

Statement of

Camille A. Olson Seyfarth Shaw LLP

Before the United States Senate Committee on Health, Education, Labor & Pensions

Hearing on S. 1881

The Americans With Disabilities Act Restoration Act of 2007

November 15, 2007



SAN FRANCISCO
560 Mission Street, Suite 3100
San Francisco, California 94105-2930
415/397-2823 FAX 415/397-8549

SACRAMENTO
400 Capitol Mall, Suite 2350
Sacramento, California 95814-4428
916/448-0159 FAX 916/558-4839

LOS ANGELES
2029 Century Park East, Suite 3300
Los Angeles, California 90067
310/277-7200 FAX 310/201-5219

CHICAGO
131 South Dearborn Street, Suite 2400
Chicago, Illinois 60603-5577
312/460-5000 FAX 312/460-7000

BOSTON
Two Seaport Lane, Suite 300
Boston, Massachusetts 02210
617/946-4800 FAX 617/946-4801

HOUSTON
700 Louisiana Street, Suite 3700
Houston, Texas 77002-2797
713/225-2300 FAX 713/225-2340

BRUSSELS
Boulevard du Souverain 280
1160 Brussels, Belgium
32-2-647-60-25 FAX 32-2-640-70-71

NEW YORK
620 Eighth Avenue
New York, New York 10018
212/218-5500 FAX 212/218-5526

WASHINGTON, D.C.
815 Connecticut Avenue, N.W., Suite 500
Washington, D.C. 20006-4004
202/463-2400 FAX 202/828-5393

ATLANTA
1545 Peachtree Street, N.E., Suite 700
Atlanta, Georgia 30309-2401
404/885-1500 FAX 404/892-7056

Statement of

Camille A. Olson
Seyfarth Shaw LLP

Before the United States Senate
Committee on Health, Education, Labor & Pensions

Hearing on S. 1881
The Americans With Disabilities Act Restoration Act of 2007

November 15, 2007

Good afternoon, Mr. Chairman and Members of the Committee. My name is Camille A. Olson, and I am pleased to present this testimony addressing S. 1881, the Americans with Disabilities Act Restoration Act of 2007 ("S. 1881"). I am a Partner with the law firm of Seyfarth Shaw LLP. Seyfarth Shaw is a national firm with nine offices and has one of the largest labor and employment practices in the United States. Nationwide, over 350 Seyfarth Shaw attorneys provide advice, counsel, and litigation defense representation in connection with discrimination and other labor and employment matters affecting employees in their workplaces.¹

I am Chairperson of Seyfarth Shaw's Labor and Employment Department's Complex Discrimination Litigation Practice Group. I have practiced in the areas of employment discrimination counseling and litigation defense for over twenty years at Seyfarth Shaw's home office in Chicago, Illinois. Our firm has been actively involved in

¹ I would like to acknowledge Seyfarth Shaw attorneys William P. Schurgin, Condon A. McGlothlen, Anne E. Duprey, Annette Tyman, Kyle R. Hartman, Laura E. Reasons, Jonathan J.C. Grey, and law clerk Katherine Mendez for their invaluable assistance in the preparation of this testimony.

the legislative and regulatory process surrounding the Americans with Disabilities Act² since its passage in 1990. Members of our firm, along with our training subsidiary, Seyfarth Shaw at Work, have also written treatises on the ADA; advised thousands of employers on complying with the ADA; trained tens of thousands of managers and employees on the requirements of the ADA; and actively conducted employer audits and developed workplace best practices under the ADA.

My personal legal practice is focused on equal employment opportunity compliance – counseling employers as to their legal obligations under the ADA, developing best practices in the workplace, training managers and supervisors on the legal obligations they have under the ADA, and litigating ADA and other employment discrimination cases. I also regularly teach employment discrimination at Loyola University School of Law in Chicago, Illinois. I am a frequent lecturer and have published numerous articles and chapters on various employment and discrimination issues. For example, in 2006 I co-edited a book entitled *Labor and Employment Law: The Employer's Compliance Guide* for Thompson Publishing Group. I am also a member of the United States Chamber of Commerce's policy advisory committee on equal employment opportunity matters, and I am a member of the Board of Directors of a number of business and charitable institutions. Most recently, in 2006 I participated, on behalf of employer groups, in ADA shareholder meetings focused on analyzing the impact of various aspects of the ADA since the ADA's enactment.

Today, I have been invited to discuss with you the meaning and impact of the Americans with Disabilities Act Restoration Act of 2007 ("S. 1881"). There can be no question that sponsors of S. 1881 have proposed changes to the ADA with the intent of benefiting individuals with disabilities. S. 1881's proposed changes, however would unquestionably expand ADA coverage to encompass almost any physical or mental impairment – no matter how minor or short-lived. In essence, S. 1881 changes the focus of the ADA from whether an individual has a functional "disability" to whether the

² Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-12213 (1994); 47 U.S.C. § 225711 (2001)).

individual has an “impairment,” without regard to whether the impairment or ailment in any way limits the individual’s daily life. Indeed, under the proposed definition, almost anything less than perfect health would be a disability under the ADA.

While I strongly support equal opportunities in employment and, in particular, the inclusion of individuals with disabilities in the workplace, I respectfully submit that, if enacted, S. 1881, as currently drafted, would go far beyond clarifying the original intent and language of the ADA. While I recognize that many current members of this Committee were among the original sponsors of the ADA, and I cannot deny the frustration which some of you have expressed over certain interpretations of the statute, I urge you to look carefully at the language of S. 1881, because I do not believe that it is the best course of action.

Instead of clarifying the ADA, S. 1881 would *expand* the ADA by (1) removing the current ADA requirement that a disability “substantially limit a major life activity;” (2) prohibiting consideration of mitigating measures that an individual may be using, such as medication or devices, when determining whether the individual has a disability; and (3) shifting the burden of proof from employees to employers as to whether an individual is “qualified” to perform the essential functions of a job.

When we were initially involved in the legislative and regulatory process surrounding the ADA in the late 1980s and early 1990s, no federal statute provided comprehensive protection to individuals with disabilities. Congress’s focus then was on Americans with disabilities who had been shut out of the workplace – persons who were substantially limited in major life activities such as their ability to hear, see, walk, speak, eat, perform manual tasks, and/or care for one’s self. When we spoke of individuals with disabilities at that time, many of us focused on the millions of individuals who were deaf or hard of hearing, blind, or who were significantly limited in their mobility.

Ironically, from 1993 to the present, the average number of ADA charges filed with the EEOC by individuals who are deaf or hearing impaired consistently represent

only 3 percent of all ADA claims filed.³ Instead, the most common ADA claim filed relates to back conditions, representing close to 13 percent of all ADA claims, which are often the result of workplace injuries that are otherwise covered by workers' compensation laws.⁴ Indeed, individuals with conditions such as cancer, diabetes, and epilepsy combined have historically accounted for less than 10% of all ADA charges filed.⁵ Moreover, these historical percentages have remained *unchanged* following the Supreme Court decisions that have given rise to today's proposed legislation.⁶

Our experience in working with employers every day on ADA compliance in their workplaces demonstrates some of the successes that have been achieved as a result of the passage of the ADA. Employers have completely revised their application and pre-hire processes to ensure that individuals with disabilities fully participate in the opportunities available for open positions. Employers have made significant modifications to jobs and aspects of workplace infrastructure to ensure that all employees have access to the same terms and conditions and benefits of employment. Employers have developed policy statements and implemented training programs in their workplaces to sensitize fellow employees and their managers to the rights of individuals with disabilities. Employers have regularly engaged in the interactive process with employees and medical professionals, as well as the Job Accommodation Network, and other accommodation resources, to ensure that they are providing appropriate reasonable accommodations to individuals with disabilities.

Yet, one of the most important changes brought about by the ADA is its impact on the way employers think. Today, employers focus on not "how" the job is done, but instead on "what" the job requires. Most employers large and small now have job

³ EEOC.gov, ADA Charge Data by Impairments/Bases – Receipts
<http://www.eeoc.gov/stats/ada-receipts.html> (last visited Nov. 13, 2007).

⁴ *Id.* (see, especially, Intake Averages for Non-Paralytic Orthopedic Impairment and Orthopedic and Structural Impairments of the Back).

⁵ *Id.*

⁶ *Id.*

descriptions describing essential job functions, and they use those as objective hiring guides – a change in the hiring landscape driven entirely by the ADA. And, when employers do not comply with the obligations of the ADA, there has been a record of enforcement of the rights of individuals with disabilities before the EEOC⁷ and in court proceedings.⁸

In attempting to clarify the ADA, S. 1881 engages in precisely the wrongful conduct that the law was intended to prevent.⁹ In defining all impaired individuals as disabled, S. 1881 labels as “disabled” all individuals with impairments of any sort or

⁷ For example, from July 26, 1992, through September 30, 2006, the EEOC reports that 235,465 charges were filed by individuals claiming violations of their rights under the ADA. Each year, since 1992, the EEOC has resolved charges that have provided monetary benefits totaling approximately \$44,000,000 per year to charging parties, for a total of \$622,600,000 in monetary benefits throughout this time period. These monies do *not* include monetary benefits obtained by individuals or the EEOC through litigation in court. EEOC.gov, ADA Charges FY 1997 – FY 2006, <http://www.eeoc.gov/stats/ada-charges.html> (last visited Nov. 13, 2007).

⁸ Courts have enforced significant monetary awards and entered injunctions to ensure ADA compliance where employers were found not to comply with existing ADA obligations. See, e.g., *E.E.O.C. v. Tommy Bahama Group*, No. 2:06-CV-01406-RSM (Empl. Discrim. Verdicts & Settlements) (BNA) (W.D. Wash. June 4, 2007) (consent decree enjoining employer from further ADA violations and requiring notices, training, and other relief); *E.E.O.C. v. AmSan LLC*, No. 2-06CV-260-J (Empl. Discrim. Verdicts & Settlements) (BNA) (N.D. Tex. May 23, 2007) (enjoining employer from engaging in ADA violations); *Harding v. Cinbro Corp.*, No. 04-158-B-W (D. Me. August 22, 2006) (Empl. Discrim. Verdicts & Settlements) (BNA) (jury verdict in favor of employee who was terminated shortly after disclosing his medical condition to his employer); *E.E.O.C. v. EchoStar Commc’ns Corp.*, No. 02-CV-00581 (Empl. Discrim. Verdicts & Settlements) (BNA) (D. Colo. May 6, 2005) (jury verdict in favor of blind applicant for failure to provide reasonable accommodation); *Brady v. Wal-Mart Stores Inc.*, No. 03-CV-3834 (E.D.N.Y. February 23, 2005) (Empl. Discrim. Verdicts & Settlements) (BNA) (jury verdict in favor of disabled worker for violations under ADA and NY State Human Rights Law); *Zolnick v. Graphic Packaging Corp.*, No. 00-CV-1800 (Empl. Discrim. Verdicts & Settlements) (BNA) (D. Colo., September 24, 2004) (jury verdict in favor of a disabled worker who was not allowed to return to work following recovery from brain aneurysm); *Young v. DaimlerChrysler*, No. IP-01-299-C-M/S (Empl. Discrim. Verdicts & Settlements) (BNA) (S.D. Ind. June 21, 2004) (jury verdict in favor of disabled worker denied transfer that would have accommodated her severely injured right arm).

⁹ 42 U.S.C. §1201(a)(5)(7).

degree – regardless of whether those impairments are functionally limiting. Congress expressly repudiated this approach in 1990:

[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and *resulting from stereotypic assumptions not truly indicative of the individual abilities of such individuals to participate in, and contribute to, society*;...¹⁰

In effect, S. 1881 engrafts the “regarded as” definition into the first prong of the statutory definition of who is “disabled” under the Act. Put another way, *Congress* would be “regarding as” disabled, individuals with non-disabling impairments. In a misguided attempt to advance the rights of persons with disabilities, the law would incorporate the stereotypic assumptions that it has taken our nation years to advance above and beyond. By defining disability to mean “impairment,” S. 1881 makes all impairments *per se* disabilities, thus repeating the wrongs the ADA was originally designed to eliminate.

Moving the ADA’s focus away from individuals with disabilities to individuals with impairments, as S. 1881 would do, will give virtually every employee the right to claim reasonable accommodation for some impairment, no matter how minor, unless the employer can prove that doing so would be an undue hardship. Employers will find themselves addressing potential accommodation requests from individuals with high cholesterol, back and knee strains, colds, the flu, poison ivy, sprained ankles, stomach aches, the occasional headache, a toothache, and a myriad of other minor medical conditions that go far beyond any reasonable concept of disability.

¹⁰ 42 U.S.C. §1201(a)(7) (emphasis added).

Similarly, prohibiting employers from considering mitigating measures in determining whether someone has a disability will, in effect, make almost every individual someone who has a disability under the ADA. The clearest example pertains to eyesight. Without question, the ability to see is a major life activity. By requiring that we evaluate whether someone has a sight impairment without regard to mitigating measures means that anyone who wears glasses, contact lenses, has had laser surgery, or at any time in their life did not have 20/20 uncorrected eyesight, will be considered a person with a disability under the ADA.

Finally, the ADA, like all other civil rights legislation relating to employment, currently requires the plaintiff to prove that he or she was qualified for the job at issue. S. 1881 would instead require employers, who are generally prohibited from inquiring into an employee's medical condition under the ADA, to bear this burden of proof, while the facts lie with the plaintiff.

For these reasons, and all of the reasons set forth below, I oppose the Americans with Disabilities Act Restoration Act of 2007, as drafted, and urge the Committee to carefully review the issues raised in this statement as it considers S. 1881.

The ADA's Original Purpose and Language

On July 26, 1990, the ADA was enacted into law with the stated purpose of providing a "clear and comprehensive national mandate" to eliminate discrimination against individuals with disabilities.¹¹ Title I, the employment title of the ADA, has been considered the "most comprehensive piece of disability civil rights legislation ever enacted and the most important piece of civil rights legislation since the 1964 Civil

¹¹ Title I relates to private and public sector employment. Title II relates to state and local governments. Title III relates to places of public accommodation. Title IV relates to telecommunications and common carriers. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-12213 (1994); 47 U.S.C. § 225711 (2001)).

Rights Act.”¹² In enacting the ADA, Congress expressly found, and included in the ADA’s statutory language, that “some 43,000,000 Americans have one or more physical or mental disabilities. . . .”¹³ Congress further found that individuals with disabilities were left with no legal recourse to counter the historical segregation and isolation that relegated the disabled to an inferior status in society.¹⁴ Thus, the ADA’s overarching goal was to bring into the fold of mainstream society¹⁵ a “discrete and insular minority” of disabled individuals who had been “subjected to a history of purposeful unequal treatment.”¹⁶ Congress’s findings, quoted above, are expressly incorporated into the ADA itself.

The final version of the ADA was enacted into law following a period of considerable debate, negotiation, and compromise between Congress and President George H.W. Bush’s Administration.¹⁷ In the spirit of such compromise, the enacted law “recognize[d] the civil rights of persons with disabilities as well as the economic restraints of businesses and other entities covered by the Act.”¹⁸ While signing the ADA into law, President George H.W. Bush explained to America’s business community the careful balance of opportunities and obligations reflected in the new law:

¹² Arlene Mayerson, *The Americans with Disabilities Act – An Historic Overview*, 7 Lab. Law. 1 (1991); see also 1 Henry Perritt, Jr., *Americans with Disabilities Act Handbook*, § 1.01 at 3.

¹³ 42 U.S.C. § 12101(a)(1).

¹⁴ 42 U.S.C. §§ 12101(a)(2)-(5).

¹⁵ Remarks of President George Bush at the Signing of the Americans with Disabilities Act (July 26, 1990), <http://www.eeoc.gov/ada/bushspeech.html> (last visited Nov. 13, 2007).

¹⁶ 42 U.S.C. § 12101(a)(7).

¹⁷ 1 Perritt, Jr., *Americans with Disabilities Act Handbook*, § 2.02 at 19; *The Americans with Disabilities Act: A Practical and Legal Guide to Impact Enforcement and Compliance*, Bureau of National Affairs, Inc. at 35-62 (1990).

¹⁸ Mayerson, 7 Lab. Law. 1, 6 (1991).

You have in your hands the key to the success of this act, for you can unlock a splendid resource of untapped human potential that, when freed, will enrich us all. I know there have been concerns that the ADA may be vague or costly, or may lead endlessly to litigation. But I want to reassure you right now that my administration and the United States Congress have carefully crafted this Act. We've all been determined to ensure that it gives flexibility, particularly in terms of the timetable of implementation, and we've been committed to containing the costs that may be incurred.¹⁹

The ADA defines an individual with a disability as someone who either (1) has a physical or mental impairment that substantially limits that person in one or more major life activity; or (2) has a record of such physical or mental impairment; or (3) is regarded as having such a physical or mental impairment.²⁰ This definition of disability was adopted by Congress from Section 504 of the Rehabilitation Act of 1973, the statutory predecessor to the ADA that covered employers with federal contracts and/or those receiving federal financial assistance.²¹

Under both the ADA and Rehabilitation Act, the definition of *a physical or mental impairment* has *always* been defined very broadly.²² Similarly, the EEOC's ADA regulations define physical and mental impairments as:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting . . . neurological,

¹⁹ Remarks of President George Bush at the Signing of the Americans with Disabilities Act (July 26, 1990), <http://www.eeoc.gov/ada/bushspeech.html> (last visited Nov. 13, 2007).

²⁰ 42 U.S.C. § 12101(2).

²¹ Rehabilitation Act of 1973, Pub. L. No. 93-112, *amended by* Pub. L. No. 93-516, 88 Stat. 1617 (1974) (codified at 29 U.S.C. § 701 *et seq.*)

²² 29 C.F.R. pt. 1630, App. § 1630.2(h) (2006).

musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin and endocrine: or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities.²³

The language of the EEOC regulations mirrors that used in various ADA committee reports as descriptive of physical or mental impairments under the ADA.²⁴ The EEOC regulations also mirror the 1977 regulations issued by the Department of Health, Education, and Welfare (“HEW”) to define physical and mental impairments, and thereby implement Section 504.²⁵ *Given this broad definition of impairment, almost any physical or mental health condition – no matter how minor, episodic, latent, or temporary – would be covered.* Courts addressing the meaning of impairment have held it to include the following examples of minor conditions: tennis elbow, headaches, high cholesterol, contusions to the knee, back strains, and knee strains.²⁶ In sum, the definition of physical or mental impairment, under both the Rehabilitation Act and the ADA has been broad, sweeping, and inclusive for over 40 years.

For decades, Congress and the federal agencies have agreed that a physical or mental impairment is necessary, but not sufficient, to trigger disability law protections.

²³ 29 C.F.R. § 1630.2(h) (2006).

²⁴ S. Rep. No. 101-16, at 22 (1989); H.R. Rep. No. 101-485, pt. 2 at 51 (1990); H.R. Rep. No. 101-485, pt. 3 at 28 (1990).

²⁵ See 45 C.F.R. § 84.3(j)(2)(1) (2005). Advocates for the ADA have described these regulations as “the best source for understanding the definition of disability under the ADA.” Chai R. Feldblum, *The Americans With Disabilities Act Definition of Disability*, 7 Lab. Law. 11, 12-13 (1991).

²⁶ See, e.g., *Cella v. Villanova Univ.*, 113 Fed. Appx. 454 (3d Cir. 2004) (tennis elbow); *Sinclair Williams v. Stark County Bd. of Comm’rs*, 7 Fed. Appx. 441 (6th Cir. 2001) (headaches); *Benoit v. Tech. Mfg. Corp.*, 331 F.3d 166 (1st Cir. 2003) (back and knee strains).

Beyond that, the impairment must also *substantially limit* the person in one or more *major life activity*.²⁷ The 1977 HEW regulations, committee reports to the ADA, and EEOC regulations all set forth an illustrative list of “major life activities”: “caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”²⁸

The ADA’s inclusion of “substantially limits one or more of the major life activities of such individual” was the result of deliberate and careful consideration by Congress. In adopting the substantial limitation on a major life activity requirement, Congress (not the federal judiciary) made clear that covered disabilities do not include “minor, trivial impairments, such as a simple infected finger.”²⁹ Given an increasingly global economy, and the challenges faced by U.S. manufacturers competing with those in China and India, this Committee must consider: Is American business better able to bear that burden now, than in 1990?

Whether an impairment substantially limits a major life activity for a particular person requires an individualized, case-by-case assessment of how that person’s impairment (or impairments) affects the life of that individual. As even the EEOC has noted, “the determination of whether an individual has a ‘disability’ is not necessarily based on the name of the diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of that individual.”³⁰

The ADA, like the Rehabilitation Act before it, did not attempt to create a “laundry list” of impairments that are necessarily disabilities, recognizing that some impairment may be disabling for particular individuals but not others, and that new impairments

²⁷ 42 U.S.C. § 12102(2)(A).

²⁸ See 45 C.F.R. § 84.3(j)(2)(ii) (2005); Senate Committee on Labor and Human Resources, S. Rep. No. 101-16, 101st Cong., 1st Sess., at 22 (1989); 29 C.F.R. § 1630.2(i).

²⁹ S. Rep. No. 101-16, at 23 (1990); H.R. Rep. No. 101-485, pt. 2 at 52 (1990).

³⁰ 29 C.F.R. pt. 1630, App. § 1630.2(j).

maybe discovered in the future.³¹ Even short-term impairments can constitute a disability under both the ADA and the Rehabilitation Act, provided that such impairments substantially affect a major life activity. Consistent with Congress’s intent, the EEOC’s ADA regulations recognize that “[m]any impairments do not impact an individual’s life to the degree that they constitute disabling impairments.”³² In sum, the individualized approach to determining “disability” under the ADA, *i.e.*, how a particular impairment affects a particular individual in his or her major life activities, comports with how the Rehabilitation Act has operated for over 40 years.³³

As a result, the functional approach to defining disability has resulted in similar impairments producing different determinations as to whether the impairment constituted a disability under the specific facts before the court. This is true, of course, under both the Rehabilitation Act and the ADA. The result naturally flows because two individuals with the same condition may be affected very differently by the condition, and the gravity of the effects of the condition may differ, leaving one individual substantially limited in performing a major life activity, while another individual with the same condition may not have any limitations.

The following determinations under the Rehabilitation Act illustrate this concept. In *Diaz v. United States Postal Service*,³⁴ an employee with chronic back problems was

³¹ *Id.*

³² *Id.*

³³ The analysis of “who is a handicapped person under the [Rehabilitation] Act is best suited to a ‘case by case determination.’” *Rezza v. U.S. Dep’t of Justice*, No. 87-6732, 1988 WL 48541, at *2 (E.D. Pa. May 16, 1988) quoting *Forrisi v. Brown*, 794 F.2d 931, 933 (4th Cir. 1994). “It is the impaired individual who must be examined not just the impairment in the abstract.” *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1099 (D. Haw. 1980) (determining whether a disability is a qualifying handicap under the Rehabilitation Act requires a case-by-case analysis). Originally, Section 504 of the Rehabilitation Act used the phrase “handicap” rather than “disability”; otherwise, however, the two acts are identical. In 1992, the Rehabilitation Act was amended to make identical the standards for determining violations of the Rehabilitation Act and the ADA.

³⁴ 658 F. Supp. 484 (E.D. Cal. 1987).

determined not to have a disability under the Rehabilitation Act, because the impairment did not substantially limit major life activities (specifically, manual tasks associated with employment). Whereas, in *Schuett Investment Co. v. Anderson*,³⁵ an individual who suffered a back injury that substantially limited the individual's ability to perform manual tasks was found to have a disability under the Rehabilitation Act. Similarly, courts that have considered whether impaired vision is a disability have focused on the extent of the impairment, as well as the impact of the impairment on the individual in its corrected state. Courts reach different results depending on the facts of the particular case. Thus, in one case it was held that a person who had, at best, combined visual acuity of 20/100 with the use of conventional corrective lenses was determined to have a disability.³⁶ On the other hand, an individual whose uncorrected vision was below the minimum level set for a police officer, but whose vision was correctable to 20/20, was held not to have a disability.³⁷ When considering whether cerebral palsy rendered an individual substantially limited in a major life activity, courts have also reached different results depending on the severity of the condition and its impact on the life of the particular individual.³⁸ Thus, prior to the ADA's passage, under the Rehabilitation Act, the same medical condition, depending on its impact on the individual, led to one individual being covered under the Rehabilitation Act, while another was not.

Under the ADA, courts have applied this individualized, functional approach to the ADA. Thus, depending on the impact of the physical or mental impairment, it may or may not constitute a disability under the ADA. For example, in one case, a school

³⁵ 386 N.W.2d 249 (Minn. App. 1986).

³⁶ *Sharon v. Larson*, 650 F. Supp. 1396 (E.D. Pa. 1986).

³⁷ *Padilla v. Topeka*, 708 P.2d 543 (Kan. 1985) (myopic applicant for police officer position was not handicapped under the Rehabilitation Act).

³⁸ *Compare Pridemore v. Rural Legal Aid Soc.*, 625 F. Supp. 1180 (S.D. Ohio 1985) (individual with cerebral palsy does not have a disability under Rehabilitation Act when the impairment had little outward manifestation and no apparent substantial limitation on any major life activity); *with Fitzgerald v. Green Valley Area Educ. Agency*, 589 F. Supp. 1130 (S.D. Iowa 1984) (individual with cerebral palsy and left-side hemipelia was substantially limited in a major life activity under the Rehabilitation Act).

custodian’s recurrent depression constituted a disability within the meaning of the ADA because it substantially limited his ability to work and interact with others. In another, a plant worker’s long history of depression was not a disability under the ADA because it had very little impact on her ability to work and care for herself.³⁹ Similarly, individuals with arthritis,⁴⁰ bipolar disorders,⁴¹ and epilepsy⁴² may or may not have a disability under the ADA, depending on the nature and extent their particular impairments impact their lives.

Finally, currently under the ADA, a plaintiff bears the burden to prove that he or she is a member of the protected class covered by that statute. The ADA incorporates the procedures of Title VII.⁴³ As a matter of logic and fairness, it has been interpreted as incorporating Title VII’s standards of proof.⁴⁴

³⁹ Compare *Anderson v. Indep. Sch. Dist. No. 281*, No. 01-560, 2002 WL 31242212 (D. Minn. 2002) (individual with depression considered disabled under the ADA); with *Cooper v. Olin Corp.*, 246 F.3d 1083 (8th Cir. 2001) (individual with depression not considered disabled under the ADA).

⁴⁰ Compare *Bearshield v. John Morrell & Co.*, 570 N.W.2d 915 (Iowa 1997) (individual with degenerative arthritis was not disabled because impairment had little impact on individual’s life or ability to function); with *Barnes v. Northwest Iowa Health Ctr.*, 238 F. Supp. 2d 1053 (N.D. Iowa 2002) (particular individual’s rheumatoid arthritis a disability under ADA).

⁴¹ Compare *Reed v. Lepafe Bakeries, Inc.*, 102 F. Supp. 2d 33 (D. Me. 2000), *aff’d* 244 F.3d 254 (1st Cir. 2001) (individual with bipolar disorder was disabled under the ADA); and *Carrozza v. Howard County*, No. 94-1593, 1995 WL 8033 (4th Cir. Jan. 10, 1995) (individual with bipolar disorder was disabled under ADA as a major life activity was substantially impacted by this impairment); with *Horwitz v. L & J.G. Stickley, Inc.*, 122 F. Supp. 2d 350 (N.D.N.Y. 2000) (individual’s bipolar disorder did not constitute disability under ADA).

⁴² Compare *Granzow v. Eagle Food Ctrs. Inc.*, 27 F. Supp. 2d 1105 (N.D. Ill. 1998) (individual’s epilepsy was disability as it substantially limited her various major life activities); with *EEOC v. Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2001) (individual with epilepsy did not present evidence sufficient to establish ADA coverage).

⁴³ See 42 U.S.C. § 12117(a) (“The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the

S. 1881 Goes Far Beyond the ADA’s Original Purpose and Language

When introduced on July 26, 2007, S. 1881 was described as a “modest, reasonable legislative fix . . . so that people who Congress originally intended to be protected from discrimination are covered under the ADA.”⁴⁵ Instead, Senate Bill 1881 significantly expands the original language and intent of the ADA. It does not merely clarify the ADA, and it does not revise it to reflect Congress’s or President George H.W. Bush’s original intent underlying its passage in 1990. S. 1881 amends the ADA as described below.

First, S. 1881 expands the ADA’s definition of disability by eliminating the requirement that the medical condition substantially impact one of the individual’s major life activities. Without this original language, the ADA would deem a physical or mental impairment to be a “per se disability” without reference to the medical condition’s effect on the person. As such, S. 1881 replaces the ADA’s functional approach to defining a disability and replaces it with a *per se* approach that was rejected at the time of the ADA’s passage, and that contravenes the definition of disability under the Rehabilitation Act as well.

S. 1881 notes that one of the principal cases that has motivated its sponsors to propose amending the ADA is the Supreme Court’s decision in *Toyota Motor Mfg.*,

Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.”).

⁴⁴ See, e.g., *Raytheon Co. v. Hernandez*, 540 U.S. 44, 50 n.3 (2003) (stating “[t]he Courts of Appeals have consistently utilized... [the McDonnell Douglas burden-shifting] approach when reviewing motions for summary judgment in disparate-treatment cases” and citing *Pugh v. Attica*, 259 F.3d 619, 626 (7th Cir. 2001) (applying burden-shifting approach to ADA disparate-treatment claim)). See also 42 U.S.C. § 12113(a) (setting forth defenses under the ADA and *not* including defense that plaintiff is *not* a “qualified individual”).

⁴⁵ Cong. Rec. S10152 (daily ed. July 26, 2007) (statement of Rep. Harkin).

Kentucky, Inc. v. Williams.⁴⁶ In *Toyota*, the question posed to the U.S. Supreme Court was whether the plaintiff’s carpal tunnel syndrome and tendonitis were disabilities under the ADA. Importantly, there was no dispute that the plaintiff’s carpal tunnel syndrome and tendonitis were physical impairments.⁴⁷ The issue before the Supreme Court was whether these impairments substantially limited the major life activity of performing manual tasks. Justice O’Connor, writing for a *unanimous* court, found that the term “major life activity” “refers to those activities that are of central importance to daily life.”⁴⁸ The court noted that those impairments that only affect a major life activity in a “minor way” do not rise to the level of a disability. The court emphasized the need for individualized assessment of the effect of the impairment on each individual.⁴⁹ Justice O’Connor held that it was insufficient to merely submit a medical diagnosis of impairment; rather, the individual must offer evidence of the impairment’s impact on his or her own daily life activities.⁵⁰

The *Toyota* case involved an individual who was injured at work and who alleged that she could not perform a job that required her, as part of a vehicle inspection process, to physically wipe painted car surfaces that were at or above shoulder level for significant periods of time.⁵¹ The individual had already been awarded workers’ compensation and, without dispute, had previously been accommodated on several occasions by Toyota in various ways to allow her to continue working. While individuals may take issue with the Supreme Court’s unanimous ruling, there is an important lesson in the facts of the case.

⁴⁶ 534 U.S. 184 (2002).

⁴⁷ *Id.* at 196.

⁴⁸ *Id.* at 187.

⁴⁹ *Id.* at 199.

⁵⁰ *Id.* at 198.

⁵¹ *Id.* at 189.

Simply stated, if Congress enacts S. 1881 it should be prepared for the federal courts to be inundated with tens of thousands of cases, if not more, filed by workers' compensation attorneys on behalf of individuals with minor work-related injuries that have no long-term or significant impact on their clients' daily life activities.⁵² Why would they do so? Because the ADA provides for attorneys' fees and compensatory and punitive damages to successful plaintiffs. From an employment attorney's standpoint, enactment of S. 1881 and the cascade of likely litigation that would follow would be a boon for business. Perhaps the more troubling concern is that these amendments will have the effect of diluting the definition of disability to such an extent that persons who are truly disabled, such as those who are deaf or blind or unable to walk, will find themselves in a long line of plaintiffs.

Similarly, employers would be forced to implement workplace accommodations for people with tennis elbow who may need an arm support, for people with ingrown fingernails who request dictation software to avoid irritating their fingers while typing, to people with sprained ankles who request mobility assistance. With limited resources, employers may be faced with deciding whether to provide sign language interpreters for deaf employees at company meetings or special chairs or other mechanical devices to people with sore backs, tennis elbow, or sprained wrists. These are decisions that employers should not be required to make. Nor do they benefit the people whom the ADA is truly intended to protect.⁵³

Who among us doesn't have some physical or mental impairment? Are all of us in this room individuals whom the ADA was intended to protect and bring into the mainstream of society? If so, what will be the impact on those individuals with

⁵² Similarly, the EEOC, given the ADA's charge-filing prerequisite to bringing suit in court, will also be inundated with charges of violations by individuals who would qualify as disabled under S. 1881's definition. With scarce resources, the EEOC would also be forced to spend considerably more time simply administratively managing the many new charges from individuals who have no substantial limitation on a major life activity.

⁵³ Also, if employers are required to accommodate all of these minor impairments at what point do the sum total of the accommodations become an undue hardship, especially for small businesses?

disabilities that are substantial, who are competing for limited company resources and accommodations with others whose impairments are also covered under S. 1881's definition? Can an employer prefer one employee's request over another because of the perception that the request is "more justified" because of the nature of the "impairment," or because the employee makes the request first (so that the employee who sprained her ankle at the basketball game two weeks ago whose doctor has requested that she be provided a handicap parking space gets the space in lieu of a newly-hired employee who uses a wheelchair)?

Proponents of S. 1881 point to a number of cases in which individuals with certain impairments were determined to have a disability under the Rehabilitation Act, while other individuals with similar impairments were determined not to have a disability under the ADA, as support for their position that the ADA must be amended to ensure that all individuals with those impairments are covered by the ADA. As explained below, their analysis does not justify the definition of disability contained in S. 1881, as their analysis is faulty and misplaced, and does not support adopting any "mental or physical impairment" as the definition of disability under the ADA.

Proponents of S. 1881 have argued that individuals with intellectual and developmental disabilities are not covered by the ADA, citing *Littleton v. Wal-Mart Stores*.⁵⁴ This mischaracterizes the *Littleton* court's holding. The court did not hold that a plaintiff with intellectual and developmental disabilities could not be disabled under the ADA. The plaintiff in *Littleton* claimed that, because of his mental condition, he was substantially impaired in the major life activities of working, learning, thinking, and communicating. However, the plaintiff testified that there were no jobs that he could not perform, that he had graduated from high school and attended a technical college, and that he could read. Further, the plaintiff did not proffer any evidence to show that he was unable to think or communicate. Accordingly, the court held that the plaintiff's mental impairment did not limit any major life activities.

⁵⁴ 231 Fed. Appx. 874 (11th Cir. 2007).

This holding is *not* a blanket denial of coverage for mental disabilities under the ADA, as the proponents of S. 1881 suggest. In fact, courts have consistently held that where a mental condition substantially limits major life activities, a plaintiff is covered under the ADA.⁵⁵ Proponents of S. 1881 have similarly mischaracterized the ADA’s coverage of individuals with diabetes, noting that diabetics are not covered under the ADA. Again, this blanket statement is without merit. Courts have consistently held that an individual with diabetes is disabled under the ADA where the condition substantially limits a major life function of the individual.⁵⁶

The court in *Nawrot* noted the importance of assessing individuals’ physical impairments on a case-by-case basis under the ADA. The court stated that having diabetes was not *per se* dispositive of whether or not someone is disabled under the ADA; the answer to that question depends on the severity of the impairment. The court acknowledged what courts have acknowledged since the passage of the Rehabilitation Act – that individuals with identical mental and physical impairments may or may not be disabled depending on the impact of the condition on their ability to perform major life activities. For example, while analyzing a claim under the Rehabilitation Act, the court in *Elstner v. Southwestern Bell Tel. Co.*⁵⁷ stated that courts must consider the effects of impairments on *individuals*. “The inquiry is, of necessity, an individualized one –

⁵⁵ See *E.E.O.C. v. Dollar Gen. Corp.*, 252 F. Supp. 2d 277, 284-85 (N.D. N.C. 2003) (holding that mentally retarded plaintiff with a mental impairment that substantially limited one or more of her major life activities was disabled under the ADA); *McAlindin v. County of San Diego*, 192 F.3d 1226, 1236 (9th Cir. 1999) (reversing grant of summary judgment, and holding that a genuine issue of material fact existed as to whether plaintiff’s anxiety disorder substantially limited a major life activity).

⁵⁶ See *Lawson v. CSX Transp. Inc.*, 245 F.3d 916, 923 (7th Cir. 2001) (“we have no difficulty in determining that Mr. Lawson’s insulin-dependent diabetes . . . [is] a physical impairment under the act” and that it impair[s] major life activities); *Lutz v. Glendale Union High Sch., Dist. 205*, 8 Fed. Appx. 720, 722 (9th Cir. 2001) (reversing summary judgment for plaintiff and holding there was a triable issue as to whether plaintiff’s diabetes substantially limited major life activity); *Nawrot v. CPC Int’l*, 277 F. 3d 896, 905 (7th Cir. 2002) (“we are convinced that Nawrot has sufficiently demonstrated that his diabetes substantially limits his . . . major life activities.”).

⁵⁷ 659 F. Supp. 1328, 1342 (S.D. Tex. 1987).

whether the particular impairment constitutes for the particular person a significant barrier to employment.”⁵⁸ Furthermore, the court in *Forrisi v. Bowen*,⁵⁹ cautioned against the very outcome that the proponents of S. 1881 are advocating. The court noted that defining a disability cannot be accomplished through “abstract lists and categories of impairments.” As the Court of Appeals explained:

The Rehabilitation Act assures that *truly disabled*, but genuinely capable, individuals will not face discrimination in employment because of stereotypes about the insurmountability of their handicaps. It would debase this high purpose if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared. Indeed, the very concept of an impairment implies a characteristic that is not commonplace and that poses for the particular individual a more general disadvantage in his or her search for satisfactory employment.⁶⁰

For all of these reasons, we urge the Committee to reject S. 1881’s definition of disability as defined by any mental or physical impairment of any type.

Second, contrary to S. 1881, mitigating measures should be considered in determining whether an individual has a disability under the ADA. The impact of mitigating measures on the definition of disability under the ADA has been controversial since the ADA’s enactment. In *Sutton v. United Air Lines*⁶¹ the U.S. Supreme Court held that if a person takes steps “to correct for, or mitigate, a physical or mental

⁵⁸ *Id.* at 1342.

⁵⁹ 794 F.2d 931, 933-34 (4th Cir. 1986).

⁶⁰ *Id.* at 931 (emphasis added).

⁶¹ 527 U.S. 471, 482-83 (1999).

impairment, the effects of those measures – both positive and negative – must be taken into account when judging whether that person is ‘substantially’ limited in a ‘major life activity.’” Importantly, the Supreme Court’s holding emphasizes that both the *positive and negative* effects of any mitigating measures must be taken into account when analyzing a person’s potential disability. Accordingly, while the benefits of using medication or an adaptive device are to be considered in determining ADA coverage, so too are any side effects or negative ramifications. While subject to criticism, this common sense approach is preferable when considering the alternative.

If the statute were changed to bar consideration of mitigating measures, every person who at any time in his or her life has had uncorrected vision of less than 20/20 would have a disability. All of us who wear glasses or contact lenses would be covered. Individuals who had previously been near-sighted but who had the problem corrected by laser surgery would be covered because they have a history of an impairment. Even individuals who do not need glasses or corrective devices, but whose vision is impaired because they have less than 20/20 uncorrected vision, would be covered.⁶² By removing this criteria, S. 1881 would open a “Pandora’s Box” of claims by people who do not have a disability under any rational interpretation of that term.

The problems, however, do not end there. If mitigating measures are not to be considered, how would an employer accommodate an individual whose impairment was correctable by medication, such as hearing loss, hay fever, or asthma, but who refused physician recommended medications or devices? Today, courts would find that

⁶² Although estimates vary, there are approximately 10 million blind and visually impaired people in the United States. American Foundation for the Blind, Blindness Statistics, <http://www.afb.org/Section.asp?SectionID=15> (last visited Nov. 13, 2007). By contrast, approximately 78 percent of adults in the United States utilize some form of vision correction device: 67 percent wear prescription glasses; 16 percent wear contact lenses; and 10 percent wear non-prescription (*i.e.*, reading) glasses. The Vision Care Institute of Johnson & Johnson Vision Care, Inc., *Americans Are out of Focus on Proper Vision Care*, Sept. 12, 2006, available at http://www.harrisinteractive.com/news/newsletters/clientnews/2006_JohnsonJohnsonVisionCare.pdf.

individual not protected under the ADA.⁶³ However, under S. 1881, such individuals would clearly be covered. Employers would be forced to accommodate employees whose impairments could be readily corrected by medication, but who choose not to correct them for personal reasons. Similarly, people who choose not to wear glasses for vanity reasons would have to be accommodated.

Today we have heard legitimate concerns and issues relating to individuals with diabetes. Many of us are aware of the decision in *Orr v. Wal-Mart Stores*,⁶⁴ where Mr. Orr was found not to have a disability because it was determined that his diabetes did not substantially affect a major life activity. In numerous other cases, however, individuals with diabetes have been found to have a disability under the ADA. For example, in *Lawson v. CSX Transportation Inc.*,⁶⁵ cited by the dissent in *Orr*, the Seventh Circuit Court of Appeals found that the diabetic plaintiff was substantially limited in the major life activity of “eating.” The court reasoned that the plaintiff “must always concern himself with the availability of food, the timing of when he eats and the type and quantity of food he eats.”⁶⁶ The court went on to hold that “[t]he district court failed to consider the extent of the restrictions imposed by Mr. Lawson’s treatment regimen and the consequences of noncompliance with that regimen.”⁶⁷ Ironically, Mr. Orr was precluded by the Eighth Circuit panel, over the objection of dissenting Judge Lay, from raising these issues because he had not pled that he was limited in the major life activity of eating in his original complaint.⁶⁸ This is a procedural or evidentiary issue unique to that case, not a problem with the ADA itself.

⁶³ Nancy Lee Jones, *CRS Report for Congress, The Americans with Disabilities Act (ADA): Statutory Language and Recent Issues*, 7 (Congressional Research Service 2007).

⁶⁴ 297 F.3d 720, 724 (8th Cir. 2002).

⁶⁵ 245 F.3d 916, 923-24 (7th Cir. 2001).

⁶⁶ *Id.* at 924.

⁶⁷ *Id.*

⁶⁸ 297 F.3d at 725.

Other cases are also illustrative. In *Nawrot*,⁶⁹ the court found that the plaintiff had demonstrated that his diabetes substantially limited “his ability to think and care for himself,” which are both major life activities. In that case, the plaintiff injected himself with insulin approximately three times a day and tested his blood sugar at least ten times a day.⁷⁰ Even taking these mitigating measures into account, which the court noted were themselves a “substantial burden,” did not remedy all of the adverse effects of his diabetes.⁷¹ Despite his medication Mr. Nawrot still suffered from “unpredictable hypoglycemic episodes” and during such episodes “his ability to express coherent thoughts [was] significantly impaired.”⁷² For these and other reasons, Mr. Nawrot was found to be covered under the ADA.⁷³

In *Sutton v. United Air Lines*, the Supreme Court also cited Congress’s finding in the plain language of the ADA (there were approximately 43 million Americans with one or more disabilities) as established that those whose impairments are largely corrected by medication or other devices do not have a disability within the meaning of the ADA.⁷⁴ As Justice Ginsburg pointed out in her concurring opinion, the congressional finding that 43 million people had disabilities indicated that such persons “are a discrete and insular minority” that have been “subject to a history of purposeful unequal treatment and relegated to a position of political powerlessness.”⁷⁵ The Supreme Court further noted that the finding that 43 million Americans had disabilities reinforced the fact that Congress adopted a “functional” instead of a “nonfunctional” approach for the definition

⁶⁹ 277 F.3d 896, 905 (7th Cir. 2002).

⁷⁰ *Id.* at 901.

⁷¹ *Id.* at 904.

⁷² *Id.* at 905.

⁷³ See also, e.g., *Rodriguez v. ConAgra Grocery Products Co.*, 436 F.3d 468, 480-81 (5th Cir. 2006).

⁷⁴ 527 U.S. at 484-86.

⁷⁵ *Id.* at 494 (Ginsburg, J., concurring).

of disability.⁷⁶ Indeed, the Supreme Court noted that if a “nonfunctional” approach were used, allowing any health condition that impairs health or normal functions of an individual were all that was necessary to establish protection, there would be some “160 million” Americans with disabilities.⁷⁷ In short, the Supreme Court recognized the imperative of individualized inquiry into the impact of an impairment on each individual in determining coverage under the ADA. In contrast, S. 1881 would label all people with a particular condition as disabled irrespective of whether the condition even impairs, let alone substantially limits, any major life activity.

Third, in a clear departure from the current statutory scheme, S. 1881 shifts the burden of proof to the employer to demonstrate that an individual alleging discrimination “is not a qualified individual with a disability.”⁷⁸ Indisputably, the protected class currently covered by the ADA includes “qualified individual[s] with a disability”⁷⁹ - - disabled individuals who, with or without reasonable accommodation, can perform essential job functions.⁸⁰ This inquiry involves two steps: (1) a determination of whether the individual “satisfies the requisite skill, experience, education and other job-related requirements” of the position; and (2) a determination of whether the individual “can perform the essential functions of the position” “with or without accommodation.”⁸¹

The calculated balancing of the rights and obligations between disabled employees and employers is clear from the ADA’s legislative history.⁸² In accepting the House version of the definition, the Conference Committee rejected a Senate

⁷⁶ *Id.* at 486-87.

⁷⁷ *Id.* at 487.

⁷⁸ See S. 1881 § 7.

⁷⁹ See 42 U.S.C. § 12112(a).

⁸⁰ 42 U.S.C. § 12111(8).

⁸¹ 29 C.F.R. § 1630.2(m).

⁸² See H.R. Rep. No. 101-485 (1990); S. Rep. No. 101-16 (1989).

amendment that would have created a presumption favoring the employer's determination of essential functions.⁸³ In so doing, the Conference Committee noted that the adopted language was "not meant to change the current burden of proof."⁸⁴ Thus, the plaintiff continues to bear the burden of proving he or she is "qualified" under the Act.⁸⁵ As a practical matter, that means employees with disabilities need only prove they are qualified, with or without accommodation, to perform the important parts of their jobs.

Moreover, this compromise is rooted in the statutory scheme which circumscribes an employer's ability to ask an employee whether or not he or she has a disability, or about the "nature or severity of such disability."⁸⁶ Plainly, individuals possess and control confidential information about their own health that others do not, and to which others do not have access under the law. For this reason, employees are far better positioned than employers – who lack such information – to demonstrate that they are qualified individuals despite their medical conditions and/or limitations due to such conditions. Simply put, it would be unfair and impracticable to circumscribe employers from inquiries about medical conditions – as the law does – and at the same time impose on employers the burden of proving that a plaintiff is not a qualified individual under the ADA, as S. 1881 would do.

⁸³ H.R. Rep. No. 101-485, at 33 (1990).

⁸⁴ *Id.* at 34.

⁸⁵ 1 Perritt, Jr., *Americans with Disabilities Act Handbook*, §3.06 at 115.

⁸⁶ 29 C.F.R. § 1630.13. The statute does permit wide-ranging post-offer, pre-employment inquiries and examinations of applicants. 29 C.F.R. § 1630.14. However, employment decisions based on the results of such inquiries or examinations must be "job-related and consistent with business necessity," 29 C.F.R. §1630.14(b), a stringent standard by all accounts. More importantly, as to current employees, Congress limited an employer's ability to ask about medical conditions based on the premise that someone currently performing a job is medically able to do so. *EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act* No. 915.002 (2000).

S. 1881's attempted reversal of Congress's allocation of the burden of proof contravenes the fundamental tenet of law disfavoring proof of a negative proposition.⁸⁷ Requiring employers to bear the burden in litigation of disproving that an employee is qualified to perform a particular job would lead to a host of practical problems – and absurd litigation results – before and at trial. For example, whether an individual is “qualified” must be determined at the time of the employment action in question. By the time of litigation and/or trial, assuming an employee fails to share certain relevant information with an employer at the time of the challenged action, that critical information may no longer be available, which would unfairly prevent the employer from meeting its burden in litigation.

Significantly, if S. 1881 is enacted, it would not only reverse the ADA and its carefully crafted compromises, but it would also become the only federal employment discrimination statute to shift the burden on this element – that is, a plaintiff's membership in the protected class – to employers.⁸⁸ Although individuals with disabilities are doubtless deserving of protection under federal law, it seems a disservice to those individuals and members of other protected classes to give the ADA plaintiff in effect “most favored nation” status. Proponents of S. 1881 point out that Title VII plaintiffs need not prove they are members of a protected class; for example, there is never a dispute that an African-American plaintiff is covered by Title VII. But that is because Title VII protects everyone, blacks and whites, men and women. Like the Age Discrimination in Employment Act, the ADA is different. As explained previously, it was irrefutably intended to cover a limited universe of Americans. Moreover, unlike virtually all other employment discrimination statutes, the ADA imposes certain affirmative

⁸⁷ 2 *McCormick on Evidence* 474-75 (Kenneth S. Broun et al. eds., 6th ed. 2006); *Walker v. Carpenter*, 57 S.E. 461 (N.C. 1907) (“The first rule laid down in the books on evidence is to the effect that the issue must be proved by the party who states an affirmative, not by the party who states a negative.”).

⁸⁸ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (Plaintiff bears burden as part of *prima facie* case to show he is a member of the protected class); *Raytheon Co.*, 540 U.S. at 50, n.3.

obligations on employers. Those obligations result in preferences that only people with disabilities are entitled to receive.⁸⁹

Conclusion

In conclusion, serious concerns exist with respect to the Americans With Disabilities Act Restoration Act of 2007. Mr. Chairman and Members of the Committee, I thank you for the opportunity to share some of those concerns with you today. Please do not hesitate to contact me if I can be of further assistance in this matter.

⁸⁹ *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) (“Yet, the Act, U.S. Airways says, seeks only “equal” treatment for those with disabilities While linguistically logical, this argument fails to recognize what the Act specifies, namely that preferences will sometimes prove necessary to achieve the Act’s basic equal opportunity goal. The Act requires preferences in the form of “reasonable accommodations” that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy. By definition any special “accommodation” requires the employer treat an employee with a disability differently, *i.e.*, preferentially.” (emphasis in original.)