



**CONSORTIUM FOR CITIZENS
WITH DISABILITIES**

**FAILING TO FULFILL THE ADA'S PROMISE AND INTENT:
THE WORK OF THE COURTS IN NARROWING PROTECTION
AGAINST DISCRIMINATION ON THE BASIS OF DISABILITY**

Prepared by the Consortium for Citizens with Disabilities, September 2006

“With today's signing of the landmark Americans with Disabilities Act, every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom.”ⁱ

With that promise, President George H.W. Bush signed the Americans with Disabilities Act into law on July 26, 1990. Congress had passed the law earlier that month with overwhelming bipartisan support, and leading lawmakers from both parties joined President Bush as he hailed the ADA as “the world’s first comprehensive declaration of equality for people with disabilities.”ⁱⁱ

This historic law prohibits disability-based discrimination and requires changes in workplaces, public transportation systems, and other programs and services. In the sixteen years since its passage, the ADA has changed how we design our buildings and sidewalks, improved public transportation and product design, and required modification of certain employment practices. While significant physical and social barriers remain, changes brought about by the ADA have made it possible for more people with disabilities to be out in the world: working, shopping, eating in restaurants, seeing movies, getting to and from the doctor’s office.

**DESPITE THESE POSITIVE GAINS, THE ADA HAS NOT FULFILLED ITS FULL PROMISE BECAUSE IT
HAS NOT BEEN INTERPRETED OR ENFORCED AS CONGRESS INTENDED**

The purpose of the ADA is to provide a “clear and comprehensive national mandate,” with “strong, consistent, enforceable standards,” for eliminating disability-based discrimination.ⁱⁱⁱ Yet the courts have not interpreted the ADA as providing comprehensive protections. On the contrary, the courts have limited the ADA’s reach significantly by, among other things, (1) denying the ADA’s protection to broad classes of persons with disabilities that Congress clearly intended to protect, (2) narrowing employers’ “reasonable accommodation” obligations, and (3) expanding defenses to charges of disability-based discrimination.^{iv}

This piece addresses the first of these problems: the extent to which the Supreme Court and lower federal courts have restricted the class of persons protected by the ADA. These restrictive rulings are not consistent with the intent and direction of Congress, three different presidents and their administrations, and the federal agencies with ADA enforcement responsibilities, including the Justice Department and the Equal Employment Opportunity Commission.

THE SUPREME COURT HAS FRUSTRATED CONGRESSIONAL INTENT BY RESTRICTING ACCESS TO THE ADA'S PROTECTION FROM DISABILITY-BASED DISCRIMINATION

The Supreme Court's 1999 "Mitigating Measures" Decisions

In a series of cases decided in 1999, the Supreme Court ruled that mitigating measures – medication, prosthetics, hearing aids, other auxiliary devices, diet and exercise or any other treatment – must be considered in determining whether an individual has a disability under the ADA.^v This means that people with serious health conditions who are fortunate enough to find a treatment that makes them more capable and independent – and more able to work – may find that they are not protected by the ADA at all.

In reaching this conclusion, the Court disregarded explicit statements from Congress that it did not intend mitigating measures to be considered in determining whether a person has a disability. Similarly, the Court disregarded explicit statements from Congress expressing its intent to protect persons with serious health conditions like epilepsy, diabetes, HIV, depression, and cancer. All of these conditions might be partially or fully controlled by medication or other treatment. Yet Congress clearly included these persons within the ADA's protection.

The Court also minimized Congress's decision to adopt the definition of disability from the Rehabilitation Act, which already had been interpreted by the Court expansively and to protect persons who are "regarded as" disabled by others, whether or not they had a limiting impairment. In these pre-ADA cases, courts recognized that the reaction of others – based on fear, stereotype, prejudice, or unfamiliarity – can be more disabling than an actual physical or mental impairment. For example, a teacher with tuberculosis was protected by the Rehabilitation Act because her employer substantially limited a major life activity – her ability to work – by firing her based on its fears about her impairment (tuberculosis).^{vi} Discrimination in that single teaching job was sufficient to show that the school board regarded the teacher as substantially limited in the major life activity of work and to trigger protection of the Rehabilitation Act so that the teacher could challenge her dismissal. By adopting the Rehabilitation Act's definition of disability, Congress intended for the courts to reach this same conclusion under the ADA.

The Supreme Court has frustrated this intent, ruling that an employer's decision to exclude an employee from a particular job is not sufficient. Instead, the employee must show that the employer thought that the employee was incapable of performing a broad range of jobs in order to come within the protection of the ADA as having been regarded as disabled.^{vii} This is not what Congress intended.

The Supreme Court's 2002 Decisions Further Restrict the ADA's Scope

In 2002, the Court issued another set of problematic rulings.^{viii} In the first of these rulings – *Toyota Motor Mfg., Kentucky, Inc. v. Williams* – the Court reached the remarkable conclusion that the ADA "must be interpreted strictly to create a demanding standard for qualifying as disabled." The Court's strict interpretation of the ADA is in marked contrast to its treatment of other civil rights statutes like the Civil Rights Act of 1964, upon which the ADA was modeled and which the Court interprets broadly.

Following the Supreme Court's Lead, the Lower Courts Have Severely Restricted Access to the ADA's Protection from Disability-Based Discrimination

In the wake of the Supreme Court's restrictive rulings, millions of Americans who experience disability-based discrimination have been or will be denied protection of the ADA and barred from challenging discriminatory conduct. Cases brought under the ADA already demonstrate that this happens routinely:

- A pharmacist with diabetes who was fired for taking a break to eat was not protected by the ADA.^{ix} Wal-Mart fired Stephen Orr after refusing to allow him to take a lunch break so that he could regulate his blood sugar and control his diabetes by eating. Because he managed his diabetes through medication and by following a dietary regimen that required him to eat at specific times, the court ruled that Mr. Orr was not substantially limited in any major life activity and, therefore, was not protected from discrimination under the ADA. Because he was not protected by the ADA, the court never considered whether allowing a lunch break so that Mr. Orr could control his diabetes was a “reasonable accommodation.”
- An auto packaging machine operator with epilepsy who resigned after her employer required her to take a work-shift that would have worsened her seizures was not protected by the ADA.^x The court held that even though Vanessa Turpin suffered nighttime seizures characterized by “shaking, kicking, salivating and, on at least one occasion, bedwetting” and that caused her to “wake up with bruises on her arms and legs,” Vanessa was not “disabled” because “[m]any individuals fail to receive a full night sleep.” The court further held that Vanessa’s daytime seizures, which “normally lasted a couple of minutes” and which caused her to “bec[o]me unaware of and unresponsive to her surroundings” and “to suffer memory loss,” did not render her “disabled” because “many other adults in the general population suffer from a few incidents of forgetfulness a week.”
- An employee with cirrhosis of the liver caused by chronic Hepatitis B who was fired for falling behind on his assignments as a result of his reduced liver functioning, and after the employer refused to make accommodations, was not protected by the ADA.^{xi} The court held that Kent Furnish was not “disabled” because liver function – unlike eating, working, or reproducing – “is not integral to one’s daily existence.”
- A merchandise stocker with lifelong epilepsy who was fired after being out sick for five days was not protected by the ADA.^{xii} The court held that James Todd was not “disabled” because he only had seizures once a week, lasting only five to fifteen seconds, and his medication caused only “some” adverse effects on his intellectual functioning.
- A store maintenance worker who experienced a traumatic brain injury causing a four-month coma, weeks of rehabilitation, an inability to work for fourteen years, blurred vision, spasms in his arms and hands, slowed learning, poor coordination, and slowed speech was not protected by the ADA.^{xiii} The court held that “this evidence does not establish that [Christopher Phillips] is substantially limited in the major life activities

of learning, speaking, seeing, performing manual tasks, eating or drinking,” and, therefore, Mr. Phillips was not “disabled” under the ADA.

- A truck driver with a hand injury, who was told by his employer that “he was being fired because of his disability, he was crippled, and the company was at fault for having hired a handicapped person,” was not protected by the ADA.^{xiv} While serving in the Army, Robert Tockes’s right hand was caught between two vehicles, permanently restricting his use of that hand. The court ruled that the employer did not regard Mr. Tockes as disabled when it fired him for using only one hand to fasten a load on a flatbed truck. While, “[o]bviously [the employer] knew [Mr. Tockes] had a disability,” that “does not mean that it thought him so far disabled as to fall within the restrictive meaning that the ADA assigns to the term.”

These cases are not unique. Studies show that plaintiffs lose more than 90% of ADA claims, mostly on the ground that they do not meet the definition of “disability” and are therefore not protected by the ADA.

The ADA is as necessary today as when Congress passed the law in 1990. Unemployment and poverty rates among people with disabilities remain far higher than the general population. Many people with disabilities continue to be warehoused unnecessarily in institutions simply because states have failed to develop appropriate community-based services to enable them to live normal lives. While curb cuts, ramps, and elevators are commonplace in some cities, physical and transportation barriers still limit people with disabilities from participating in the activities of everyday life that others take for granted. Oversight and analysis of the problems with enforcement of the ADA is needed to ensure that the fundamental promise of the ADA – equality of opportunity for Americans with disabilities – is fulfilled.

ⁱ Remarks of President George Bush at the Signing of the Americans with Disabilities Act, available at http://www.eeoc.gov/abouteeoc/35th/videos/ada_signing_text.html

ⁱⁱ *Id.*

ⁱⁱⁱ 42 U.S.C. § 12101 (b) (1), (2).

^{iv} *See, e.g., U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002). *See also* National Council on Disability’s policy series *Righting the ADA*, available at <http://www.ncd.gov/newsroom/publications/2002/rightingthead.htm>

^v *See Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

^{vi} *School Board of Nassau Cty, Fla v. Arline*, 480 U.S. 273 (1987).

^{vii} *Sutton*, 527 U.S. 471, 492-93.

^{viii} *See Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002).

^{ix} *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720 (8th Cir. 2002).

^x *Equal Employment Opportunity Comm’n v. Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2001).

^{xi} *Furnish v. SVI Sys., Inc.*, 270 F.3d 445 (7th Cir. 2001).

^{xii} *Todd v. Acad. Corp.*, 57 F. Supp. 2d 448 (S.D. Tex. 1999).

^{xiii} *Phillips v. Wal-Mart Stores, Inc.*, 78 F. Supp. 2d 1274 (S.D. Ala. 1999).

^{xiv} *Tockes v. Air-Land Transport Services, Inc.*, 343 F.3d 895 (7th Cir. 2003).