U.S. House of Representatives
Committee on Education and Labor

Hearing on H.R. 3195
"ADA Restoration Act of 2007"

January 29, 2008

Testimony of Andrew J. Imparato
President and Chief Executive Officer
American Association of People with Disabilities (AAPD)

American Association of People with Disabilities
1629 K Street NW, Suite 503 • Washington, DC 20006
phone 202-457-0046 (V/TTY) • 800-840-8844 (V/TTY) • fax 202-457-0473 • www.aapd.com

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Chairman Miller, Ranking Member McKeon, and Members of the House Committee on Education and Labor:

Thank you for the opportunity to provide testimony today in support of the Americans with Disabilities Act Restoration Act (ADA Restoration Act) of 2007, H.R. 3195. My name is Andrew J. Imparato and I am the President and Chief Executive Officer of the American Association of People with Disabilities (AAPD). With more than 100,000 members around the country, AAPD is the largest cross-disability membership organization in the United States. AAPD's mission is to organize the disability community to be a powerful force for change—socially, politically and economically. Founded on the fifth anniversary of the signing of the Americans with Disabilities Act (ADA), AAPD has a strong interest in the full enforcement and implementation of this landmark civil rights law. On behalf of the Board, staff and members of AAPD, I applaud you for holding this hearing today and for devoting your attention to one of the top policy priorities of the disability community.

Prior to joining AAPD in 1999, I worked as an attorney at the Disability Law Center in Boston, the U.S. Senate Subcommittee on Disability Policy, the U.S. Equal Employment Opportunity Commission, and the National Council on Disability. In my role as General Counsel and Director of Policy at NCD, I oversaw a multi-year study of federal enforcement of the ADA and other civil rights laws for people with disabilities.

I am honored to testify today along with Professor Robert Burgdorf, an attorney and disability leader who played such an important role in conceptualizing and drafting the ADA when he worked for the National Council on Disability (NCD) in the late 1980s. Professor Burgdorf also helped to lead NCD's more recent effort to develop recommendations for the legislative changes needed to restore the ADA to its original intent in the wake of a number of highly problematic Supreme Court and lower federal court decisions that have severely restricted the scope of the protected class and made it difficult for people with a wide range of disabilities to bring claims for discrimination in employment. Since the ADA's passage, courts have repeatedly told plaintiffs – who are seeking not federal disability retirement benefits but simply fair treatment in the workplace – that their conditions do not rise to the level of an ADA disability and that they are not protected against discrimination under the ADA.

Having graduated law school in 1990, I am one of many professionals with disabilities who have pursued our careers armed with a federal law designed to ensure our equal employment opportunity. I was a third year law student when I experienced my first episode of serious depression. Seemingly overnight, I went from being a confident visiting student at Harvard Law School to having difficulty getting out of bed and making it through the day. I was blessed to have an incredibly supportive wife and was able to get the support I needed to finish law school and begin my career. Since that time, I have lived with recurrent episodes of depression and hypomania, with a diagnosis of bipolar disorder or manic depression. I spend approximately six months every year with low energy and low self-confidence followed by six months of high energy, high self-confidence, and limited patience. One of the symptoms of depression is a tendency to undervalue one's skills and work capacity, and I remember during my first bout with depression wondering if I would be able to function in a full-time professional environment. I now know that going to work every day in a field that I find compelling has turned out to be one of the strongest mood stabilizers in my life. I strongly believe in the therapeutic value of work for people with psychiatric conditions and a wide range of disabilities, and I am deeply troubled that we have not seen measurable increases in the employment rates of people with significant

disabilities since the ADA's enactment in 1990.[1] A report out from the U.S. Equal Employment Opportunity Commission (EEOC) just this month[2] has only added to my alarm and dismay. The report notes a decline in the employment of people with significant disabilities in the federal government every year for more than the last decade, in sharp contrast to the overall growth of the federal workforce.

As someone who has been very open about my diagnosis over the course of my legal career, I have found it difficult to predict how people may react upon learning that I have bipolar disorder. It is my observation, especially in instances in which a disability is not visible or readily apparent, that people have the tendency either to question whether it is real or to assume that it is so severe that it disqualifies that person from particular jobs or assignments. One of our challenges as disability advocates is to facilitate the ability of individuals to be open about their disabilities and have them be taken seriously and accommodated at work if necessary, all the while avoiding overreactions by employers or prospective employers upon learning of a diagnosis. Surmounting such attitudinal barriers leads to better employment outcomes, greater productivity, and a healthier work climate for the millions of Americans who still feel the need to keep their disabilities and chronic health conditions a secret at work.

For the most part, I have been quite fortunate to have found employers and mentors who have cultivated my talents and created opportunities for me to grow and demonstrate my abilities. However, that is not to say that I have been nor will continue to be immune from facing discrimination in the workplace. Until recent years, I took comfort in knowing that I had civil

[1] 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).

[2] "Improving the Participation Rate of People with Targeted Disabilities in the Federal Workforce," *available at*: www.eeoc.gov/federal/report/pwtd.html, noting that while federal government grew by 135,000 workers between fiscal years 1997 and 2006, the number of federal employees with significant disabilities decreased from 28,671 to 24,442, leaving them at 0.94 percent of the overall federal workforce.

rights protections should I ever need them. Unfortunately, in light of a number of narrowing court decisions in the last decade, I no longer have confidence that the ADA would protect me if I needed it. Because of court decisions that have aggressively narrowed the scope of the ADA's protected class, were I to bring a claim of disability employment discrimination today, a court would likely conclude that my employment successes and integrated family life indicate that my diagnosis is not sufficiently disabling to claim the protections of the ADA, even in light of blatant discrimination on the basis of my bipolar disorder.[3] At a minimum, I could expect to be subjected to a battery of questions probing into the intimate details of my life and disability that are entirely irrelevant to my ability to perform the job. Throughout the country, this has become not the exception but the norm for victims of employment discrimination on the basis of disability who attempt to have their day in court. I will highlight several of their stories throughout my testimony. Their stories help to demonstrate that this problem is not limited to a single outlier judge, a problematic employer or particular geographic region. Rather, the troubling case law, which is voluminous, is indicative of a growing nationwide problem that requires a Congressional remedy.

I am here today to testify that the broad remedial statute that Congress wrote and passed in 1990 has fallen victim to a form of judicial activism whereby the U.S. Supreme Court and the lower federal courts have made it increasingly difficult for individuals with epilepsy, diabetes, amputations, various forms of cancer, and a wide range of mental and physical conditions to establish that they have a disability for purposes of the ADA. On account of these narrowing court decisions, Americans who experience employment discrimination on the basis of their disabilities are increasingly precluded from reaching the issue of whether they were treated fairly in the workplace because their cases are being tossed out of court on the issue of whether their disability is "severe enough" to come under the protections of the ADA. In fact, data suggests that as many as 97% of all disability discrimination cases are decided in favor of the

[3] In fact, case law already exists which has found bipolar disorder not to be a disability under the ADA. *Johnson v. North Carolina Dep't of Health and Human Servs.*, (M.D.N.C. 2006).

employer, often before the individual even has the opportunity to demonstrate how their treatment was unfair.[4] So much a deviation is the ADA's current state of affairs from original Congressional intent that Members of Congress and the former U.S. Attorney General, involved in its original passage, have repeatedly stated their displeasure[5] and their support of H.R. 3195 as a remedy to the courts' damage.

In 1990, the ADA was heralded as an "emancipation proclamation"[6] for people with disabilities. Seventeen years later, on account of judicial activism, we are far from having a law that can be counted on to safeguard the fair treatment of people with disabilities in the workplace. On the contrary, we have a federal court decision from just last May in which Charles Littleton, Jr., a young man with intellectual and developmental disabilities who was attempting to start work as a cart pusher at a local retailer through the help of a state vocational assistance program, was told that he did not qualify for the ADA's protections after he experienced discrimination during the hiring process. The Eleventh Circuit Court of Appeals noted about Mr. Littleton, who lives with his mother, has the cognitive abilities of an 8 year-old, and receives Social Security disability benefits: "We do not doubt that Littleton has certain limitations because of his mental retardation. In order to qualify as 'disabled' under the ADA, however, Littleton has the burden of

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[4] *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").

[5] Press release of Majority Leader Steny Hoyer, "Hoyer Introduces Americans with Disabilities Restoration Act of 2007," *available at:* http://hoyer.house.gov/Newsroom/index.asp?ID=955&DocumentType=Press+Release, stating: "Let me be clear: This is not what Congress intended when it passed the ADA. We intended a broad application of this law. Simply put, the point of the ADA is not disability, it is the prevention of wrongful and unlawful discrimination"; Emailed letter of the Honorable Dick Thornburgh, Former Attorney General of the United States, to the Honorable Orrin Hatch, requesting support of the ADA Restoration Act of 2007, *available at:* http://www.aapd.com/News/adainthe/071025dt.htm, referencing the current circumstances as an "untenable situation" and stating: "Under a series of court decisions, the definition of who qualifies as an 'individual with a disability' has become so restrictive and difficult to prove that millions of people we intended to protect from discrimination -including people with epilepsy, diabetes and cancer -are no longer covered by the law's protections."

[6] *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.

proving that he actually is . . . substantially limited as to 'major life activities' under the ADA."[7] Later in their analysis, the court stated that no evidence existed to support Mr. Littleton's contention that his intellectual disabilities substantially limit him in major life activities, explaining, "It is unclear whether thinking, communicating, and social interaction are 'major life activities' under the ADA."[8]

How did we end up with such absurd court decisions all over the country, and how do we fix them?

When Congress wrote and passed the ADA in 1990, it included in the statute a definition of "individual with a disability" that had been used since 1978 under the federal Rehabilitation Act. That three-pronged definition provides protections for individuals with a physical or mental impairment that substantially limits at lease one major life activity; individuals with a history of such an impairment; or individuals who are regarded or perceived as having such an impairment and treated unfairly on that basis. As the Supreme Court noted in its 1987 *Nassau County School Board v. Arline* decision, "By amending the definition of 'handicapped individual' to include not only those who are actually physically impaired, but also those who are regarded as impaired…, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."[9] This key observation, coupled with over a decade of federal case law interpreting the definition of "handicap" in the Rehabilitation Act broadly, gave Congress every reason to expect that the ADA's definition would receive a similarly broad construction by the courts, thus protecting people with all kinds of disabilities against employment discrimination.

Regrettably, beginning with a trio of Supreme Court decisions in 1999, we have witnessed an aggressive effort by the federal courts to narrow the scope of who qualifies for civil rights

[7] *Littleton v. Wal-Mart Stores, Inc.*, No. 05-12770, 2007 WL 1379986, at *4 (11th Cir. May 11, 2007).
[8] *Id.*, at *3.
[9] *Nassau County School Board v. Arline*, 480 U.S. 273, at 283-284 (1987).

protections under the ADA. In *Sutton v. United Airlines* and two related 1999 decisions[10], the Supreme Court ruled that people who are able to function well with the help of "mitigating measures," including medication, prosthetics, diet, hearing aids, etc., should not be considered substantially limited even if they clearly are so in their natural or unmitigated state. This holding, which directly contradicted the positions of the all of the federal agencies charged with enforcing the ADA,[11] the eight federal Courts of Appeal that had addressed "mitigating measures" prior to *Sutton* case,[12] as well as the report language of Congressional committees that helped to write the ADA,[13] has led to a string of decisions in which plaintiffs are told that their serious health conditions do not rise to the level of "disabilities" and therefore they are not within the law's protected class. That is what happened to Ruth Eckhaus. Ms. Eckhaus, a railroad employee who used a hearing aid and who was told by her employer that they "could not hire someone with a hearing aid because [the employer] had no way of knowing if she would remember to bring her hearing aid to work,"[14] was not protected by the ADA when she sought to bring a case of employment discrimination. The court held that Ms. Eckhaus "failed to show that her hearing impairment, when corrected by hearing aids, substantially limits a major life activity,"[15] and was therefore not "disabled" for purposes of the ADA's protections.

The effect of the *Sutton* trilogy is that people with all kinds of disabilities, who make use of a treatment or support to enable themselves to participate more fully and independently in society, including in the workplace, are increasingly finding themselves without the ADA's civil rights protections. Moreover, when employees attempt to establish that they do indeed have a disability by introducing evidence that was previously unknown to the employer and that *did not* form the basis for the adverse action being challenged, that evidence is then being used

[10] *Sutton v. United Airlines*, 527 U.S. 471 (1999);); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).
[11] *Sutton*, 527 U.S. at 496-97 (Stevens, J., dissenting).
[12] *Id.,* (listing cases).
[13] *See, e.g.*, Senate Committee on Labor and Human Resources, S. REP. NO. 101-116 at 121 (1989), *stating:* "[W]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids."
[14] *Eckhaus v. Consolidated Rail, Corp.,* No. Civ. 00-5748 (WGB), 2003 WL 23205042, at *5 (D.N.J. Dec. 24, 2003).
[15] *Id.*, at *9.

successfully by employers to argue that the employee is not qualified in the first place for the position in question.[16]

The damage caused by the mitigating measures decisions has been magnified by other rulings, notably the 2002 Supreme Court decision in *Toyota v. Williams*.[17] In *Williams*, contrary to the clear intent of Congress that the law be construed broadly as a remedial measure, the Court ruled that that the definition of disability needed to be interpreted strictly "…to create a demanding standard for qualifying as disabled."[18] Lower courts certainly took note of the *Williams* decision, ruling in case after case that people with all varieties of disabilities – muscular dystrophy,[19] epilepsy,[20] traumatic brain injury,[21] amputation,[22] breast cancer (and accompanying masectomy, chemotherapy, and radiation therapy),[23] fractured spine[24] – are *not* disabled for purposes of the protections of the ADA. Mr. Carey McClure, an electrician who has muscular dystrophy, is here today to give his own account of how the *Williams* decision did just that to his case of employment discrimination in the Fifth Circuit.

The universe of people who could experience discrimination in the workplace on the basis of fears, myths, and stereotypes surrounding physical attributes, psychiatric conditions, or medical diagnoses is extensive, and the ADA was created with all of these people and circumstances in mind. Unlike an analysis for a disability retirement program's cash benefit, civil rights laws *should* be construed broadly to ensure equality for all Americans. This was the *clear* intent of Congress and the President in 1990, and the ADA Restoration Act seeks to reinstate this objective.

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[16] *See* Claudia Center & Andrew J. Imparato, *Redefining "Disability" Discrimination: A Proposal to* Restore Civil Rights Protections for All Workers, 14 STAN. L. & POL'Y REV. 321 (2003).
[17] *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).
[18] *Id.*, at 197.
[19] *McClure v. General Motors Corp.*, 75 Fed. Appx. 983, 2003 WL 21766539 (5th Cir. 2003).
[20] *Equal Employment Opportunity Comm'n v. Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2001).
[21] *Phillips v. Wal-Mart Stores, Inc.*, 78 F. Supp. 2d 1274 (S.D. Ala. 1999).
[22] *Williams v. Cars Collision Center, LLC*, No. 06 C 2105 (N.D. Ill. July 9, 2007).
[23] *Pimental v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177, 183 (D.N.H. 2002).
[24] *Williams v. Excel Foundry & Machine, Inc.*, 489 F.3d 309, 311 (7th Cir. 2007)

Disability civil rights laws start with the recognition that disability is a natural part of the human experience that in no way should limit a person from participating fully in all aspects of society. Some people are born with their disabilities. Others acquire them through accident or injury or while placing themselves in harm's way in service of our country. Unlike other protected classes, disability is a category that any person at any time can join. A broad interpretation of the ADA is something that every American can benefit from if and when they experience disability discrimination.

People with disabilities should have every incentive to function to the fullest extent of their abilities and not be punished for their successes nor subjected to a fishing expedition regarding the extent of their disabilities when they seek to challenge discrimination at work. Each summer, AAPD places college students with varied disabilities into summer internships on the Hill and in the federal Executive Branch. Each of our interns has worked exceptionally hard in school and life and many have garnered a number of impressive awards and recognitions. As they graduate and enter the workforce, I hope they continue to encounter work environments that appreciate their work ethic and focus on their skills and abilities rather than on their disabilities. In light of the Supreme Court's restrictive interpretations of the ADA, however, I fear, given how much they have been able to achieve, whether they too would be shut out of the ADA's protections should they ever require them.

I think, too, of our country's returning Iraq and Afghanistan war veterans. I think of the estimates that as many as 60-70% of all wounded returning veterans may have traumatic brain injury (TBI).[25] Many others are returning with post-traumatic stress disorder (PTSD), epilepsy, depression, hearing impairments, loss of limbs, and other complex conditions. Once these veterans begin to return to the workforce in greater numbers, what trends will emerge regarding

[25] Institute of Medicine, the National Academies, Evaluating the HRSA Traumatic Brain Injury Program, Washington, D.C.: The National Academies Press, Eden, Jill and Rosemary Stevens, Editors, 2006, p. 41.

their integration and civil rights protections in the workplace, given that case law surrounding each of these disabilities is increasingly dismal?

Moreover, my two sons, ages 9 and 14, may be genetically predisposed to bipolar disorder. What civil rights legacy can we promise them if we do not right this law?

As members of the Education and Labor Committee, you know that our nation's policies under the Individuals with Disabilities Education Act, the Rehabilitation Act, the ADA and other laws are designed to promote equality of opportunity, full participation, independent living and economic self-sufficiency for people with disabilities. Due to a series of decisions limiting the scope of the ADA, probably best exemplified by the recent *Littleton* decision, people with disabilities are being forced to give up their civil rights protections when they try to improve their functioning and participate in the economic mainstream. Whereas Congress intended the ADA to tear down the shameful wall of exclusion that had barred people with a wide range of disabilities from achieving to their full potential, the federal courts have contorted the law to the point where they have created a new wall that is keeping disabled victims of discrimination from ever reaching the issue of whether they were treated fairly or discriminated against at work.

The ADA Restoration Act, H.R. 3195, is a straightforward bill that will make it crystal clear that employment discrimination cases should be about how a person was treated at work and not about whether that person's impairments make it hard to brush one's teeth,[26] comb one's hair,[27] or have children.[28] The bill will refocus the courts on an employee or applicant's qualifications and performance and away from intimate details about their disabilities that are irrelevant to the workplace and often unknown to their employer or prospective employer. It will restore civil rights protections for people with epilepsy, diabetes, cancer, depression, amputations, and a whole host of physical and mental disabilities who have been denied their day in court because of activist judicial rulings that ignore legislative history and Congressional intent. It will end the

[26] *McClure v. General Motors Corp.*, 75 Fed. Appx. 983, 2003 WL 21766539 (5th Cir. 2003).
[27] *Id.*
[28] *Pimental v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177, 183 (D.N.H. 2002).

perverse incentive created by court rulings that punish people who successfully manage their disabilities and enter the workforce.

I am delighted that H.R. 3195 has attracted broad bipartisan support in the House under the strong leadership of Congressmen Steny Hoyer and Jim Sensenbrenner, and I encourage this Committee to mark it up and send it to the House floor with strong bipartisan support. H.R. 3195 will recreate the level playing field that Congress had in mind when it passed the ADA in 1990. It will send a message to the activist bench that they should adhere to Congressional intent and not rewrite laws to suit their own political or policy agenda. It will not solve all of the many challenges that people with disabilities continue to face in the workplace, but it will reestablish a solid foundation on which we can build policies and programs to bring more people with disabilities into the economic mainstream.

Thank you again for the opportunity to provide testimony, and I look forward to your questions.