



**U.S. House of Representatives Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties**

**Hearing on H.R. 3195
“ADA Restoration Act of 2007”**

October 4, 2007

**Testimony of Cheryl Sensenbrenner
Chairperson, Board of Directors
American Association of People with Disabilities (AAPD)**

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Chairman Nadler, Ranking Member Franks, and Members of the House Judiciary Subcommittee:

Thank you for the invitation to discuss the topic of ADA Restoration. I am honored to have this opportunity to testify on an issue that affects the ability of literally millions of people with disabilities to enter and maintain their participation in the American workforce. My name is Cheryl Sensenbrenner, and I am pleased to offer my testimony today as the Board Chair of the American Association of People with Disabilities (AAPD), a national non-profit, non-partisan membership organization promoting the political and economic power of the more than 50 million children and adults with disabilities throughout the U.S. With more than 100,000 members, AAPD is the largest national cross-disability membership organization in the country. In addition to my affiliation with AAPD, I offer my testimony today as a granddaughter, a sister, and a mother of people with disabilities as well as my experience of being a woman with a disability myself.

I offer my testimony today at a most crucial moment for people with disabilities – a time at which U.S. Courts are at complete odds with clear Congressional intent regarding civil rights protections of people with disabilities, and at a time during which you, Congressmen and Congresswomen, can set a landmark civil rights law back on its intended course toward equality for all people.

In 1990, with tremendous bipartisan support, Congress passed the ADA, and President George H.W. Bush signed it into law. During its passage, Congress acknowledged that people with disabilities were extremely disadvantaged socially, economically, vocationally, and educationally – this “political powerlessness” on account of pervasive discrimination, segregation, and exclusion “resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society...”¹

Congress’s intention was clear. This great law, the ADA, was meant to stand as the “emancipation proclamation for people with disabilities”² against the unfair discrimination that

¹ Americans with Disabilities Act, 42 U.S.C.A. §12101 (1990).

² See Remarks of President George Bush at the Signing of the Americans with Disabilities Act, available at <http://www.eeoc.gov/ada/bushspeech.html>; See also Remarks from Senators Orrin G. Hatch and Edward M. Kennedy, at National Council on Disability, *The Americans with Disabilities Act Policy Brief Series: Righting the ADA, No. 1: Introductory Paper* (October 16, 2002), available at <http://www.ncd.gov/newsroom/publications/2002/rightingtheada.htm>.

had permeated all aspects of life for people with disabilities for far too long. The law's broad directive to employers, public transportation systems, public accommodations, as well as other program and service providers (including the private sector) was to stop the unfair treatment of people on the basis of their current, past, or perceived disabilities. Once implemented, the ADA was intended to give all people with disabilities the opportunity for independence and full participation and inclusion in society.

And to be sure, in the last 17 years since its passage, we have witnessed an undeniable transformation in our society. Access to public transportation has improved considerably on account of the ADA requirement that all new buses, trains, and accompanying stations be accessible for people with mobility, sensory and other disabilities – there is no question we live in a more accessible society than in 1990 on account of the ADA. Closed-captioning, curb-cuts, power-assisted doors, large print signage – all of these are hallmarks of society post-ADA – of a society more welcoming of and accessible to people with disabilities than in a time past.

I remember that time past. I can remember cold, snide remarks, and demeaning looks and stares that my sister, Tara, who has Down's syndrome, endured nearly every day growing up. And for myself, I vividly recall numerous occasions in which I was subjected to the ignorant comments and low expectations of others after acquiring my spinal cord injury at age 22. I remember once waiting for my father, then Attorney General of Wisconsin, in the lobby of a bank while he conducted some business, and I remember a bank executive staring at me and stating coldly, "People like that belong on park benches out front and not in our lobby."

I remember it so clearly – "People like that," he said. "People like that" are me, my sister, my son, many of my dearest friends, and countless Americans. "People like that" are your loved ones, your friends, or even you – now, or in the future.

You see, the ADA starts with the recognition that disability is a natural part of the human experience. Any person at any time can encounter or acquire a disability. Some people are born with their disabilities, like Tara. Some acquire their disabilities through accident or injury, like I did. Others encounter invisible disabilities through a bout with an illness. Some manifest their disabilities during their school years. Others acquire a disability as they age. And still others acquire disability while putting their lives on the line for our country, as we are reminded daily with each wave of returning soldiers from Iraq and Afghanistan.

Given that all kinds of disability can enter any person's life at any time, often without warning, the more accessible the society we create, and the more intact our system of legal protections, the greater benefit we all reap as a result. The ADA, then, is a law for all people. It was meant to ensure that whatever the circumstances may be that surround a person's encounter with disability, Americans are never to be treated unfairly, excluded unnecessarily, or relegated to second-class citizenship on the basis of disability without recourse.

Despite all the progress since the passage of the ADA, sadly, we still have a long way to go before the ADA's inclusive vision becomes a reality in America. For instance, I am amazed at how routinely kind and well-educated individuals with whom I interact assume that I acquired my disability after marrying my husband, Congressman F. James Sensenbrenner, by remarking how good it was of him to "stick by me" through that. The fact of the matter is Jim and I fell in love and got married during a time in which I was already disabled. You see, he "got me" in a wheelchair, or at best on Canadian crutches. As for my sister, Tara, through the support of family, she graduated from high school, pursued college coursework, and has gone on to support herself through various jobs, which she has used to finance and insure her car and participate in numerous hobbies. Just this week, she gave me lots of helpful tips about my testimony. And yet despite all her immediately apparent independence, Tara too still routinely runs up against paternalistic words and actions.

Although there are many obstacles yet to be removed for people with disabilities, I believe the largest and most pervasive one to remain is that of attitude. The fears, myths, and stereotypes about people with disabilities from my youth are the same fears, myths, and stereotypes that I still hear of and encounter today, and they are the same fears, myths, and stereotypes that all too routinely result in people being shut out of employment opportunities.

While it is obvious that the ADA has acted as a great equalizer in a variety of contexts, its full potential has yet to be realized. The ADA, as Congress intended in its passage, creates an incentive, arising from a legal obligation, for all citizens to forge a better understanding and more proper perspective for accepting and integrating people with disabilities into all aspects of society, including the workforce.³ In order for that to occur and for the greatest barrier to all people with disabilities – fears, myths, and stereotypes – to be removed, the law must be applied and enforced as it was intended.

However, this is not happening. Several of my esteemed colleagues on the panel today will discuss the numerous damaging court decisions that have significantly narrowed the intended protections of this law. As a result of these court rulings, the ADA has lost some of its potency as a teacher, and the devastating effects are clear.

The employment rate of people with disabilities has not improved with the passage of the ADA.⁴ Two-thirds of individuals with disabilities who do not have a job say they want to have one but cannot find employment.⁵ Many of those who do find employment often experience discrimination along the way – in hiring, requesting accommodations, or in unlawful terminations – on account of the same pervasive fears, myths, and stereotypes which characterized the past. What's worse, when these individuals seek their day in court, more than 90% of the time, the courts will side with the employers rather than the individuals who faced discrimination.⁶ By undercutting civil rights protections for people with disabilities, the Courts have imposed a dangerous and unacceptable U-turn in the progress people with disabilities have made to date. They have made it legal for employers to say "You are not welcome here" to disabled individuals who want to work, and who want to pay taxes – some of whom have a history of dependency on entitlement programs but are attempting to leave them to become financially independent; some of whom have recently completed higher education following 13 years of inclusive education, only to find that now, after all their hard work, the inclusivity and legal protections are gone.

The ADA was meant to be just like other civil rights laws that address employment discrimination – the sole focus of a legal case was to be on the alleged discrimination of the employer—whether the worker was treated fairly or treated unfairly because of unlawful discrimination. However, as I have come to understand it, unlike other civil rights laws, the Courts have created what I like to call a "double whammy" for people with disabilities who seek to bring a case under the ADA. First they must prove their disabilities through a series of

³ Laura L. Rovner, *Disability, Equality, and Identity*, 55 Ala. L. Rev. 1043 (2004).

⁴ Despite many factors contributing to a positive outlook for employment of people with disabilities, including the passage of civil rights laws like the ADA, the employment rate of people with disabilities has not improved significantly, as EEOC Chair Naomi C. Earp pointed out in her testimony during the September 13, 2006 ADA Oversight Hearing held by the House Judiciary Committee, Subcommittee on the Constitution. See also Harris, L. & Associates (1998) *N.O.D./Harris Survey Program on Participation and Attitudes: Survey of Americans with Disabilities*. New York. See also L. Harris & Associates, *N.O.D./Harris Survey Program on Participation and Attitudes: Survey of Americans with Disabilities* (2004).

⁵ *Career World*, Nov/Dec 2000.

⁶ See Amy L. Allbright, 2004 *Employment Decisions Under the ADA Title I – Survey Update*, 29 *Mental & Physical Disability L. Rep.* 513, 513 (July/August 2005) (stating that in 2004, "[o]f the 200 [employment discrimination] decisions that resolved the claim (and have not yet been changed on appeal), 97 percent resulted in employer wins and 3 percent in employee wins").

invasive and often highly irrelevant inquiries into the most intimate aspects of their lives. Once they have satisfied this increasingly difficult standard, only then are they given the opportunity to present the facts of discrimination. While a requirement of “proving” one’s disability may be reasonable in the context of an entitlement program, it is an unnecessary and harmful step in an employment discrimination context because it is preventing people from ever reaching the issue of whether they were treated unfairly because of their real or perceived disability.

As things currently stand, the effects of the court cases are as absurd as they are devastating. Every day, people with conditions like epilepsy, diabetes, HIV, cancer, hearing loss, depression, and most recently, even people with intellectual disabilities (the new term for what we used to call “mental retardation”), are getting caught in the first “hoop” of the court’s inquiry. A multitude of people who manage their disabilities effectively through medication, prosthetics, hearing aids, or other “mitigating measures” are viewed as “too functional” – or not “disabled enough” – to be protected under the ADA.⁷ Once stuck in the first hoop, these individuals never have an opportunity to present the facts of blatant employment discrimination that led them to pursue a legal remedy. This means that employers are allowed to make employment decisions on the basis of disability – fire or not hire someone because of their misperceptions or prejudices about disability – and yet the courts find those same individuals “not disabled enough” to be protected under the law! What an absurdity!

As Chairperson of the Board of Directors of AAPD, I often think of our organization’s summer Congressional and Information Technology interns with disabilities. I think of how gifted, capable, and sometimes eccentric they are – all so unique and all with such varied disabilities – and I wonder if any of them will be shut out of the law with which Congress intended to protect their civil rights should any of them ever need it.

Even closer to home, I have to wonder what would happen if the many disabled people in my family were ever to encounter and try to challenge employment discrimination under the judge-invented standard that is now the law of the land. Let us assume each of my family members with a disability applied for and was denied a job because of his or her condition. It is often not that blatant, but for purposes of this exercise, let us assume each family member was told the reason they were not considered for the position was because of his or her disability.

My grandmother, Clara Warren, who had type 1 diabetes, would not likely fare well. If voluminous court decisions are any indication, more than likely, she’d get stuck in the first hoop of the “double whammy.” Because she responsibly managed her diabetes with medication and diet, the court would tell her that she was not disabled for purposes of the ADA and toss her case out of court. My son, Frank, who, like me, has ADHD, would also likely be told that he was too high-functioning to be protected under the law – never mind that in this hypothetical scenario, they expressly *told* him that they were not hiring him because of his ADHD. The same would likely be true of such a case pertaining to my spinal cord injury – I would be viewed as getting by “too well” to be considered disabled for purposes of the ADA’s protection. After hearing from the Littleton’s today, I have less confidence that the outcome would be any different for my sister, Tara, with her intellectual disabilities, who would also likely be viewed as

⁷ See *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) (holding 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 and is protected by the ADA); see also *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999)). 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: “whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids.” S. Rep. No. 116, 101st Cong., 2d Sess. at 22 (1989); see also, Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 Berkeley J. Emp. & Lab. L. 91, 106 (2000).

too “high-functioning” to be protected. In each of our instances, the facts of the employer’s conduct would never even be heard in court.

As if that was not preposterous enough, if we revisit each of my family members in turn and alter only one fact, all of our cases would likely be taken up in court and the facts of discrimination would be heard. If my grandmother had not taken her insulin; if Frank and I had not found ways to manage our ADHD; if I had not committed to physical therapy and rehabilitation following my accident; if Tara had not pursued and relied upon family supports and training. Basically, if all of us played into the historically low expectations for people with disabilities – not done all that we could do to recover from or manage our conditions – we would all stand a much better chance of having our day in court.

I hope this family hypothetical scenario helps illuminate what the lawyers and policy experts can explain in greater depth. It seems to me that the last message we would want to send to Americans with disabilities – particularly youth with disabilities and returning war veterans – is the less you manage your disability, the less you try, the more likely you are to be protected under civil rights laws.

Were the ADA to be applied as are other civil rights laws are, without the first hoop of proving one’s disability, the remedial goals of the ADA could be fulfilled. There would still be cases tossed out on the merits, just like lawsuits brought under other civil rights laws, but those cases deserving of judicial consideration would see their day in court, and the ADA would again be allowed to function as it was intended.

My passion in seeing this legislation passed into law is very personal. While I may not be able to speak to all the fine nuances of court decisions, I do know that there is something seriously wrong with the scenario I described. And I know that we have deviated far, far away from what was intended when Senator Bob Dole, who helped to found AAPD and Congressman Tony Coelho, AAPD’s current Vice Chair, both key leaders in the passage of the original ADA, have been written out of the very law they helped author.

Please support and help pass the ADA Restoration Act so that the ADA can open wide the doors of opportunity to all Americans.

Thank you for giving me the opportunity to provide my testimony this morning.