the Supreme Court made it official by explicitly announcing in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* that the elements of the ADA are “to be interpreted strictly to create a demanding standard for qualifying as disabled” (122 S.Ct. 681, 691). Accordingly, the current legal standard promulgated by the High Court is a strict and demanding one that makes it difficult to prove that one has a disability under the ADA.

By raising the bar for proving disability to such an extremely high level, the courts have frequently made the standard almost equivalent to proving that one is unable to work or function in society, thus making it highly difficult to prove that one is simultaneously “qualified.” This has been referred to as a “Catch-22” by some courts and commentators. Subsequent policy briefs in the “Righting the ADA” series will discuss various types of serious and sometimes debilitating conditions that have been ruled not to be disabilities as a result of the cramped approach to eligibility for ADA protection. It is clear, however, that the notion that it is too easy to qualify as having a disability is a blatant fiction.

Myth: The ADA permits fringe lawsuits by persons who should not be protected by the Act.

Related to the misconception that it is too easy to demonstrate disability under the ADA is the notion that the ADA authorizes the filing of frivolous lawsuits by persons with extreme, dubious, or outlandish conditions. LaCheen’s study of television and radio coverage of the ADA found a heavy media focus on conditions widely perceived to be “undeserving,” and that most publicity is devoted to situations in which persons with such conditions file ADA claims that are weak or lack merit. “Thus,” she observed, “the message conveyed is that people claim to have these particular conditions to cheat the system, get special treatment, or evade personal responsibility for their own conduct” (21 *Berkeley Journal of Employment and Labor Law* at p. 228). She concludes that the media tend to consider as “undeserving” individuals “who are thought to be to

blame for their conditions, those with hard-to-verify or easy-to-fake conditions, or with conditions many view as medicalized descriptions of lifestyle choices and behaviors” (p. 227). She noted that “some of the cases with weak claims or claims lacking in merit that have received extensive media coverage have taken on a legendary, even folkloric, status” (p. 226). One of the examples she discussed was a man who claimed that he was protected by the ADA in bringing a loaded gun to work because he contended he had a psychiatric disability.

Various journalists, commentators, and entertainment writers have cited examples, some based on actual incidents and some imaginary or conjectural, of people with questionable or unauthentic conditions claiming to be protected by the ADA. An article in a national newspaper discussed an ADA suit brought by a man who had a number of teeth missing². A columnist wrote that any employee who was “a colossally obnoxious jerk” or “seriously insufferable to colleagues” would be protected by the ADA as a person with a mental impairment and could not be fired or held to conduct standards applied to other employees³. An ADA critic produced what he called a “Parade of Absurdities” of individuals claiming to have a disability under the ADA⁴. Among examples he cited were that of a telephone operator who sued her former employer alleging that “chronic lateness syndrome” was a disability, and a university professor, fired for sexually assaulting a female colleague, who alleged that he had a disability under the ADA because prescription drugs he was taking had “loosened his inhibitions.” The view that almost any condition can qualify as a disability under the ADA was dramatized in extreme form in an episode of television’s *The Simpsons* discussed in LaCheen’s article⁵. The story centers on Homer Simpson’s attempt to eat enough to bulk himself up to 300 pounds in order to get out of a calisthenics program at work and gain the right to work at home. He consults a book titled “Am I Disabled?” and finds among the conditions listed not only “hyper-obesity,” but also “achy breaky pelvis,” “lumber lung” and “juggler’s despair.” The clear impression conveyed is that the legal definition of disability has virtually no limits.

Of the real-life cases that LaCheen discussed as examples of supposedly “undeserving” claimants [including the man who claimed his psychiatric disability justified bringing a loaded gun to work], she noted that “all of these cases were dismissed at the administrative level or in court.” Likewise, the incident involving the man with teeth missing was resolved by the courts’ rejection of his ADA claim. Gilbert Casellas, Chairman of the Equal Employment Opportunity Commission (EEOC), wrote a letter to the editor responding to the “Parade of Absurdities” piece (Gilbert F. Casellas, “Forget Sympathy; We’re Talking Justice,” *Wall Street Journal*, July 14, 1995, Letter to the Editor). He declared that the commentator’s “specious shop of ADA horrors fails to disclose that most of the ‘cases’ cited were never filed with the EEOC and did not go to court. And, in those few cases where a court did rule, ... the system worked [because the courts ruled in favor of the employer].” He added that “[t]he ADA does not help people with petty impairments.”

The media attacks on the ADA definition capitalize on a widespread public misconception that a really good law can prevent frivolous or marginal lawsuits. This ignores the reality that for all

practical purposes anyone can sue any other person for anything. Access to the courts is a fundamental American liberty; architectural barriers notwithstanding, everyone is supposed to have access to the courthouse doors. All that it takes to bring a court action against someone is the preparation of court papers and submission of a filing fee. You can sue your neighbors because you think their chimney is ugly, or your uncle because you do not like his ties. This does not mean that such lawsuits will get anywhere, but people are entitled to file them.

The test of a law's efficacy is not whether it can prevent people from suing, but whether it gives the courts adequate standards for distinguishing between cases that have some potential merit to them from cases that are brought on a frivolous basis without any legal substance to them. The courts routinely weed out lawsuits that lack legal validity, that in legal terminology do not present a legitimate, "colorable claim" that a statute has been violated. Insubstantial or erroneous legal actions can be and continuously are dismissed for failure to state a legally valid claim, and summary judgment can be granted if the court finds that there is no chance a plaintiff can prevail even if she or he proves the facts alleged in the complaint. At whatever stage of the proceedings a court becomes aware that a suit before it is frivolous or insubstantial, it has ample means to toss the case out of court. Moreover, federal rules of procedure authorize sanctions to be imposed upon attorneys who initiate frivolous, vexatious lawsuits.

Given the large number of ADA suits that are dismissed at preliminary stages over the issue of the plaintiff's disability, the ADA obviously provides adequate statutory criteria for excluding numerous conditions that the courts find do not meet the Act's standards for establishing a disability. The real problem is that the media tend to publicize, and commentators tend to moralize about, claims involving obscure, marginal, spurious, or unpopular conditions, while too little attention is devoted to reporting that complaints involving such conditions almost never get very far. And not enough media attention is paid to the many cases involving conditions that fall foursquare within the ADA's definition of disability.

Myth: The definition of disability under the ADA should be more narrow and specific, like eligibility criteria applied under the Social Security disability program.

Some media discussions of the definition of disability under the ADA suggest that this definition should be more like determinations of eligibility made under Social Security laws, where the standards are more limited and narrow, and frequently entail medical documentation of the nature and extent of the person's condition⁶. The expectation that ADA protection should involve a similar eligibility determination process represents a fundamental misunderstanding. Social Security disability benefits programs are special benefits programs. They are designed to be limited to a restricted group of eligible recipients. Legal and funding constraints necessitate that they be restricted to the specific individuals for whom such benefits and services are intended. The ADA's protection against discrimination on the basis of disability, in contrast, should be available to all Americans who experience such discrimination.

In prior policy briefs in this *Righting the ADA* series, NCD has discussed the facts that the ADA's primary objective was to eliminate "pervasive" discrimination on the basis of disability in a "comprehensive" fashion, that every American is potentially protected by the ADA from being discriminated against on the basis of disability, and that the definition of disability in the ADA was meant to be interpreted broadly to achieve the Act's remedial, civil rights objectives (<http://www.ncd.gov/newsroom/publications/43million.html>; <http://www.ncd.gov/newsroom/publications/broadnarrowconstruction.html>). Nondiscrimination is not a thing that can be spread too thin by granting it to too many people. This situation is dramatically different from disability benefits programs, such as SSI and SSDI, which are predicated upon identifying a limited group of eligible persons to receive special benefits or services that other citizens are not entitled to obtain. After comparing the particular standards (including eligibility criteria) and purposes of the ADA, the Social Security Act, Worker's Compensation, and disability insurance plans, the EEOC has declared that "[t]he ADA's purposes and standards are fundamentally different from the purposes and standards of other statutory schemes and contractual rights" (Notice Number 915.002 (Feb. 12, 1997), 8 *Employment Discrimination Rep.* (BNA) 253, 255).

The ADA and Social Security disability laws are based on sharply different approaches to disability — the "medical model" and the "social" or "civil rights" model. The medical model considers disability to be a person's deviation from health or "normality" — a defect, infirmity, or ailment. It assesses disability according to the degree of limitation of physical or mental function in the individual. The medical model attempts to cure or rehabilitate disability; if treatment or rehabilitation is successful, the individual no longer is disabled. If that proves impossible, the medical model envisions that "patients" should be taken care of through long term health care and income support benefits. At a fundamental level, Social Security disability benefits programs are premised on a medical model approach to disability; they seek to provide income support for people who are found to be totally unable to work due to disability. The SSI and SSDI programs employ identical statutory standards for disability; under both programs, claimants must demonstrate that they are "unable to engage in any substantial gainful activity" because of a "medically determinable physical or mental impairment" (42 U.S.C. § 1382c(a)(3)(A); 42 U.S.C. §§ 416(i), 423(d)(i)(A)). Clearly, these restrictions are based on the medical model.

The ADA, on the other hand, is based on a social or civil rights model (sometimes referred to as a socio-political model). It views the limitations that arise from disabilities as largely the result of prejudice and discrimination rather than as purely the inevitable result of deficits in the individual. Sociology Professor Richard K. Scotch, a disability policy author, has written:

In the socio-political model, disability is viewed not as a physical or mental impairment, but as a social construction shaped by environmental factors, including physical characteristics built into the environment, cultural attitudes and social behaviors, and the institutionalized rules, procedures, and practices of private entities and public

organizations. All of these, in turn, reflect overly narrow assumptions about what constitutes the normal range of human functioning.
(Models of Disability and the Americans with Disabilities Act, 21 *Berkeley Journal of Employment and Labor Law* 213, 214-15 (2000))

The implications of this alternative model are profound. Professor Krieger has written that the ADA's concept of disability views it "not only in terms of the internal attributes of the arguably disabled individual, but also in terms of external attributes of the attitudinal environment in which that person must function. 'Disability,' under this conception, resides as much in the attitudes of society as in the characteristics of the disabled individual" (Linda Hamilton Krieger, Afterword: Socio-Legal Backlash, 21 *Berkeley Journal of Employment and Labor Law* 476, 480-81 (2000)). She elaborated as follows:

the drafters of the ADA sought to transform the institution of disability by locating responsibility for disablement not only in a disabled person's impairment, but also in "disabling" physical or structural environments. Under such a construction, the concept of disability takes on new social meaning. It is not merely a container holding tragedy, or occasion for pity, charity, or exemption from the ordinary obligations attending membership in society. The concept of disability now also, or to a certain extent instead, contains rights to and societal responsibility for making enabling environmental adaptations. The ADA was in this way crafted to replace the old impairment model of disability with a socio-political approach.

Quite intentionally, the ADA deviated from the path of social welfare benefits legislation and endorsed a different conception of disability. The contention that the ADA definition of disability in the ADA should be more constricted and medically oriented like eligibility criteria of Social Security benefits programs is wrong practically, historically, and philosophically.

Myth: There are two distinct groups in society -- those with disabilities and those without.

Many of the media criticisms of the ADA definition of disability have at their root a misconception that there are two truly separate groups in society—people with disabilities and people without disabilities. One commentator wrote of "those unfortunate individuals who have genuine physical or mental disabilities."⁷ ABC television's John Stossel, a staunch critic of the ADA, has referred to such persons as "real victims" as distinguished from "so-called victims" who claim to have disabilities to qualify for ADA protection⁸. Sometimes the view that the population splits neatly into two groups on the basis of the presence or absence of disability is not expressed directly, but is displayed in a "we/they" attitude toward persons with disabilities in media coverage⁹. According to this simplistic conception, the task involved in determining who should be covered by the ADA is simply to draw a bright line between those who have a disability and the rest of the population who do not. Anyone who is on the non-disability side of the line but claims to be protected by the ADA is automatically deemed to be a deceitful,

malingering, greedy impostor. Such views represent a terrible oversimplification of a much more complicated reality.

Human beings do not really exist in two sharply distinct groups — those with disabilities and those without. The actual reality is what has been called a “spectrum of abilities.” The spectrum of abilities was a key concept described in a 1983 report by the U.S. Commission on Civil Rights — *Accommodating the Spectrum of Individual Abilities*. The Commission noted that, while the popular view is that people with disabilities are impaired in ways that make them sharply distinguishable from nondisabled people, instead of two separate and distinct classes, there are in fact “spectrums of physical and mental abilities that range from superlative to minimal or nonfunctional” (p. 87).

To illustrate this spectrum phenomenon, the Commission examined the faculty of sight:

The simplistic categorization of “blind” and “sighted,” for example, actually covers infinite gradations and variations of the ability to see. Vision is not one-dimensional, but rather involves a number of component functions, such as seeing at a distance, distinguishing colors, focusing on nearby objects, seeing in bright light, seeing in shade or darkness, seeing to the side, and so on. For each such visual function there is a range of abilities. For example, at one end of the visual acuity spectrum are the few people with unusually sharp eyesight — those who can read print finer than that on the bottom of a doctor’s eye chart. At the other end are the tiny proportion with no vision whatsoever. The vast majority of people fall somewhere between these two extremes. A similar continuum occurs in regard to other component functions of the ability to see.

The Commission noted examples of the range of ability regarding other visual functions — differences in visual fields varying from “tunnel vision” to excellent peripheral vision; and variations in the way the eyes focus, including, at one extreme, conditions such as amblyopia, sometimes referred to as “lazy eye.” It also observed that there are great variations in the parity or disparity of an individual’s vision in each of the eyes, with some having almost equal vision in both eyes, others having clearly superior vision in one eye and inferior vision in the other eye, and some having vision in only one eye.

A similar continuum occurs with each other human function, whether it is the ability to walk, the ability to perform manual functions, intelligence, mental health and emotional stability, hearing, or speech. Various conditions that are considered disabilities — for example, hearing impairment, paralysis, mental retardation, visual impairment, HIV infection, epilepsy, diabetes, and learning disabilities — though commonly thought of as distinct and homogenous conditions, actually consist of a wide range of conditions with infinite gradations and variations (pp. 88–89).

Regarding psychiatric conditions, the Commission noted that “mental health and emotional stability occur as a continuum, and people exhibit every imaginable degree of being in touch

with reality and of ability to cope with the demands of life” (p. 88). The U.S. Supreme Court has observed: “At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable” (*Addington v. Texas*, 441 U.S. 418, 426–27 (1979)). The Commission on Civil Rights elaborated: “From this hazy standard of relative normality, the mental health spectrum continues through an overlapping range of conditions labeled personality disorders, psychosomatic reactions, neuroses, and psychoses. Within each of these categories of psychiatric labels, there are endless variations and degrees” (*Accommodating the Spectrum*, p. 88 n.4). The American Psychiatric Association has recognized that the boundaries between mental health and a mental disorder, and between various particular mental disorders, are blurry. In explaining its list of mental disorders, the Association observed that “there is no assumption that each category of mental disorder is a completely discrete entity with absolute boundaries dividing it from other mental disorders or from no mental disorder” (American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* xxii (4th ed., 1987) (commonly referred to as “DSM-IV”)).

Differences in the scope and degree of impairments and limitations are further complicated by wide variations in the applicability and efficacy of equipment, devices, and techniques for dealing with such limitations. Wheelchairs, braces, walkers, crutches, prosthetic devices, canes, hearing aids, eyeglasses, and other devices may enhance the abilities of different persons to different degrees. Techniques such as signing, speechreading, and brailleing may be easy to master and very beneficial for one individual, moderately helpful for a second person, and frustrating or nearly impossible for a third. Life experience, motivational factors, and personal preferences affect how people deal with functional limitations. One person who cannot see may choose to use a cane, another to use a guide dog, and a third to go out only when accompanied by a sighted guide.

The result of such complexities and nuances is that, for each human function, some individuals excel, some perform minimally or not at all, and others perform at all gradations in between. Any attempt to draw a line across the spectrum of individual abilities and to label those on one side disabilities and those on the other not, by regarding a certain degree of impairment of particular functions as constituting disability, is bound to involve artificiality and arbitrariness. Conditions immediately on either side of any such line will look more alike than different, and will have more in common than two conditions that are more widely apart on the spectrum even though they happen to be on the same side of the line. Thus, the vision of people whose visual acuity borders either side of the line separating legal blindness from sighted will be more similar than that of a person whose visual acuity measures 20/180 and another whose visual acuity measures 20/10, even though both fall on the “sighted” side of the dividing line.

Moreover, the notion that people with disabilities and people who do not have disabilities make up two distinct groups in society, distinguishable by the presence or absence of physical or mental impairments, completely fails to reflect the social model of disability discussed in the

previous section. To the extent that disability is a product of the physical and attitudinal environment, the degree to which a person has a disability can vary from place to place, from social group to social group, and from context to context. The importance of particular functional skills varies immensely according to the situation, and can be greatly affected by the availability or unavailability of accommodations and alternative methods of doing things. People with nearly identical conditions can encounter very different degrees of labeling, prejudice, and discrimination in their lives, and, as a result, have a very different experience of being considered and considering themselves as having a disability or not. Encountering barriers or otherwise being discriminated against because of one's physical or mental conditions is a central element of the experience of disability.

And being treated as if one has a disability is not necessarily dependent upon actually having a functional impairment. People with cosmetic disfigurements, for example, may not actually have any limitations on function but still be considered and treated as having a disability. Under the social model, such people have a disability and should be protected from discrimination based on it. Similarly, a person who has recovered after treatment for a psychiatric condition may have no ongoing impairment but be considered and treated by others as having a disability. An openly gay person who has a slender physique may be treated as having AIDS even though that is not the case. A person who is mislabeled as mentally retarded due to culturally biased testing or other classification errors may find that this designation continues to haunt him or her many years later. These examples illustrate that social judgments play a key role in the concept of disability, and that the experience of having a disability and being discriminated against because of it are not wholly foreordained by determinable physical or mental impairments, but are related to the social context and the degree of acceptance, prejudice, or rejection an individual encounters.

For all of these reasons, the idea that the population breaks neatly into two categories — those with a disability and those without a disability — is an enormous oversimplification of the rich and complicated reality of human characteristics, environmental factors, and social interaction and differentiation.

Myth: The ADA was intended primarily to protect persons who are blind, deaf, or do not have the use of their legs or arms.

The spectrum of abilities and the social model concepts, which are discussed in the prior two sections, would not be so critical in understanding the definition of disability if the ADA was only intended to provide protection to persons with a few specified, very severe disabilities. Such conditions would fall on the more severe end of the spectrum of abilities, and persons with such conditions would almost certainly encounter barriers and discrimination and therefore qualify under the social model of disability. Accordingly, such conditions can be considered disabilities without much debate. The picture of disability as encompassing a small number of severe

conditions is one that has been embraced by some elements of the media. Many media discussions of the ADA contrast the claims of disability by persons having conditions the media consider undeserving, on the one hand, with those deemed “truly disabled,” on the other. A central focus of John Stossel’s “Blame Game” special report on ABC television was contrasting those with true disabilities and those who merely affected victimhood to obtain ADA protection¹⁰. Frequently this distinction is accompanied by an assertion that the ADA was intended primarily to protect those who use wheelchairs, and people who are blind or deaf. Typical articulations of this view were the statement of one commentator that “the wheelchair-bound (sic), the blind and the deaf” were expected to be “among the ADA’s main beneficiaries,”¹¹ and that of an employment lawyer quoted in a national newspaper article on the ADA: “The Act was intended for true disabilities, the person who is blind or in a wheelchair.”¹² Severe physical disabilities are most often given as the types of conditions that advocates of narrow coverage of the ADA contend the Act was meant to address. LaCheen’s study found that conditions deemed to be “legitimate and worthy disabilities” in media analysis are “usually those visible to the naked eye, such as mobility impairments and blindness” (21 *Berkeley Journal of Employment and Labor Law* at p. 227).

Whatever emotional appeal such a narrow approach to the scope of disability may have due to its naive simplicity, it is wholly contradicted by the content and history of the ADA’s definition of disability. In the ADA Congress did not invent a new definition of disability but used the same broad definition it had inserted in the Rehabilitation Act in 1974. This definition has three separate prongs — actual disabilities, a record of disability, or being regarded as having a disability, and the broad scope of the Rehabilitation Act definition of disability (formerly “handicap”) was recognized from the beginning. Congress adopted the definition in 1974 because the prior Rehabilitation Act definition had proven “far too narrow and constricting...” (S. Rep. No. 93-1297, at 63). The original regulations for the implementation of Section 504 of the Rehabilitation Act, issued by the Department of Health, Education, and Welfare (HEW) in 1977, made it clear that the definition of disability was not limited to “traditional handicaps.” When some commenters objected to the regulatory definition as “unreasonably broad,” HEW expressly rejected the suggestion that only traditional handicaps should be covered and declared that the Department “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” (Analysis of the Final Regulation, 42 Fed. Reg. 22,685–86 (1977)). In discussing these regulations, the Supreme Court has recognized that “the Department [HEW] found that a broad definition, one not limited to so-called ‘traditional handicaps,’ is inherent in the statutory definition” (*School Board of Nassau County v. Arline*, 480 U.S. 273, 280 (1987)).

The ADA Committee reports indicate that Congress intended the definition of disability to be comprehensive, and they expressly endorsed the HEW analysis of the definition. The Committees also refused to provide a specific list of all the specific conditions, diseases, or infections that constitute physical or mental impairments under the definition “because of the difficulty of ensuring the comprehensiveness of such a list.” In lieu of a comprehensive list,

however, the ADA Committee reports did set out a partial list identifying some major examples of conditions included as physical or mental impairments. The list includes “orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, infection with the Human Immunodeficiency Virus, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, drug addiction, and alcoholism” (Senate Report at 22; Education & Labor Committee Report at 51; House Judiciary Committee Report at 28). Moreover, the Committee reports contained discussions of various other kinds of conditions that the Committees intended to be included as disabilities under the ADA. A few examples are burn victims, persons with epilepsy and other seizure disorders, and individuals with back abnormalities.

Clearly the ADA definition is not, should not be, and never was limited to providing protection only to individuals who are blind, deaf, or use wheelchairs.

Myth: Some types of impairments, such as psychiatric conditions, drug addiction, and alcoholism, are less deserving of protection than others.

Some media criticism of the ADA definition of disability focuses on particular categories of disabilities whose inclusion is challenged or ridiculed. LaCheen’s study produced the following finding:

Six types of disabilities are commonly portrayed in the media as “undeserving”: obesity; substance abuse & alcoholism; psychiatric disabilities; multiple chemical sensitivities; learning disabilities; and chronic fatigue syndrome. It is probably no coincidence that these same disabilities also receive media coverage that for the most part is widely disproportionate to the number of legal claims filed by people with these conditions. Further, the cases brought by people with these disabilities that receive the most publicity are often those with weak claims or claims that lack merit.
(21 *Berkeley Journal of Employment and Labor Law* at pp. 227-28).

Particular hostility has been leveled at the ADA’s coverage of psychiatric disabilities. This is consistent with a media penchant for portraying psychiatric disabilities negatively in general. In its report on psychiatric disability issued in 2000, NCD observed that “[n]egative stereotypes about people labeled with psychiatric disabilities are widely perpetuated by the media” (National Council on Disability, *From Privileges to Rights: People Labeled with Psychiatric Disabilities Speak for Themselves*, p. 99). The report discussed journalist Patrick Smellie’s study of the news media’s coverage of psychiatric disabilities that was published in *QUILL*, a publication of the Society of Professional Journalists; Smellie concluded that the mainstream media “is amplifying, sustaining, and legitimizing a largely false picture of mental ill-health” (Patrick Smellie, *Mental Illness Coverage: Feeding Stereotypes*, *Quill*, March/April 1999). This media bias against psychiatric disabilities has fueled critical media commentary of the ADA’s protection of people

with such disabilities. In discussing negative media views of the ADA, Professor Krieger observed:

Negative media commentary crested after publication of the EEOC's Guidance on Psychiatric Disabilities and the ADA in March 1997. Designed to help employers understand what the Act did and did not require, the Guidance unleashed a torrent of rhetorical attacks on both the ADA and the EEOC. Leading newspapers in major metropolitan areas ran stories and commentary with headlines like: Late for Work: Plead Insanity; Protection for the Personality-Impaired; and Gray Matter — Breaks for Mental Illness: Just What the Government Ordered. Cartoonists had a field day....
(21 *Berkeley Journal of Employment and Labor Law* at pp. 9-10 (footnotes omitted)).

Attacks on the ADA's coverage of psychiatric disabilities involve several component mischaracterizations. One of these is that the ADA's inclusion of these disabilities was something novel or a "stretch." The definition of disability in federal nondiscrimination laws has included "mental impairments" since 1974, a phrasing that clearly encompasses psychiatric conditions, provided they meet the other statutory criterion — that they substantially limit a major life activity. Beginning with HEW regulations in 1977, the regulatory guidance underscored unequivocally that "emotional illness" was within the definition's scope, and this statement was reiterated in ADA committee reports and in the ADA regulatory guidance. When the ADA was pending in Congress, congressional opponents of the legislation argued that coverage of psychiatric conditions should be removed from the legislation but never doubted that it was included within the existing legislative definition. During Senate debates, threatened demands by some Senators for individual roll-call votes on amendments to exclude conditions listed in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-III) led to a compromise whereby eleven specified conditions were excluded from the ADA's definition of disability. This outcome reinforced, however, the ADA's coverage of psychiatric disabilities other than those specifically excluded. The ADA clearly has included psychiatric disabilities as covered impairments since its inception. Despite media misgivings, psychiatric disabilities are just as real and frequently just as debilitating as physical disabilities. People with such conditions are subjected to much prejudice and discrimination that unnecessarily limit their ability to participate fully in society. It is just such kinds of discrimination that the ADA was intended to prohibit.

A second element of negative media accounts of ADA coverage of psychiatric disabilities is sensational exaggeration of the propensity for violence of people with psychiatric disabilities. In its *From Privileges to Rights* report, NCD described the process by which one of the most common negative stereotypes is conveyed: "widely publicized reports of violent crimes by people labeled with psychiatric disabilities, although they are statistically rare, have precipitated stronger and more prevalent prejudice, which extends to the vast majority of people labeled with psychiatric disabilities who are nonviolent and law-abiding" (p. 99). NCD observed that "the media ... frequently seize on crimes involving people labeled with psychiatric disabilities and

overreact,” with the unfortunate result that “such media results harm and stigmatize the millions of other people labeled with psychiatric disabilities who do not commit crimes.”

Such stereotypes have been used, as the authors of a law review article on psychiatric disabilities have observed, “in attempts to delegitimize the Americans with Disabilities Act” (Vicki A. Laden and Gregory Schwartz, “Psychiatric Disabilities, the Americans with Disabilities Act, and the New Workplace Violence Account,” 21 *Berkeley Journal of Employment and Labor Law* 246 (2000)). They elaborated as follows: “Deploying vivid media representations of volatile, psychotic employees, ADA critics suggest that the Act has deprived employers of the ability to protect employees from criminal assault by dangerous co-workers” (pp. 246-47). The authors challenged several aspects of the popular media conception. Preliminarily, they pointed out that workplace violence by employees is not the widespread, “epidemic” problem that media accounts trumpet, because such incidents are statistically rare and account for only a minute portion of deaths and injuries in the workplace (pp. 256-59).

Moreover, the media assumption that psychiatric disabilities correlate with violence is not supported by scientific studies. The law review article authors discussed the available studies and declared that “available research presents no valid basis for concluding that an individual ... who has diagnosed psychiatric conditions poses any greater risk of future violence than others in the general population” (p. 260). Their review of research findings disclosed that being labeled as having a psychiatric disability had a statistical correlation with likelihood of violence only in limited circumstances where a history of substance abuse was also present. This conclusion is consistent with a large study of this issue funded by the John D. and Catherine T. MacArthur Foundation which found that there is no correlation between a diagnosis of mental illness and a propensity for violent behavior, unless there is a substance abuse history in addition to the diagnosis of a psychiatric condition. The facile media presumption of a linkage between psychiatric disabilities and violence does not have scientific footing. It is rare, indeed, for media coverage of issues involving the ADA and psychiatric disabilities to attempt to dispel the popular misconception that such a correlation exists.

The authors of the law review article on psychiatric disabilities noted that “[m]ythology and stereotyping, such as the belief that psychiatric disability is associated with a propensity for dangerousness, were explicitly denounced” in the legislative history of the ADA (p. 263). Several of the ADA Committee reports required that the defense of direct threat be shown by specific threatening behavior on the part of the individual, rather than deduced from diagnostic labels. The House Judiciary Report added the following: “For example, an employer may not assume that a person with a mental disability, or a person who has been treated for a mental disability, poses a direct threat to others. This would be an assumption based on fear and stereotype.” (H.R. Rep. No. 101-485 (III) at 30 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 453 (footnotes omitted)).

Another shortcoming of negative media perspectives on the ADA's protection of individuals with psychiatric disabilities is the suggestion that the ADA prohibits employers from doing anything about employees with psychiatric disabilities who violate rules, engage in disruptive or dangerous conduct, or cannot do the job. This misconception applies more broadly than just to psychiatric disabilities and will be addressed in more detail in subsequent sections of this paper. But it should be noted here that the ADA authorizes employers to terminate or to not hire any person, including individuals with psychiatric disabilities, who cannot perform the essential functions of the job position, and may similarly weed out any employee or applicant who poses a direct threat to the health or safety of other persons in the workplace, whether or not the person has been labeled as having a psychiatric disability. The notion of employers hamstrung by the ADA from preventing misconduct and dangerous workplace conduct by persons with psychiatric diagnoses is purely fictitious.

The media have also devoted a considerable amount of negative coverage to the ADA's inclusion of drug addiction and alcoholism as disabilities. Among the situations listed in the "Parade of Absurdities" article discussed previously was that of a high school guidance counselor who claimed to be protected by the ADA because of his cocaine dependence. Both LaCheen's and Krieger's articles discuss an extreme example of media ridicule of the ADA — an episode of television's *King of the Hill* program titled "Junkie Business." In the episode, as Professor Krieger describes it, "a drooling, near catatonic addict-employee who spent much of the work day in a fetal position claimed protection of the ADA to avoid being fired" (21 *Berkeley Journal of Employment and Labor Law* at p. 10). He also claimed "rights" under the ADA to come in late, to have the lights dimmed, and to do little productive work.

There is nothing novel, surprising, or controversial about the ADA's inclusion of drug addiction and alcoholism as physical or mental impairments. In 1977, the Attorney General of the United States issued a formal opinion in which he determined that drug addicts and alcoholics were "handicapped individuals" within the meaning of the Rehabilitation Act (43 Op. Att'y Gen. No. 12 (Apr. 12, 1977)). Since that time, the inclusion of those conditions has been consistently accepted as within the definition of disability under federal nondiscrimination laws. The ADA's legislative history and regulatory guidance explicitly include drug addiction and alcoholism as covered impairments.

The suggestion that the inclusion of these conditions within the scope of the ADA somehow causes mischief or problems is totally unfounded, however. While the Act does recognize drug addiction and alcoholism as falling within the parameters of the broad definition of physical or mental impairment, other provisions clarify that current drug use or alcoholism will not be permitted to interfere with performance of job and other responsibilities. The ADA excludes from the term "individual with a disability" and, thus from statutory protection under the Act, a person who currently is engaging in the illegal use of drugs, and authorizes covered entities to administer reasonable policies and procedures to ensure that a rehabilitated drug addict is no longer using illegal drugs (42 U.S.C. § 12210(a)). The ADA also gives employers explicit

authority to prohibit drug or alcohol use at the workplace, to require that workers not be under the influence of drugs or alcohol at the workplace, to require employees to comply with the Drug Free Workplace Act, and to hold drug users and alcoholics to the same qualification standards, and behavior and performance standards applied to other workers. (42 U.S.C. §12114(c)).

Accordingly, the supposedly terrible consequences flowing from the ADA's inclusion of drug addiction and alcoholism prove to be groundless. Persons who are currently using illegal drugs, such as the school guidance counselor who allegedly was using cocaine, can clearly be fired from their positions. LaCheen's discussion of the King of the Hill "Junkie Business" episode pointed out that the show made "at least eight misrepresentations about the ADA," the most significant of which was "the episode's central premise, namely, that the ADA protects employees who have used illegal drugs on the ... day they are fired" (21 *Berkeley Journal of Employment and Labor Law* at p. 230). Similarly a person who showed up for work under the influence of alcohol could be disciplined or terminated without any problem under the ADA.

Obesity has also come in for more than its share of media mockery in connection with the ADA. The "Parade of Absurdities" article discussed previously cited an example of a 410-pound subway cleaner who believed his ADA rights had been violated when he was refused a promotion to a subway train operator, a position that required operators to be able to climb under stalled trains to make minor adjustments. Another example was the previously mentioned Simpsons "King-Size Homer" episode, discussed in LaCheen's article, in which Homer set out to attain a weight of 300 pounds so that he would be "hyper-obese" and therefore get special treatment as a person with a disability¹³. Attempting to claim that he has a disability, Homer declares, "All my life I've been an obese man trapped inside a fat man's body." An opinion piece in *USA Today* complained that "the larger a person's waistline becomes the more legal rights he acquires," and declared that "[i]t is absurd to place people who overeat in the same legal class as the blind and deaf."¹⁴

The issue of the coverage of obesity by the ADA is not nearly so clear as the media examples suggest. Whether a particular person's obesity does or does not meet the definition of disability depends upon whether the causation and effects of the condition permit it to qualify under the elements of the definition: whether it is a physical or mental impairment, and if so whether it substantially limits one or more of the person's major life activities. The EEOC initially took the position that obesity would usually not constitute a disability, but subsequently indicated more acceptance of the view that obesity, and certainly "morbid obesity," is a physical impairment and can constitute a disability if it substantially limits a major life activity¹⁵. But even if an individual's obesity does qualify as a disability, the ADA still requires the person to perform essential job functions, and not to be a direct threat to others. The ADA's coverage of some persons because of their obesity merits neither the mirth nor the scorn media accounts have leveled at it.

LaCheen's study found that the other three conditions that the media characterized as "undeserving disabilities — multiple chemical sensitivities, learning disabilities, and chronic fatigue syndrome — actually represent a very small proportion of conditions that were the basis of legal claims, but received a "widely disproportionate" amount of media coverage (21 *Berkeley Journal of Employment and Labor Law* at p. 227 & n. 17). Each of these conditions can certainly constitute a physical or mental impairment: learning disabilities are, in fact, included in the list of examples of impairments in the ADA Committee reports and ADA regulations. Accordingly, any of the three conditions can constitute a disability if a complainant can demonstrate that they substantially limit a major life activity. As with other conditions, of course, persons with these conditions are subject to the requirement that they be qualified; moreover, such persons can be held to safety and other standards permitted by the ADA.

Media views that conditions deemed "undeserving" should be excluded or otherwise treated less favorably under the ADA are unjustified. Pitting any subgroup of people with "undeserving" disabilities against those who have "deserving" ones is at heart a selection of certain disabilities as unworthy or undesirable, based upon just the sort of ignorance, discomfort, or inaccurate stereotypes about the conditions that the ADA condemns. When Congress chose to do so, it expressly excluded eleven conditions. There is no legal or equitable basis for picking and choosing among all other conditions that satisfy the statutory criteria for disability. All such conditions merit the full protection of the ADA.

Myth: The ADA protects troublemakers; obnoxious and insufferable persons qualify as persons with disabilities under the ADA.

A widespread misconception perpetuated by media accounts is that people who engage in inappropriate, offensive, or violent conduct automatically fall within the ADA's protection. This is a central assumption in many of the negative portrayals of the ADA's inclusion of psychiatric disabilities discussed in the previous section of this policy brief. One columnist contended that the ADA's coverage of mental disorders results in protection for individuals having "faults of mind and flaws of character," which leads to "legal chaos and moral confusion."¹⁶ This led him to the conclusion mentioned previously that any employee who is "a colossally obnoxious jerk" or "seriously insufferable to colleagues" would be protected by the ADA as a person with a disability. The episode of King of the Hill profiled by LaCheen and discussed in a previous section of this policy brief includes a character who claims his anger prevents him from driving to visit a customer and suggests that "my anger is handicappin' me" (quoted in 21 *Berkeley Journal of Employment and Labor Law* at p. 230). The episode leaves the impression that being angry is equivalent to having a disability if the individual characterizes it as such. Such media views fuel the misconception that the ADA can be invoked to excuse incompetence and evade responsibility for one's conduct.

The suggestion that misbehavior or negative emotions equal a disability seriously misunderstands the role that relative degrees of impairment and professional diagnosis play in

the determination of which conditions are or are not disabilities. It completely ignores the statutory criteria and the role that psychiatrists and psychologists play in diagnosing psychiatric disabilities and distinguishing such conditions from lesser degrees of dysfunction. A person seeking to establish the existence of a psychiatric disability in an ADA action will need evidence that a qualified psychiatrist or psychologist has examined the individual and found him or her to have a recognized psychiatric impairment. The complainant must then be able to show that his or her impairment substantially limits a major life activity. Moreover, ADA regulations specifically provide that a limitation that only affects an individual in his particular job is not a disability. If all these burdens are met, the complainant will still have to prove that she or he was subjected to unjustified discrimination by the covered entity. And the courts have ruled that it is not unlawful discrimination for an employer to hold workers, even those with psychiatric conditions, to a requirement that they get along with supervisors and co-workers, and abide by other necessary workplace standards of conduct.

To be qualified and therefore protected by the ADA, a worker must be able to perform the essential functions of the job. Thus the reality is in sharp contrast to the frequently presented media image of an employee avoiding work tasks by merely stating that he or she has some disability that is evidenced by bad behavior. Improper behavior does not in itself constitute a disability. And the existence of a disability neither excuses employees from performing essential job tasks nor gives them the right to engage unrestrainedly in offensive or disruptive behavior.

IMPACT OF QUALIFYING AS HAVING A DISABILITY

The media-fostered misconceptions about who has a disability under the ADA are exacerbated by further misleading representations about the consequences and advantages that flow from qualifying as having a disability under the ADA.

Myth: Under the ADA, an employer is not permitted to fire an employee who has a disability.

An article in a national news magazine stated that having a condition recognized as a disability under the ADA gives a worker “legal protection against being fired.”¹⁷ This representation, though frequently assumed or stated by those not familiar with the actual requirements of the ADA,¹⁸ is patently false. In the first place, an employer clearly has the right to terminate an employee with a disability for reasons other than the disability; nothing in the ADA’s statutory language, the regulations, or court interpretations indicate otherwise. Thus, a publishing company could terminate an editor who proves deficient in editing skills even if the editor uses a wheelchair or has cancer. A chef who prepares terrible-tasting food can be fired even if the chef has a speech impairment, or epilepsy, or is missing a limb. Unless a terminated employee can demonstrate a direct link between the firing and the employee’s disability, the employee does not

have a viable claim against her or his employer under the ADA, because the ADA's employment provisions prohibit discrimination that is "because of the disability" of the worker or applicant.

Moreover, under the ADA, its implementing regulations, and applicable court decisions, employers can terminate employees who cannot do the job even if their disabilities are the reason they cannot do it. As one U.S. Court of Appeals observed, "The ADA does not ... erect an impenetrable barrier around the disabled employee, preventing the employer from taking any employment actions vis-a-vis the employee." *Siefken v. Village of Arlington Heights*, 65 F.3d 664, 666 (7th Cir. 1995). In that case, the court upheld the firing of a police officer who could not perform his duties due to diabetes.

People with disabilities are not protected by the employment provisions of the ADA unless they are "qualified," which is defined to mean that the person "can perform the essential functions of the employment position" with a "reasonable accommodation" if one is appropriate (42 U.S.C. § 12111(8)). For example, a pizza deliverer who becomes blind as a result of illness, accident, or a condition such as diabetes can be terminated from the job, even though the person's inability to drive and thus perform the essential job function is directly the result of the individual's blindness. The company will have to consider whether there is a vacant position for which the pizza deliverer is qualified to which she or he can be reassigned as a reasonable accommodation. If there is no such vacant position, the company is free to discharge the employee. This example serves to illustrate the broadly applicable principle that the ADA does not force employers to retain employees in positions in which they cannot perform essential job functions. Only "qualified" workers and applicants are protected from termination under the ADA.

Employers are also permitted to make use of qualification standards and employment tests to weed out employees and potential employees whom the employer views as undesirable. If such standards or tests screen out or have a tendency to screen out people because of their disabilities, the ADA permits employers to use them anyway if they can be shown to be "job-related for the position in question" and "consistent with business necessity" (42 U.S.C. § 12112(b)(6)). The EEOC has taken the position that to be consistent with business necessity standards must pertain to essential job functions. In the event that the employer's standards or tests do screen out an individual because of his or her disability, the employer must consider whether a reasonable accommodation to the individual's condition would enable her or him to satisfy the qualification standard or demonstrate the essential job skill the test is assessing.

Among the qualification standards an employer is entitled to impose, the ADA expressly authorizes a requirement that an individual not "pose a direct threat to the health or safety of other individuals in the workplace" (42 U.S.C. § 12113(b)). This is true even if the employee's health or safety shortcomings relate directly to a disability. Although the statutory language refers to threats to "other individuals," in its decision in *Chevron U.S.A. Inc. v. Echazabal* (122 S.Ct. 2045 (2002)), the Supreme Court upheld an EEOC regulation that allows employers to apply this "direct threat" defense to risks to the worker's own health in addition to the risks to

others recognized in the ADA's language. In either situation, the employer must consider whether there is a reasonable accommodation that would permit the worker to perform the job without posing any threat to health or safety. Ultimately, however, the ADA does not require employers to retain workers whose disabilities will result in direct threats to health or safety in the workplace.

Accordingly, the ADA permits employers to terminate workers with disabilities in at least three situations: (1) the termination is unrelated to the disability; (2) the employee does not satisfy qualification standards the employer has imposed, which standards either do not screen out workers because of disability, or, if they do, are job-related and consistent with business necessity; and (3) because of the employee's disability, he or she poses a direct threat to health or safety in the workplace. In situations (2) and (3), the employer must consider whether there is a reasonable accommodation that would enable the worker to avoid disqualification and perform the job. The notion that "you can't fire an employee who has a disability" is far from the truth.

Myth: The ADA gives job applicants with disabilities an advantage over other applicants, and forces employers to hire unqualified workers with disabilities.

Another common misunderstanding about the ADA is the belief that it provides some type of preference or advantage for the hiring of workers with disabilities. The ADA does not contain any affirmative action requirement and only requires that employers not discriminate because of disability¹⁹. The Act does not establish any targets or statistical goals for hiring persons with disabilities, and does not mandate any outreach programs for increasing the proportion of workers with disabilities, but merely requires that solicitation, application, and hiring processes not exclude or discriminatorily screen out or disadvantage applicants with disabilities. It certainly does not direct that an applicant with a disability must be hired, or has an edge in being hired, without regard to the applicant's qualifications and credentials. Most of what was said in the previous section regarding employers' authority to discharge workers with disabilities applies fully to employers' discretion in hiring new employees or considering current employees for new positions they are seeking. Employers can decide not to hire applicants with disabilities because they are not qualified or because they would pose a direct threat to health and safety on the job.

In particular, the ADA permits employers to use qualification standards, employment tests, and other selection criteria to screen out applicants. If the standards, tests, and criteria disadvantage applicants because of their disabilities, then they must be job-related and consistent with business necessity (42 U.S.C. § 12112(b)(6)). And even if a particular applicant with a disability is capable of performing the essential job functions and satisfies the employer's qualification standards, including not posing a direct threat to health or safety, the employer still is not necessarily required to hire the applicant with a disability. In his letter to the editor responding to the "Parade of Absurdities" article, Gilbert Casellas, Chairman of the EEOC wrote:

One of the foundations of the ADA is that an employer can hire the most qualified person for the job. The law simply states that a person with a disability must be considered “qualified” if he or she has the skill, education and experience for the job, and can perform the essential job functions either with or without a reasonable accommodation. (Gilbert F. Casellas, “Forget Sympathy; We’re Talking Justice,” *Wall Street Journal*, July 14, 1995, Letter to the Editor).

In other words, the ADA makes sure that qualified applicants with disabilities are not removed from consideration on a discriminatory basis because of their disabilities, but it does not prevent the employer from ultimately selecting another candidate with equal or better qualifications whom the employer decides is the better candidate, so long as the selection is not made because of the disability of the applicant not selected.

An irony is that while the ADA is misrepresented by some as giving too much advantage to applicants with disabilities in the hiring process, it is also attacked as an unsuccessful statute because it has not had enough impact in getting more people with disabilities hired. Perhaps if the ADA did give applicants with disabilities an advantage, the statistics regarding employment of people with disabilities would show more improvement. In actuality, however, the ADA seeks only to eliminate discrimination from the application and hiring process; it offers no preference or advantage to job seekers with disabilities and certainly does not coerce employers into hiring unqualified workers.

Myth: The ADA prevents employers from holding workers with disabilities to standards prohibiting unacceptable forms of behavior in the workplace.

An oft-repeated media misconception about the ADA is that it takes away employers’ ability to insist upon certain standards of conduct on the job. The “Parade of Absurdities” article, for example, cited the following as situations prompting ADA suits by workers who claimed they had disabilities: a male philosophy professor who had been fired for allegedly sexually assaulting a female professor and sexually harassing three students, and a government clerk fired after repeated rude outbursts and loud denunciations of supervisors²⁰. One of the examples discussed by LaCheen of reports of ADA claims that have attained “legendary, even folkloric, status” was the situation featured on a network TV news special of a man who claimed that he was protected by the ADA in bringing a loaded gun to work because he asserted he had a psychiatric disability²¹. The media reports of these incidents implied that the ADA rendered employers helpless to deal with such forms of unacceptable conduct in the workplace. Less publicized was the fact that no court upheld an ADA claim in any of these situations.

The fact is that in applying the ADA and regulations that implement it the courts have consistently ruled that “common sense” conduct standards, including getting along with supervisors and co-workers and obeying orders of supervisors, are legitimate job-function requirements that may be enforced by employers upon employees with disabilities. Under the

ADA and its predecessor, Section 504 of the Rehabilitation Act, the courts have upheld the right of employers to terminate employees with disabilities for various types of misconduct, including the following: inability to get along with supervisors and co-workers, inability to tolerate rejection or criticism, failing to obey the orders of supervisors, engaging in violent behavior toward a supervisor, threatening a fellow worker, highly excessive absences from work, bringing loaded weapons to work, screaming obscenities and threatening a supervisor, and destroying office equipment²². Specific provisions of the ADA clarify that employers can prohibit alcohol and illegal drug use at work and can prohibit employees from showing up at work drunk or on illegal drugs (42 U.S.C. §§ 12114(c)(1) & (c)(2)).

The ADA does not require employers to retain employees who display seriously inappropriate behavior, regardless of whether they have a disability or not. Employers are fully entitled to expect employees to comply with basic rules of proper workplace behavior, and are empowered to take appropriate disciplinary action, up to and including termination, when they do not.

Myth: Under the ADA, administrative complaint and court proceedings are loaded in favor of people with disabilities.

A common media portrayal is of businesses being victimized by people with actual or purported disabilities who file ADA complaints against them. An employment lawyer quoted in a national newspaper article on the ADA declared that the Act is being “used as a club against employers.”²³ One element of this perceived unfairness to businesses and other entities subject to the law’s requirements is an assumption that a person who claims that she or he has a disability is virtually certain to prevail in a discrimination complaint against an employer or other covered entity, that filing an ADA claim is an almost sure road to victory in court.

Previous sections of this policy brief have made clear that proving that one has a disability under the ADA is usually far from easy, and is an undertaking that the great majority of complainants fail at, as the statistics show. Later policy briefs will discuss the ways in which this task is getting even harder as the Supreme Court has ratcheted up the standards for establishing that one has a disability under the ADA. But even if a complainant succeeds in demonstrating the presence of a disability under the Act, the road to winning an ADA case is far from complete.

Meeting the statutory definition of individual with a disability is only a preliminary hurdle that, if successfully surmounted, leads to the real challenge of proving that one was discriminated against. Discrimination based on disability is defined in the statute and regulations in ways that give employers many options for defending their actions as nondiscriminatory even when they involve disadvantage to an individual because of a particular disability. It may be useful in this connection to remember that laws prohibiting race, gender, and religious discrimination protect all individuals no matter what their particular race, gender, or religion. Being covered by a nondiscrimination statute, then, is obviously not the same as proving that you have been subjected to unlawful discrimination.

Statistical studies discussed previously in this policy brief indicate that complainants ultimately prevail in only about one out of ten ADA complaints. Succeeding in an ADA suit is hardly a sure thing. It is no wonder that a newspaper article on the ADA quoted an attorney who had brought an ADA suit and lost as saying, “Very few plaintiffs’ attorneys are taking ADA cases. You just can’t win them.”^{24c} This statement is much closer to the actual reality than the common impression that the ADA is heavily slanted toward people who file discrimination complaints. NCD and most disability rights activists believe that ADA administrative enforcement and court proceedings are in fact too predisposed in favor of defendants.

ADA REQUIREMENTS

Much of the media criticism of the ADA and many of the harmful implications attributed to it are based on misunderstandings of what the Act actually requires. All too often such reporting and commentary are not based on any familiarity with the actual requirements of the ADA and the standards and practices developed to implement it. Accordingly, media accounts of the ADA have conveyed at least as much misinformation about the law as accurate information about the obligations it imposes.

Myth: The ADA imposes extreme, unrealistic requirements that defy common sense.

One repeated drumbeat among media coverage of the ADA is that the law goes too far in prohibiting discrimination on the basis of disability and imposes obligations that are contrary to common sense. Some commentators profess that they are sympathetic to measures to “help the handicapped,” but believe that this law goes too far and places overwhelming burdens on businesses²⁵. Typically, after voicing such sweeping condemnation of the requirements established by the ADA, they proceed to discuss a few examples in one of three categories: (1) the ADA includes some conditions as disabilities that they think should not be included, (2) accessibility requirements cost too much; or (3) the ADA’s reasonable accommodation requirement hamstring businesses by giving expensive special treatment to people who do not deserve it.

The issues surrounding who is included in the definition of disability and common media misperceptions about it are addressed in previous sections of this policy paper. The common misunderstandings of the ADA’s accessibility and reasonable accommodation requirements are discussed in the sections which follow. In general, however, the negative media views of the ADA’s requirements usually reveal more about the commentators’ lack of knowledge and familiarity with the actual provisions of the ADA than they provide pertinent insights into shortcomings of the statute.

Previous policy papers in this *Righting the ADA* series have discussed the extensive process of congressional study, conceptual analysis, negotiation, compromise, debate, and fine-tuning that

culminated in the ADA. The ADA was a bipartisan measure, with considerable input and give-and-take with members on both sides of the congressional aisle. Negotiations with the George H. W. Bush administration and with numerous representatives of business interests played a major role in shaping the final legislation. Throughout the ADA, statutory requirements are tempered by (1) limitations (such as undue burdens and undue hardship limits to covered entities' obligations), (2) exemptions (such as exemptions for private clubs and religious organizations), (3) floors on coverage (such as provisions providing coverage only for employers having 15 or more employees), (4) exceptions (such as the exception of small buildings from the requirement of having elevators in newly constructed commercial facilities, and not requiring over-the-road buses to have accessible restrooms if it would result in a loss of seating capacity), (5) linkages to size and resources (such as consideration of costs, financial resources, size, etc., of a covered entity in determining what is an undue hardship for an employer, or what is readily achievable for a public accommodation), (6) phase-ins (such as having the employment provisions of the Act not take effect for employers having 25 or more employees until two years after the Act was passed, and until four years after the Act was passed for employers having 15 to 25 employees; and having interim requirements until completion of a study of access requirements for over-the-road buses), (7) defenses (such as explicitly permitting employers to require that workers not pose a direct threat to others, and permitting religious organizations to require workers to conform to religious tenets of the organization), and (8) low-level obligations (such as requiring architectural changes to existing buildings only if they are "readily achievable" — defined as easy and cheap; and requiring accessibility as a component of renovation and alteration project only to the extent that its cost is not "disproportionate" to the overall project). At every step of the way the ADA was carefully crafted to take business realities and common sense into account.

One of the ironies is that, against the grain of the media accusations that the ADA goes overboard and requires too much from the entities subject to it, many disability rights activists complain that the law did not go nearly far enough in prohibiting discrimination on the basis of disability. They note that other types of civil rights laws impose absolute obligations that do not permit costs to be offered as an excuse as the ADA does. They disagree with the ADA's focus only on new construction and alterations for imposing substantial accessibility requirements; they argue that this means that some facilities will never have to meet accessibility requirements. They also object to the ADA's exemptions for religious organizations and private clubs, and to the narrow limitations on remedies available under the Act.

Whatever validity such opinions may have, they certainly indicate that the media have not presented a balanced view when they characterize the ADA as an extreme statute that places untempered, overly burdensome obligations on employers and other covered entities.

Myth: The ADA's requirements are too hard on small businesses.

A particularly common version of the general charge that the ADA is too burdensome is the accusation that the Act imposes serious hardships upon small businesses²⁶. Misimpressions about

the actual requirements of the ADA and a lack of familiarity with prior laws prohibiting discrimination against people with disabilities have combined to whip up sentiments that the Act does not take into account the needs of small businesses and is, therefore, disastrous for them. Actually, the ADA was very carefully crafted to take into account the needs and situations of small businesses at every juncture. Each of the major requirements of the bill was tailored in some way to consider and make allowance for the important and unique needs of the small business operator.

It is true that small businesses were not wholly exempted from the coverage of the Act; small businesses are too important a source of goods and services for the American public to have them totally exempted and told that it is okay to go ahead and discriminate against people with disabilities. Small businesses make up a large percentage of the establishments that provide services and goods on a daily basis; to cut them out of the ADA would have seriously undermined the law's goal of opening up our society to people with disabilities on an equal basis. In many contexts, small business *is* business in America today. Permitting small restaurants, lunchrooms, theaters, service stations, etc., to continue to discriminate would have defeated a major purpose of the Act. If nondiscrimination is to have any real meaning, it is essential that local neighborhood businesses be prohibited from engaging in such discrimination. The approach of the ADA was not to eliminate small businesses from the requirements of the bill, but rather to tailor the requirements of the Act to take into account the needs and resources of small businesses — to require what is reasonable to require and not to impose obligations that are unrealistic or debilitating to businesses.

Each of the major sections and requirements of the ADA takes into account the fact that some businesses are very small local enterprises that may have very limited resources. In each area, either the size and resources of establishments were explicitly required to be taken into account in determining what is required, or some amelioration for small businesses was built into the substantive requirement itself. The following are some of the ways in which the provisions of the ADA provide great deference for the characteristics and needs of small businesses:

Exemption for small employers

With respect to employment, the ADA totally exempted all employers with fewer than 25 employees until July 26, 1994. Since that time only employers with fewer than 15 employees were exempt.

Undue hardship limitation

For those employers large enough to be covered despite the small employer exemption, the duty of making reasonable accommodations for employees with disabilities does not apply when an accommodation would impose an “undue hardship.” Among the factors that must be considered in determining whether an undue hardship exists, the Act specifically lists “the overall size of a

business of a covered entity with respect to the number of employees, number and type of facilities, and the size of the budget.” Thus, the requirement of making employment accommodations varies in relation to the size and budget of an employer, with less being required of a smaller, less prosperous business.

Readily achievable limit on barrier removal in existing public accommodations

Places of public accommodation are required by the ADA to remove architectural and communication barriers in existing facilities only if it is “readily achievable” to do so. Readily achievable means “easily accomplishable and able to be carried out without much difficulty or expense.” In determining what is readily achievable the ADA again specifies that the size and budget of a business are to be considered. A Mom-and-Pop store is held to a much lower standard than is a highly financed, big national concern.

Undue burden limitation regarding auxiliary aids and services

Public accommodations are not required to provide auxiliary aids and services if doing so would result in an “undue burden.” As with “undue hardship” and “readily achievable,” the ADA specifies that the determination of what is an undue burden must take into account the size and budget of a business. A struggling small business is excused from providing an auxiliary aid or service in circumstances where a larger, more prosperous business might be required to provide it.

The elevator exception for small buildings

The ADA generally requires accessibility in new construction consistent with overwhelming evidence that the costs of accessibility at the design and construction stage are minimal. To further protect small businesses, however, Congress added an exception to accessibility requirements with regard to small buildings. For buildings that are less than three stories or that have less than 3,000 square feet per story (no matter how many stories), no elevator is required — either for new construction or for renovation projects.

The readily accessible to and usable by standard

The ADA does not require total or universal accessibility even in regard to newly constructed facilities. The “readily accessible to and usable by” standard, drawn from previous statutes and regulations, imposes accessibility obligations that are tailored to the type and use of each particular facility. It does not require that all parking spaces, bathrooms, stalls within bathrooms, etc., have to be accessible, but only a reasonable number, depending on such factors as their location and number. A small facility is likely to have fewer areas and services, and, therefore, fewer areas and services to make accessible. The ADA does not require a business to add accessible drinking fountains and bathrooms if it does not otherwise provide fountains or

bathrooms. Small businesses with the fewest “frills” will have fewer such services and conveniences to make accessible.

Telecommunications relay services

The establishment of telecommunications relay services for individuals with speech or hearing impairments as provided for in Title IV of the ADA was an accommodation to the needs of small businesses. This system was created to permit persons using teletypewriters (text telephones) to contact businesses through a relay system in lieu of requiring all businesses to have teletypewriters themselves to permit customers to call to make reservations, purchase tickets, check on store hours or show times, etc.

Absence of compensatory and punitive damages for discriminatory public accommodations and limits on damages for employers

A compromise in the Senate removed from the ADA provisions that would have permitted the awarding of compensatory and punitive damages against places of public accommodation found to have discriminated, after some had argued that the prior monetary damages provisions might be too harsh, particularly on small businesses. The remedies available under the Act as it finally passed are highly advantageous to small businesses. The harshest remedy generally available against a small public accommodation is an injunction ordering it to stop its discriminatory activity. The Attorney General does have the power to bring suits for damages in “pattern or practice” cases, but it is the very rare case in which a Mom-and-Pop operation or other small business is subjected to such liability. Damages against employers under the ADA are governed by provisions of the Civil Rights Act of 1991 (42 U.S.C. § 1981a) that limit awards of compensatory damages (other than actual physical injury and pecuniary loss) and punitive damages to a total of \$50,000 for employers with 15 to 100 employees.

Because of these features of the ADA, and others not mentioned here, the ADA is almost certainly the most responsive to the needs and characteristics of small businesses of any federal nondiscrimination law that has ever been passed or even considered by the Congress.

Myth: The ADA’s accessibility requirements are extreme and exorbitantly costly.

A particular target of claims that the ADA imposes unrealistic obligations has been the Act’s requirements relating to architectural, transportation, and communication accessibility. Critics charge that compliance with accessibility mandates in the ADA demands massive expenditures that severely burden and drain the coffers of public agencies and that threaten the economic survival of private businesses.

To those familiar with the history of disability policy, the claims that the ADA’s accessibility requirements are devastatingly expensive have a familiar ring. Shortly after the Rehabilitation

Act of 1973 became law, many of those subject to accessibility requirements under that law complained of ruinous costs of complying. It turned out that their cost estimates were greatly exaggerated; describing this era, Sociology Professor Richard K. Scotch, a disability policy author, wrote: “Several recipients provided extremely high cost estimates based on the incorrect assumption that all existing buildings had to be made accessible and then complained that they could not meet the cost of compliance” (Richard K. Scotch, *From Good Will to Civil Rights: Transforming Federal Disability Policy* (1984) at p. 118). And, he added, “journalists echoed these criticisms.” Another author wrote that “[t]hroughout this period, cost estimates for [accessibility] accommodations, often in the billions of dollars, swirled around public forums, creating outcries about excessive mandates and impossible spending targets” (Stephen L. Percy, *Disability, Civil Rights, and Public Policy: The Politics of Implementation* (1989) at p. 241). He added that while such estimates were often excessive, they nonetheless served to generate broad discontent with accessibility requirements.

In reviewing the costs and benefits of accessibility requirements under the Rehabilitation Act, the U.S. Commission on Civil Rights found that “[p]rojected costs have frequently proven to be overestimated and contrary to common sense and practicality” (*Accommodating the Spectrum of Individual Abilities* (1983) at p. 70). One illustrative example involved North Carolina education officials who reportedly estimated that it would cost \$15 billion to make state university buildings accessible in compliance with Rehabilitation Act requirements. It ultimately turned out that the actual costs were about \$15 million.²⁷

After the ADA was enacted, the same types of inflated cost estimates began to surface, and were touted in some media reports. An article in *The Wall Street Journal*, for example, reported that the National Association of Counties had estimated that ADA compliance would cost county governments “almost \$3 billion” and that the Metro-North Commuter Railroad Co. would have to spend \$45 million to comply (Max Boot, *A Rye Look at the ADA*, *The Wall Street Journal*, June 22, 1995, at A16). More commonly, however, media reports focus on a particular example where costs of complying with ADA accessibility standards were reportedly very high and commentators extrapolate on the particular situations to attack the ADA more broadly. Closer scrutiny of the attributed costs frequently reveals them to be exaggerated. As one disability policy journalist has noted, “people lie about costs — either inflating the cost or blaming access for costs that are attributable to things like overcharging and construction snafus.”²⁸ Often, extravagant cost estimates are the result of a serious misunderstanding of exactly what the ADA’s accessibility provisions require.

Examination of the ADA’s requirements regarding accessibility reveals that each of them sets a reasonable, attainable standard. The principal focus of ADA’s accessibility mandates is on new construction of commercial facilities. The Act’s focus on new construction was endorsed by Congress, with little resistance from business interests and architects because studies have consistently shown that, if it is designed in from the beginning, accessibility costs are quite

small. The studies document that costs attributable to accessibility features amount to between one-tenth of a percent and 1 percent of the total cost of construction.²⁹

In regard to accessibility for buildings constructed before the ADA took effect, often overlooked in media accounts of purported ADA accessibility expenses is that the Act establishes only a very modest obligation for private businesses to make accessibility improvements in existing buildings. It requires the removal of existing barriers only to the extent that doing so is “readily achievable” (42 U.S.C. § 12182(b)(2)(A)(iv)). Readily achievable is defined to mean “easily accomplishable and able to be carried out without much difficulty or expense,” taking into account the size, financial resources, and nature of the particular business. In simple terms, the ADA requires accessibility features to be incorporated into existing facilities only if it can be done easily and cheaply.

In addition, when a public accommodation is undertaking renovations or alterations of an existing facility that affect the usability of the facility, it must, to the “maximum extent feasible,” make the alterations in “such a manner” that the facility is accessible. Moreover, if the alterations are to an area where the facility’s “primary function” takes place, the public accommodation must ensure, to the “maximum extent feasible,” that there is an accessible path of travel and accessible bathrooms, telephones, and drinking fountains serving the primary function area. These latter duties, however, are required only to the extent that their costs and scope are not “disproportionate” to the overall alterations. 42 U.S.C. § 12183(a)(2). The Act directs the Attorney General to establish standards for “disproportionality,” and Department of Justice regulations specify that path-of-travel accessibility costs will be deemed disproportionate when their cost exceeds 20 percent of the overall alteration (28 C.F.R. § 36.403(f)(1)). The costs of providing accessibility can also be diminished by a federal tax deduction and a small business tax credit available for removing architectural barriers in facilities owned or leased for use in a trade or business.³⁰

As noted in the previous section of this policy brief, the ADA requirement for newly constructed facilities and alterations is worded in terms of facilities being “readily accessible to and usable by” people with disabilities. This standard does not require total accessibility of all parts of buildings, nor that all parking spaces, bathrooms, stalls within bathrooms, etc., have to be accessible, but only a reasonable number, depending on such factors as their location and number, and the type and use of the particular facility.

The ADA provides a couple of exceptions even to these moderate accessibility requirements. One of these — the elevator exception for small buildings — was discussed in the previous section of this policy brief. It provides that no elevator is required in new construction or renovation projects for buildings of less than three stories or of less than 3,000 square feet per story. And a limited exception is made to the requirement that newly constructed commercial facilities must be accessible; it excuses covered entities from accessibility features that are

“structurally impracticable” (42 U.S.C. § 12183(a)). This exception applies primarily to buildings that must be built on stilts over water or marshes.

State and local governments are subject to a requirement that newly constructed facilities be accessible. And alterations to existing facilities are required to be readily accessible to and usable by people with disabilities “to the maximum extent feasible” (42 U.S.C. § 12134(b); 28 C.F.R. § 41.58(a)). The ADA imposes an accessibility standard for existing state and local government facilities that differs from the “readily achievable” standard applicable to private facilities. This standard, which had previously been imposed under Section 504 of the Rehabilitation Act on recipients of federal financial assistance, requires “program accessibility.” This means that each individual facility does not have to be made accessible so long as the programs, activities, or services the state or local government entity provides are accessible. Instead of making structural changes to a facility, a government agency can move programs to an accessible part of a facility or to another nearby facility that is accessible, or make use of other alternative means for ensuring access. The objective is to assure that individuals with disabilities have accessible opportunities to obtain services and benefits available from state and local government entities, without necessarily making all existing facilities accessible. Many exaggerated estimates of costs of complying with ADA requirements ignore this program accessibility option.

It is true that accessibility requirements the ADA imposes on public transportation systems do in some cases involve substantial costs. What is often overlooked in media commentary on such costs is that the ADA’s transportation provisions are the culmination of formal efforts going back at least to 1970 to induce mass transit agencies to make their facilities and stations accessible. In 1970, an amendment to the Urban Mass Transportation Act declared it is “the national policy that elderly and handicapped persons have the same right as other persons to utilize mass transportation facilities and services,” required mass transit officials to make “special efforts” to allow people with disabilities to “effectively utilize” mass transportation, and required all federal programs funding mass transit to “contain provisions implementing this policy” (49 U.S.C. § 1612). Subsequently, other federal laws, including Section 504 of the Rehabilitation Act of 1973, have imposed additional legal requirements for accessibility. In response, while some transit systems have achieved considerable degrees of accessibility, others have resisted making such changes. As a result, the twenty years between the 1970 law and the enactment of the ADA in 1990 were marked by contentious court actions against and by mass transit agencies over the degree of accessibility required in transit systems receiving federal funding.

NCD’s 1986 report, *Toward Independence*, in which it first recommended that Congress pass an Americans with Disabilities Act, stated: “The Council has reviewed the implementation of the Nation’s transportation policy. Its conclusion is that we are far short of a truly accessible system” (p. 32). Concluding that “[t]he time has come to make our Nation’s policy of accessible transportation a reality,” NCD called for legislation to “require full accessibility to mass

transportation” (p. 33). The ADA put an end to the controversy and squabbling in federal regulations and the courts by providing clear and specific mandates for making transportation systems accessible. Transportation committees in the House of Representatives, in consultation with agencies of the Department of Transportation, devised reasonable and precise accessibility standards for vehicles, stations, and facilities. Such standards were then included in the statutory language of the ADA.

At the time the ADA was enacted, transit systems had already had 20 years to achieve accessibility for riders with disabilities. They have received substantial federal funding over the years for their transportation programs. As this policy brief is being issued, transit agencies have had one-third of a century to achieve accessibility of their facilities and services. Often the estimates of large expenditures for ADA compliance by transit agencies are simply overstatements, based either on inaccuracies concerning the actual requirements of the ADA or inflated cost projections. To the extent that the figures are accurate, it is appropriate to note that (1) these agencies have received very large sums of federal transportation funding over the years, and (2) the costs of complying would not appear so immense if the particular systems had not delayed implementation and had spread the costs over the years since accessibility of transportation became the national policy. Access to transportation is a key component of the ADA’s overall objective of permitting people with disabilities to enter the mainstream of American life. Rights guaranteed by other provisions of the ADA, such as equal employment opportunities and the right to use public accommodations and state and local government services on an equal basis, cannot be achieved if people with disabilities do not have access to transportation services to get to the places where the jobs, accommodations, and services are.

Some overestimations of ADA accessibility costs originate from cost figures provided by accessibility consultants who hold themselves out as experts, but are not always knowledgeable and competent, and sometimes are unscrupulous³¹. One newspaper article described the situation of an immigrant American who wanted to rent space in an existing building to open an ethnic restaurant; a restaurant design consultant described as “a high-priced expert” produced an imposing list of accessibility changes to the building that he said were necessary to meet legal requirements³². These included putting in an elevator to an employee break room in the basement, ramping a corner of the dining area with a recessed floor, reducing the number of tables in the restaurant, doubling the size of bathrooms and lowering sinks, and knocking out walls in the employee locker room, and together were estimated to run \$200 per square foot of space rented. A commentator with more knowledge of the ADA responded to the article and called the estimates “wildly inaccurate.”³³ He pointed out that under the ADA neither the elevator nor any significant lost serving space would be required,³⁴ that the changes to employee areas would only be required if the restaurant had employees with disabilities which necessitated the changes and then only to the extent that they would not be an undue hardship, and that other changes to customer service areas would only be required if they were readily achievable — easily accomplishable without much difficulty or expense. He also pointed out that significant tax credits and deductions are available to offset some of such costs that are incurred.

The reality is that, when accurately presented, the ADA's accessibility requirements are not unduly burdensome. They represent a realistic and pragmatic attempt to solve a serious public policy problem — that much of the built environment has for too long been designed and constructed to exclude and disadvantage a substantial portion of the U.S. population.

Myth: Unlike other civil rights laws, the ADA does not mandate equal treatment, but goes beyond that to require expensive and disruptive special privileges in the form of “reasonable accommodations” for people with disabilities.

Some media commentators contend that the ADA goes beyond the “equality” that is the object of other civil rights laws, that it requires special privileges for people with disabilities. Frequently, they point to the ADA requirement of individualized “reasonable accommodation” for workers and job seekers with disabilities as a prime example of such special treatment. As one ADA critic said of the reasonable accommodation obligation:

At first glance, it might seem hard to fault these sorts of provisions. After all, who doesn't want the handicapped to be part of the American mainstream? Indeed, the ADA was presented as a long overdue civil rights measure.

But the law does far more than bar simple discrimination; it also requires expensive affirmative action on behalf of the disabled.³⁵

This perspective represents a serious misunderstanding of the actual nature and extent of the ADA's reasonable accommodation requirement, and of the purpose and rationale behind it. The use of the term “affirmative action” is highly inaccurate; however appropriate affirmative action initiatives may or may not be in ameliorating the effects of entrenched discrimination, the ADA, as noted in a previous section of this policy brief, does not contain any affirmative action requirement, does not mandate any outreach programs for increasing the proportion of workers with disabilities, and does not establish any targets or statistical goals for hiring persons with disabilities. From its preamble to its final provision, the ADA is solely about “equal opportunity.” Like other civil rights laws, the ADA prohibits discrimination and requires that Americans be accorded equality in pursuing jobs, goods, services, and other opportunities. The provisions of the ADA do make it clear that equal treatment is not synonymous with identical treatment, but this is true under other civil rights laws too. The use of literacy tests and other qualification devices that unfairly screen out people on the basis of race have been struck down even though they have been evenly administered to people of all races. Weight and height requirements that disproportionately eliminate women have been held to be unlawful where they are not really necessary to ensure job performance; employers cannot exonerate themselves by showing that they applied such requirements identically to both women and men.

Letting every employee have an identical opportunity to use a restroom located up a flight of stairs may be “identical” treatment, but it is hardly equal treatment for a worker who uses a

wheelchair. Requiring the showing of a driver's license to obtain unemployment benefits may be applied identically to all applicants, but it is very unequal as applied to people who, because of impaired vision or other disabilities, cannot obtain a license to drive. Important job or benefits information broadcast over a company's loudspeaker system may be available to every employee in an identical form, but workers with hearing impairments certainly do not have equal access to such information. For people with disabilities, avoiding unnecessary differential treatment is an important element of nondiscrimination in many situations; but where people's disabilities *do* situate them differently regarding opportunities, identical treatment may be a source of discrimination, and different treatment may be required to eliminate it.

Recognition of the need for equality in fact and not merely in form has given rise to an obligation under federal disability nondiscrimination laws to make individualized adjustments to permit particular individuals with disabilities to participate in particular jobs, programs, and activities, or to benefit from particular services, facilities, benefits, privileges, or accommodations — in short, to make reasonable adjustments to offer a specific person with a disability a truly equal chance for a specific desired opportunity. The U.S. Commission on Civil Rights has observed that discrimination on the basis of disability “cannot be eliminated if programs, activities, and tasks are always structured in the ways people with ‘normal’ physical and mental abilities customarily undertake them” (*Accommodating the Spectrum of Individual Abilities* (1983) at p. 102). It added that “[a]djustments or modifications of opportunities to permit [people with disabilities] to participate fully have been broadly termed ‘reasonable accommodation.’” In 1992, the Seventh Circuit Court of Appeals rephrased this description a bit when it identified “a change in the (supposedly neutral) standard operating procedure” as “the essence of reasonable accommodation” (*McWright v. Alexander*, 982 F.2d 222, 227 (7th Cir. 1992)).

When it created the reasonable accommodation requirement, Congress understood that the rationale for it is not special treatment; it is a reflection of the fact that employers routinely plan for and accommodate the expected needs of employees in general, but most facilities, systems, practices, and furnishings have been designed without taking into account the needs of employees and potential employees with disabilities. To allow such employees to participate in the workplace, employers must make some adjustments to the way they “have always done things.” This is a precondition to achieving real equality, not a special privilege or advantage.

A related misunderstanding is the notion that it is too easy for workers with disabilities to obtain “reasonable accommodation” under the ADA. Part of this misconception is the mistaken idea discussed in detail previously in this policy brief that it is too easy to qualify as having a disability under the ADA. But even for people who meet the statutory definition, there are still additional steps they must take. An employee seeking such an accommodation: a) must inform the employer of the existence of a disability, unless the employer already knows; b) must request an accommodation; and c) can be required to provide medical or professional documentation of the nature and extent of the disability and of the necessity for and effectiveness of a requested

accommodation. The employer then can consult with other employers and other knowledgeable agencies to identify alternative accommodations. If there are several accommodations that will enable the employee to perform the essential job tasks, the employer can select the one it prefers.

Nor is there any truth to the perception that accommodations required under the ADA are disruptive and ruinously expensive, and can drive a business to bankruptcy. In fact, if a proposed accommodation is too difficult or causes financial hardship to an employer, the employer does not have to do it. This is because the ADA places an “undue hardship” limitation on the duty to accommodate workers with disabilities. The ADA defines undue hardship to mean “requiring significant difficulty or expense” and is determined in light of such factors as the nature and cost of an accommodation, the financial resources of the particular facility and the company that operates the facility, the nature, size, and location of the business, and the composition and functions of its workforce (42 U.S.C. § 12111(10)). Moreover, studies both before and since the enactment of the ADA have consistently shown that reasonable accommodations tend not to be very expensive.

The seminal study of the costs of workplace accommodations for employees with disabilities was a 1982 study funded by the U.S. Department of Labor.³⁶ It found that only 22 percent of workers with disabilities required any accommodation at all. Of those who did need accommodations, half of the accommodations they received cost nothing, and more than two thirds cost less than \$100. Later studies, both before the ADA became effective and afterwards, have reached similar results. A series of studies conducted at Sears, Roebuck and Co. from 1978 to 1996 determined that nearly all of the 500 accommodations sampled required little or no cost.³⁷ Seventy-two percent of the accommodations cost nothing, 17 percent cost less than \$100, 10 percent cost less than \$500, and only one percent cost more than \$500 (but not more than \$1000). From 1993 to 1996, the average direct cost for accommodations was \$45, and from 1978 to 1992 the average cost was \$121. In particular, the study determined that from 1993 to 1996 the average cost for accommodations relating to behavioral impairments was zero and average cost related to neurological impairments was only \$13. A 1995 Harris poll of more than 400 business executives found that between 1986 and 1995 the percentage of companies providing accommodations rose from fifty-one to eighty-one percent, but more than three-quarters of the executives reported that increases in costs associated with the provision of accommodations were minimal — a median cost of \$233 per employee.³⁸ Studies by the Job Accommodation Network (“JAN”) have found that more than two-thirds of effective accommodations implemented as a result of a JAN consultation cost less than \$500; moreover, JAN reported that for every dollar spent on effective accommodation, companies received an average of \$50 savings from lower job training costs and insurance claims, increased worker productivity, and reduced rehabilitation costs after injury on the job.³⁹

Despite the dire warnings of some commentators and critics, the costs of providing reasonable accommodations are rarely onerous if applied with common sense and in dialogue with the worker with a disability and with those, such as JAN, knowledgeable about realistic alternatives.

Moreover, in many circumstances, employers may obtain funding from external resources, such as funds from a state vocational rehabilitation agency, the federal tax credit for disability access costs, federal, state, or local tax deductions or other sources, to offset costs of reasonable accommodations. But if in particular circumstances the costs of accommodations would be too burdensome, then the undue hardship limitation provides an escape hatch to permit employers to avoid such overly harsh financial burdens. Many of the complaints about the reasonable accommodation requirement turn out on closer inspection to be contrived hypothetical situations or based on ignorance of the actual dimensions of the ADA's reasonable accommodation and undue hardship provisions.

Myth: The ADA unjustifiably intrudes on the prerogative of businesses owners to operate their businesses as they see fit, and improperly imposes unfunded mandates on state and local governments.

To some, the ADA is an example of unnecessary big government, of the federal government meddling with things that it should simply stay out of. The overwhelming bipartisan congressional support that helped enact the ADA reflects, however, quite a different view of the need for and the role played by the ADA.

Some critics paint the ADA as an unprincipled encroachment on the freedom of private business. One commentator complained that such interference with business “hardly seems fair, since businessmen are not responsible for the handicaps of the disabled,” and although he considered it appropriate to “feel compassion” for someone with a disability, “that doesn’t mean we should force someone else to reconfigure a doorway for him.”⁴⁰ Others consider the ADA to be one more example of what they challenge as “unfunded mandates” — imposition by federal law of obligations on state and local governments to accomplish some perhaps worthwhile social objective but without providing federal funding for the duties imposed; in such circumstances, the federal government provides the requirement but forces state and local governments to pay for it.

Both of these viewpoints ignore the central premise of the ADA — that the entities subject to the requirements of the ADA had in the past and were continuing to engage in unfair and unnecessary discrimination on the basis of disability. Of course, no federal civil rights laws would ever be necessary if the private sector and state and local entities did not engage in discrimination. In the ADA, Congress expressly found that discrimination on the basis of disability was “pervasive” in America, and that “discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services” (42 U.S.C. §§ 12101(a)(2) & (3)). In making such findings, Congress had extensive documentary support and extensive information from congressional hearings about the forms of discrimination on the basis of disability that occur every day.

Congress found it necessary to pass a federal law if people with disabilities were ever going to be afforded the equal opportunity to participate in American society.

The resistance over decades by some public transit systems to making their facilities and vehicles accessible to people with disabilities, despite the fact that they received sizeable amounts of federal funding, was discussed in a previous section of this policy brief. Likewise, many state and local government agencies that receive federal funding have been subject since 1973 to a requirement that they not discriminate on the basis of disability, as have other federal grantees and federal contractors. These nondiscrimination obligations have included duties to make programs and activities accessible.

But even apart from prior requirements not to discriminate, the ADA articulates the view that it is not merely a neutral circumstance for business operators and government entities to conduct their programs and activities in ways that exclude or disadvantage individuals because of disability, or to maintain workplaces and other facilities that people with various physical or mental impairments cannot get into and use. Recognizing the social model of disability, discussed in previous sections of this policy brief, the ADA considers that the limitations resulting from disabilities are not so much the result of personal deficits as of barriers imposed in the social environment. Private businesses and government agencies that occupy inaccessible facilities at some point constructed, purchased, leased, or otherwise obtained such facilities. They did so without any consideration that groups of Americans would not be able to come into and use the facilities. The existence of potential workers, customers, clients, and visitors with disabilities was totally foreseeable. Similarly, until the ADA, government entities and businesses routinely adopted and retained practices, policies, and rules that disadvantaged or excluded people with mental or physical impairments. Justin Dart, a former member and vice chairperson of NCD and a vigorous advocate for the enactment and enforcement of the ADA, often declared that the ADA was ultimately a statement by our society that discrimination on the basis of disability is wrong and unacceptable in America. Those who would excuse business or government interests from the duty to stop discriminating on the basis of disability are missing the simple, bipartisan core principle of the ADA — that continued discrimination on the basis of disability is unfair, unnecessary, unequal, and unAmerican.

CONCLUSION

While some reporting and media commentary on the ADA has been fair and balanced, far too much of it has been inaccurate and negative. The myths and misconceptions about the ADA discussed in the previous sections of this policy brief paint a picture of the ADA as an unclear law that authorizes unworthy people to sue private businesses and government agencies on feeble or ludicrous grounds, and that subjects public instrumentalities and private business concerns to weighty and unjustified burdens and financial liabilities. The reality of the ADA is in striking contrast: it is a law that (1) was carefully crafted based on years of experience with prior

disability nondiscrimination laws; (2) was carefully calibrated to provide moderate standards taking into account financial and pragmatic operational realities; (3) has been interpreted too restrictively in the courts to give protection to too few of the Americans it was intended to protect; and (4) has not been enforced vigorously to give full force to its scope and requirements.

In light of the various negative myths that have been perpetrated about the ADA by media coverage, it is surprising that the ADA's image has not been totally tarnished. But, remarkably, 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.” And a Harris poll of business executives in 1995 showed that 90 percent of the executives surveyed said that they supported the ADA.

The fact that most Americans are favorably disposed to the ADA, in the face of the misleading media perspectives on the ADA addressed in this policy brief, is testament both to the Act and to the savvy of the American citizenry. It appears that the American people have had the good sense not to buy the media hype against the ADA. They have taken “with a grain of salt” reports of extreme and groundless cases spotlighted in media coverage, and have not considered these as representative of the true thrust of the law. They have noted that much of the criticism of the Act and doomsday predictions about its implications have come from sources with a stake in discrediting the ADA or with some other ax to grind. They have also had experience with the realities of the ADA in their own communities and workplaces. 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 know that Aunt Sally who uses a wheelchair can now go to department stores, fast food places, and government offices. They know that the son of their neighbors is now living comfortably in a local group home instead of at that horrible mental retardation institution up state. 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.

Ultimately, most Americans support the ADA for the same reasons that huge majorities from both sides of the congressional aisle lined up to vote for the Act; for the same reasons that the George H. W. Bush administration, the Leadership Conference on Civil Rights, and hundreds of diverse organizations from around the country, including many religious organizations, business interests, and labor organizations, all endorsed and championed the enactment of the ADA. The American people grasp that the ADA is the right thing to do. They have come to understand that discrimination on the basis of disability is wrong, is economically indefensible, prevents a great many people from living productive and fulfilling lives, and must be eliminated if America's guarantees of equal opportunity are to be taken seriously.

This is not to suggest, however, that negative, inaccurate media coverage of the ADA does not have any effect and presents no danger. Too often, policy debates and political decisionmaking

on the ADA are framed, not by the public's underlying goodwill toward the ADA, but by the media perspectives on the law. And even though overall public support for the ADA and its objectives is overwhelming, it is difficult to know to what extent people who support the ADA may have nonetheless absorbed some of the bad media spin, and may still think it is a flawed law in one way or another. Attempts to roll back or restrict the ADA are fueled by media-fed misinformation about the Act and its effects. NCD believes it is vital to try to counter inaccurate media coverage of the ADA with full and accurate information about this critically important law.

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

ENDNOTES

1. James Bovard, "This Law Hassles Business," *USA Today*, July 26, 1994, Editorial page.
2. Stephanie Amour, "Disabilities Act Abused? Law's Use Sparks Debate," *USA Today*, Sept. 25, 1998, at 1B.
3. George F. Will, "Protection for the Personality Impaired," *The Washington Post*, Apr. 4, 1996, A31.
4. James Bovard, "The Disabilities Act's Parade of Absurdities," *Wall Street Journal*, June 22, 1995, A16.
5. The Simpsons: King-Size Homer (Fox television broadcast, Nov. 5, 1995), discussed by LaCheen at 21 *Berkeley Journal of Employment and Labor Law* 228.
6. For example, see Robert J. Samuelson, "Dilemmas of Disability," *The Washington Post*, June 30, 1999, p. A31. The logical extreme of this view was the proposal in a law review article that medical standards, partially modeled on Social Security disability eligibility criteria, should be developed for determining disability under the ADA. See Mark A. Rothstein, Serge A. Martinez, & W. Paul McKinney, "Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act," 80 *Washington University Law Quarterly* 243 (Spring 2002).
7. R. Richardson King, "Stop the Absurdities Related to Disabilities Act," *The Times-Picayune*, July 1, 1995, p. B6.

8. ABC News Special: The Blame Game (ABC television broadcast, Aug. 17, 1995) (John Stossel, reporting).
9. See, for example, James Bovard, "This Law Hassles Business," *USA Today*, July 26, 1994, Editorial page (ADA inefficient, divisive means to "try to help the handicapped").
10. ABC News Special: The Blame Game (ABC television broadcast, Aug. 17, 1995) (John Stossel, reporting).
11. Brian Doherty, "Unreasonable Accommodation," *Reason Magazine*, August/September 1995, p. 20.
12. Stephanie Amour, "Disabilities Act Abused? Law's Use Sparks Debate," *USA Today*, Sept. 25, 1998, at 1B.
13. The Simpsons: King-Size Homer (Fox television broadcast, Nov. 5, 1995), discussed by LaCheen at 21 *Berkeley Journal of Employment and Labor Law* 228.
14. James Bovard, "This Law Hassles Business," *USA Today*, July 26, 1994, Editorial page.
15. See, e.g., *Cook v. Rhode Island*, No. 93-1093 (1st Cir. 1993), Brief of the Equal Employment Opportunity Commission as *Amicus Curiae* at 12 (regulatory citation omitted).
16. George F. Will, "Protection for the Personality Impaired," *The Washington Post*, Apr. 4, 1996, A31.
17. Jerry Adler, "My Brain Made Me Do It: Multiplying the Categories of Mental Illness Isn't Just a Game; It Has Effects in the Real World," *Newsweek*, Vol 131, Issue 4, January 26, 1998, p. 56 (discussing the views of Walter Olson, author of *The Excuse Factor*).
18. For example, see, George F. Will, "Protection for the Personality Impaired," *The Washington Post*, Apr. 4, 1996, A31 (employees covered by the ADA "have a right not to be fired").
19. Contrast this with the statement of one newspaper commentator that "the law does far more than bar simple discrimination; it also requires expensive affirmative action on behalf of the disabled" (Doug Bandow, "Regulatory Reach of Disabilities Act," *The Washington Times*, Feb. 7, 1992, p. F4).
20. James Bovard, *The Disabilities Act's Parade of Absurdities*, Wall Street Journal, June 22, 1995, A16.
21. 21 *Berkeley Journal of Employment and Labor Law* at p. 226, discussing ABC News Special: The Blame Game (ABC television broadcast, Aug. 17, 1995).

22. See, for example, *Pesterfield v. Tennessee Valley Authority*, 941 F.2d 437, 441-42 (6th Cir. 1991) (inability to get along with supervisors and co-workers and to tolerate rejection or criticism); *Dowden v. Tisch*, 729 F.Supp. 1137, 1139 (E.D. Tex. 1989), *aff'd mem.*, 902 F.2d 957 (5th Cir. 1990) (failing to obey the orders of supervisors); *Adams v. Alderson*, 723 F.Supp. 1531, (D.D.C. 1989) (engaging in violent behavior toward a supervisor); *Palmer v. Circuit Court of Cook County, Ill.*, 117 F.3d 351, 352 (7th Cir. 1997) (threatening a fellow worker); *Amadio v. Ford Motor Co.*, 238 F.3d 919 (7th Cir. 2001) (excessive absences from work); *Hindman v. GTE Data Serv., Inc.*, 1995 WL 128271, at *5 (M.D. Fla. Jan. 20, 1995) (bringing a loaded firearm to work); *Mazzarella v. United States Postal Serv.*, 849 F. Supp. 89, 94 (D. Mass. 1994) (screaming obscenities, threatening a supervisor, and destroying office equipment); *Gordon v. Runyon*, 1994 WL 139411, at *5 (E.D. Pa. Apr. 24, 1994) (bringing mace and a stun gun to work).

23. Stephanie Armour, “Disabilities Act Abused? Law’s Use Sparks Debate,” *USA Today*, Sept. 25, 1998, at B1.

24. Stephanie Armour, “Disabilities Act Abused? Law’s Use Sparks Debate,” *USA Today*, Sept. 25, 1998, Final Edition, Money, B1.

25. See, for example, James Bovard, “This Law Hassles Business,” *USA Today*, July 26, 1994, Editorial page (ADA is an inefficient, divisive means to “try to help the handicapped”). Another commentator observed that the ADA “is noble for its ... philosophy,” but is “unachievable” and “logically incoherent” (Michael Kinsley, “Impractical and Ideal,” *The Washington Post*, July 1, 2002, p. A17). See, also, Trevor Armbrister, “A Good Law Gone Bad: Drafted with the best of intentions, the Americans with Disabilities Act has created a legal nightmare,” *The Readers Digest*, May 13, 1998.

26. See, for example, Michael Fumento, “Disabling fallout of disability regulations,” *The Washington Times* August 2, 1995, p. A19.

27. Joseph P. Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* (1993) at p. 71.

28. Mary Johnson, *Make Them Go Away: Clint Eastwood, Christopher Reeve & the Case Against Disability Rights* (2003) at 226.

29. In the mid 60s the National League of Cities studied costs of access for people with disabilities for a national commission on architectural barriers; the study showed that when planned into the initial design, accessibility features usually cost less than one-half of one percent. A Syracuse University study conducted for HUD reached the same conclusion. In 1975, the General Accounting Office estimated that accessibility in a new building can be accomplished for less than one-tenth of one percent of overall costs. In 1981, the Architectural and Transportation Barriers Compliance Board (ATBCB) prepared for the Office of Management and Budget a report of cost information based upon data provided by the federal

accessibility standard-setting agencies. It stated:

The Board staff reviewed cost studies and cost data compiled by states, architects, the General Accounting Office, HUD, manufacturers, and other members of the public and incorporated this information into papers which were presented to Board members and which were made a part of the public docket. Experience and research demonstrated that accessibility can be achieved at minimal cost — usually ½ to 1 percent of the construction cost. This percentage would be even lower if total cost were considered (i.e., architectural and engineering fees, cost of land, landscaping, and the like). (ATBCB, “ATBCB Minimum Guidelines and Requirements — Cost Information,” Memorandum to James C. Miller III (March 20, 1981))

Among the other studies and reports reaching the conclusion that accessibility in a new building should not cost more than one-tenth to one-half of one percent of construction costs are the following: 41 Fed. Reg. 20,333 (regulatory impact statement issued in connection with Section 504 regulation in 1977; estimated new buildings can be made accessible at additional cost of .5 percent of total cost of construction); Access Board, *About Barriers*, p. 5 (1982); U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, pp. 81-82 (1983); National Council on Disability, *Toward Independence*, Appendix, pp. F-28 & F-29 (1986).

30. 26 U.S.C. §§ 190, 44(c).

31. In some cases, the fees of such consultants are apparently calculated in relation to the costs for the entire renovation project, providing a financial incentive for inflating the scope of changes needed to comply with accessibility requirements.

32. Katherine Kersten, “ADA regulatory overkill is disabling businesses,” *Star Tribune*, September 9, 1998, p. 17A.

33. Jeff Nygaard, “Commentary,” *Nygaard Notes*, September 15, 1998, no. 2.

34. See the discussion of the elevator exception for small buildings previously in this section. Department of Justice regulations implementing Title III of the ADA declare that rearrangement of furniture that results in “a significant loss of selling or serving space” is not required as a readily achievable modification of an existing facility (28 C.F.R. § 36.304(f)).

35. Doug Bandow, “Regulatory Reach of Disabilities Act,” *The Washington Times*, Feb. 7, 1992, p. F4.

36. Berkeley Planning Associates, *A Study of Accommodations Provided to Handicapped Employees by Federal Contractors: Final Report* (prepared under a contract from the U.S. Dept. of Labor, Employment Standards Administration, June, 1982). The figures cited in the ensuing

discussion can be found at pp. ii, 20, 29. The results of the study are discussed in U.S. Commission on Civil Rights, “Accommodating the Spectrum of Individual Abilities” (1983) at p. 107.

37. The results of these and some other studies are discussed in Peter David Blanck & Mollie Weighner Marti, “Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act, 42 *Villanova Law Review* 345, 377-79 (1997).

38. Louis Harris and Associates, Inc. and National Organization on Disability, *1995 Survey of Corporate Executives of the ADA* (1995).

39. See President’s Committee on Employment of People with Disabilities, *Job Accommodation Network (JAN) Reports* (1994) at p. 10.

40. Doug Bandow, “Regulatory Reach of Disabilities Act,” *The Washington Times*, Feb. 7, 1992, p. F4.