The following documents were developed by the Rights Task Force of the Consortium for Citizens with Disabilities (CCD) as background information on court actions that have served to weaken the impact of the Americans with Disabilities Act as passed by Congress in 1990, as well as an expression of the principles that the Task Force believes must be the foundation of efforts by the Congress to restore the Act to its original Congressional intent of providing a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."

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Principles Underlying Proposed Legislation Prohibiting Discrimination in Employment Against Persons with Correctable and/or Episodic Conditions

- Congress intended that the federal definition of disability in the ADA cover people with epilepsy, diabetes, HIV, amputees, psychiatric conditions, and others who may be able to fully or partially mitigate the effects of their impairments, or who have impairments that are episodic in nature, but who nonetheless encounter discrimination due to myths, fears, and stereotypes.

- Some individuals with no present impairment at all, or with a history of disability, are subject to adverse employment actions based on stigma. Individuals also face discrimination when an employer perceives them as more limited by an impairment then they actually are. Congress intended that the ADA prevent such unfair treatment, and that persons be judged on their abilities and qualifications rather than an employer's perceptions about the content of their medical records.

- Congressional intent regarding the scope of the federal definition of disability has been overturned by court rulings concocting stringent and illogical rules regarding who meets the statutory standard. Worse, the impact of the new rules has been particularly devastating for individuals with the most stigmatized and misunderstood impairments.

- Surveys of court decisions show that people with epilepsy, cancer, diabetes, and psychiatric conditions are routinely dismissed as outside the protections of the ADA, regardless of the merits of their claims. With the definition of disability

contracted, countless Americans who continue to experience disability discrimination are barred from challenging these abuses in court.

- Federal employment discrimination law should prohibit unfair discrimination against qualified workers based upon physical or mental impairments, and should ensure that these employees and job applicants are considered based on their skills and abilities.

- Title VII and other federal employment statutes protect all workers – men, women, Asians, Caucasians, Latinos, Christians, and Muslims – from discrimination based on sex, race, national origin, and religion. This broad coverage allows courts to focus on determining when an action is unjust rather than extensively focusing on coverage issues. Protection from disability discrimination should mirror this focus, and should not be limited to those with uncorrectable conditions

- Nearly any American with an impairment may encounter discrimination and unfair treatment in the workplace. Laws ensuring workplace fairness should protect everyone, and should not be considered some extraordinary entitlement that depends upon an extensive and complex medical showing that the applicant or employee has deficits that are not relevant to the job in question.

- Employers can and have implemented across-the-board policies ensuring workplace fairness and disability nondiscrimination. The new and contradictory rules regarding who is covered by the ADA only create confusion in the administration of these policies.

- Federal laws provide employers with ample discretion to take all necessary and nondiscriminatory actions to further their legitimate business interests.

SPECIFIC PROBLEMS WITH THE DEFINITION OF DISABILITY IN THE AMERICANS WITH DISABILITIES ACT AS INTERPRETED BY FEDERAL COURTS

Introduction

The Americans with Disabilities Act (ADA) defines "disability" as follows: "The term 'disability' means, with respect to an individual – (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."

Enacted in 1990, this definition mirrors language found in the Rehabilitation Act of 1973. At that time, the language of the Rehabilitation Act had been construed broadly by federal courts, consistent with the remedial purposes of the legislation, to protect numerous groups of persons with disabilities that were either wholly or partially mitigated through treatment and other measures, such as diabetes and epilepsy. The pre-ADA courts also recognized that diseases such as HIV, even in their "asymptomatic" phases, may be disabilities. Additionally, the "regarded as" prong of the Rehabilitation Act definition had been broadly interpreted by the U.S. Supreme Court in *School Board of Nassau County v. Arline* (1987) to protect persons who were limited and discriminated against because of the "prejudice, stereotype, or unfounded fear" of others.

By adopting the same definition, and through explicit statements in the legislative history of the ADA, Congress indicated its intention that this definition

protect people with epilepsy, diabetes, mental health conditions, HIV/AIDS, including asymptomatic HIV, amputees, and others who are able to mitigate the effects of their impairments but nonetheless encounter discrimination in the workplace and other settings because of fears, myths, and stereotypes of individual employers and other covered entities.

Congressional intent on this matter has been overturned by judicial rulings importing stringent and overly narrow rules regarding who meets the statutory definition of "disability." As a result of a string of Supreme Court decisions and hundreds of cases in the lower federal courts, it has become very difficult for individuals with certain health conditions to establish that they have a disability for purposes of the ADA. People with epilepsy, diabetes, psychiatric diagnoses, and other conditions that are well controlled with medications or other disease management strategies are routinely dismissed as outside the protection of the statute. The ABA's 2003 review, its sixth, again found that employers prevail in nearly 95 percent of ADA employment cases decided by federal courts.

With the definition of disability dramatically contracted, millions of Americans who continue to experience disability discrimination are barred from challenging these abuses in the courts.

Problem – Substantial Limitation

In *Sutton v. United Airlines* (1999), the U.S. Supreme Court held that the phrase "substantially limits" requires that the individual be "presently – not potentially or hypothetically – substantially limited in order to demonstrate a disability." Further, in *Toyota Motor Manufacturing v. Williams* (2002), the U.S. Supreme Court ruled that the phrase "substantial limitation in a major life activity" must be "interpreted strictly to create a demanding standard for qualifying as disabled," and that "substantial limitation" means "prevent or severely restrict." The phrase is also construed by agencies and courts to impose a durational requirement – the individual must be limited over some period of time to be "substantially" limited. With these rules of

construction taken together, literally hundreds of opinions have held that while the plaintiff has *some* limitations as a result of a mental or physical impairment, these limitations are not enough to constitute substantial limitations.

Persons with "intermittent" or "episodic" conditions are typically excluded. For example, in *Todd v. Academy Corporation* (1999), a federal court in Texas dismissed a claim brought by a stocker with lifelong epilepsy who was fired after a five-day absence related to his condition. The judge ruled that the man was not "disabled" because he only had seizures once a week, lasting only five to fifteen seconds, and his medication caused only *some* adverse affects on intellectual functioning. The court reasoned that the plaintiff was limited in major life activities "a maximum of fifteen seconds per week." Similarly, in *Ryan v. Grae & Rybicki* (1998), the Second Circuit held that a legal secretary with ulcerative colitis causing frequent and painful diarrhea, stomach cramps, and rectal bleeding was not disabled because, while the condition had "no cure and will trouble her for the rest of her life," it is "symptomatic only at certain times," lasting "only for three to four months a year."

Additionally, in *Albertsons, Inc. v. Kirkingburg* (1999), the Supreme Court ruled that persons with a well-recognized disability such as being blind in one eye must still present particularized evidence of their limitations before they receive the anti-discrimination protections of the Act. Thus, in a case called *Tone v. USPS* (1999), a federal court in New York dismissed the discrimination claim of an individual – one with twenty-five years of service to the postal service – who had had his left eye removed due to a malignant tumor. Without special evidence of the impact of the lost eye on his ability to see, the Act did not apply, the court ruled. Many courts reject the individual's own testimony about their limitations, and dismiss claims based on a purported lack of medical or scientific "expert" evidence.

Even persons with severe disabilities are not guaranteed basic protections. In a case called *Phillips v. Wal-Mart Stores* (1999), a federal court in Alabama dismissed a claim brought by an entry-level Wal-Mart employee who had experienced a traumatic brain injury causing a four-month coma, weeks of

rehabilitation, an inability to work for 14 years, blurred vision, spasms, slowed learning, poor coordination, and slowed speech. According to the court, this worker was not "substantially limited" in speaking, communicating, seeing, or working, the court ruled. Stated the court: "The mere fact that Phillips' speech may be different than other persons within the general population does not mean that he has a substantial limitation under the ADA." In *Robinson v. Global Marine Drilling Co.* (1996), the Fifth Circuit concluded that a plaintiff with asbestosis, a chronic and progressive lung disease, was not disabled despite a 50 percent loss of lung capacity because "[s]everal instances of shortness of breath when climbing stairs do not rise to the level of substantially limiting the major life activity of breathing."

Dozens of additional examples can be offered to illustrate this legal phenomenon.

Problem – Mitigating Measures

Perhaps the most infamous and widely criticized ruling about the definition of disability is the *Sutton* Court's announcement that individuals with successfully treated medical conditions – persons who are current functioning well due to mitigating measures such as medications or prosthetic devices – are not protected unless they can demonstrate that they continue to be "presently" substantially limited even with their medication or prosthetic device. This requirement holds even if the individual can demonstrate that they were discriminated against *because of* their mitigated impairment.

This ruling has been devastating for persons with epilepsy, diabetes, cancer, depression, and other treatable conditions. As former Representative Tony Coelho, an author of the ADA and a person with epilepsy, has stated: "The Supreme Court wrote me out of my own bill!" Indeed, the vast majority of cases following *Sutton* brought by persons with epilepsy have been dismissed. A review by the Epilepsy Foundation of post-*Sutton* cases brought by individuals with epilepsy found that 70 percent of the time (18 out of 26 cases) the court ruled that the person is not

protected by the ADA. For example, in *Rutlin v. Prime Succession, Inc.* (1999), a funeral director sought a scheduling accommodation related to his epilepsy. A federal court in Michigan ruled that he was not disabled because his seizures were "generally controlled" through medication.

Similarly, in *Robb v. Horizon Credit Union* (1999), an employee had depression so severe that she required a three-week hospitalization and a two-month leave of absence during which time she had suicidal thoughts, diarrhea, and insomnia. When she returned to work, she encountered workplace gossip about her "nervous breakdown," and was not allowed to take time off to see her doctor. Two weeks later she was fired. A federal court in Illinois ruled that Mary Robb was not disabled because her anti-depressant medications allows her to function and to work without restrictions.

Problem – Regarded as Disabled

The third, "regarded as" prong was supposed to be a catch-all category enabling persons who might not themselves be disabled bring claims to challenge adverse actions they experienced because of myths or stereotypes of physical and mental impairments. The legislative history provides such examples as: An individual rejected from a particular job because a back x-ray indicates abnormalities is "regarded as" disabled, even if the person has no outward symptoms. Individuals with controlled diabetes and epilepsy who are denied jobs as a "result of negative attitudes and misinformation" are protected by the "regarded as" prong. People "who are rejected for a particular job solely because they wear hearing aids" are covered by the third prong.

The case law has eliminated protection for individuals facing these situations as a result of rigid interpretations of the statutory language. In *Sutton*, the U.S. Supreme Court ruled that a substantial limitation in working requires a "significantly reduced" ability to work and found reasonable the EEOC's regulation requiring a significant restriction in the ability to perform a class or broad range of jobs.

According to the Court, the individual must be disqualified from "more than one type of job, a specialized job, or a particular job of choice." Importantly, these standards are required not only when the person alleges an actual limitation in working, but also when the person alleges that she is regarded by an employer as limited in working. According to the *Sutton* Court ruled, "an employer is free to decide … that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job."

Given these rules of interpretation, courts have dismissed countless cases brought under the "regarded as" prong. Dismissal is common even when claims are brought by persons qualified to do the job but explicitly excluded or fired due to their employer's negative view of their impairment. The legal analysis follows one or both of the following propositions: (1) the employer only regarded the individual as being unable to perform a single job, and thus did not regard the person as substantially limited in working; or (2) the employer only regarded the individual as having an impairment, but that they did not regard the individual as having a substantially limiting impairment.

A typical example of a "single job" analysis is found in a case called *E.E.O.C. v. HBH* (1999). There, an applicant with twenty years' successful experience as an offshore crane operator was rejected by an employer based solely on a entrance medical exam that revealed two prior back surgeries. A federal court in Louisiana dismissed the claim, ruling that "at most, HBH believed that Mr. Williams was incapable of performing the single job of offshore crane operator." Similarly, in *E.E.O.C. v. J.B. Hunt Transport* (2003), the EEOC challenged the hiring practices of a huge motor carrier company that rejected, without a proper medical basis, more than 500 applicants under a policy excluding employees who used certain prescription drugs. The Second Circuit dismissed the case, ruling that the employer merely "regarded the applicants in question as ineligible for a specific position within Hunt." The *Sutton* Court dismissed the claims of the rejected applicants for pilot jobs on the same basis. These analyses are directly contrary to the legislative history of the ADA, as well as prevailing case law in effect at the time of the ADA's enactment.

A case called *Tockes v. Air-Land Transport Services* (2003) illustrates the second sort of dismissal. In that case, an Army veteran and truck driver with a crushed hand testified that when he was fired his employer told him he was being fired because of his disability, that he was "crippled," and that the company should not have hired a handicapped person. The Seventh Circuit ruled that even if the testimony were true, it did not show that the employer viewed the plaintiff as disabled, because it did not prove that the employer "mistakenly believes that an employee has a disability grave enough to be so classified under the ADA."

Problem – Major Life Activities

As noted, in *Williams*, the Supreme Court ruled that the phrase "substantial limitation in a major life activity" must be "interpreted strictly to create a demanding standard for qualifying as disabled." Additionally, the *Williams* Court ruled that the major life activity of manual tasks is limited to those tasks that are "of central importance to most people's daily lives." As a result of this stingy reading of the term "major life activity," the *Williams* Court found that Ella Williams was not "disabled," despite her inability to perform the assembly line tasks that constituted her livelihood.

Similarly, in a case called *Soileau v. Guilford of Maine, Inc*. (1997), the First Circuit ruled that an engineer with fifteen years of service to the company was not "disabled" despite his life long depressive disorder causing difficulties interacting with others and an inability to function in crowds. The court held that "interacting with others" was amorphous and "perhaps unworkable" as a major life activity, and that the evidence was insufficient to show a substantial limitation. In *Chenoweth v. Hillsborough County* (2001), the Eleventh Circuit joined the Second Circuit in holding that driving is not a major life activity, and dismissed a claim brought by a registered nurse with epilepsy.

In *Bragdon v. Abbott* (1998), the Supreme Court ruled that reproduction can be a "major life activity" in an ADA case, and that a woman with asymptomatic HIV limiting her childbearing was protected by the Act. Even this precedent does not guarantee coverage for HIV-positive plaintiffs: some courts have required persons with HIV to present evidence that they intended or desired to reproduce before they can be considered "disabled."

Further, several new cases, including *Felix v. New York City Trans. Auth.* (2d Cir. 2003) and *Wood v. Crown Redi-Mix* (8th Cir. 2003), and *Chenoweth* (11th Cir. 2001) have held that even if ADA plaintiffs can establish a substantially limiting impairment, they are not entitled to reasonable accommodation unless the requested modification relates directly to the specific limitations established. Under this emerging rationale, an individual with HIV who seeks time off for doctor's appointments is not entitled to this accommodation if, in litigation, he demonstrates his ADA "disability" on the basis of the limitation on reproduction.

Problem – Record of Disability

All of the above-described problems occur when individuals attempt to demonstrate that they have a "record" of a substantially limiting impairment. Thus, in *Colwell v. Suffolk County Police Dep't* (1998), the Second Circuit ruled that a police officer who had a cerebral hemorrhage, a thirty-day hospitalization, and a seven-month leave of absence from work did not have a record of disability.

An additional obstacle has been added by faulty judicial interpretation and poorly drafted agency guidance. While Congress intended the second prong to cover persons discriminated against by employers who learn about an applicant or employee's medical history, courts have ruled that coverage under the second prong requires an individual to demonstrate that the employer relies upon physical documentation. In other words, and odd as it may sound, the fact that an individual has a history of a disability and thereby faces discrimination does not state a claim unless the employer discriminates based on an identifiable piece of paper.

Thus, in the *Phillips* case described above, the Alabama district court ruled that Christopher Phillips did *not* have a record of disability despite his past coma and 14 years of being unable to work due to traumatic brain injury. Why? Because Mr. Phillips could not identify a piece of paper that Wal-Mart relied upon in firing him: "The only evidence he offers concerning a record of disability is his alligation that '[w]hen I was hired by Wal-Mart, I filled out some paperwork about my physical and mental limitations. … [T]he form contained an agreement on my part that Wal-Mart could apply to the State of Alabama for part of my wages because I was handicapped.' This does not establish a record of disability."

Similarly, in *Hilburn v. Murata Elec. N. America* (1999), the Eleventh Circuit ruled that an individual with coronary heart disease and a past heart attack requiring several leaves of absence did not have a record of disability, because she could not demonstrate that her employer possessed documentation of a substantially limiting mental or physical impairment.