Comments on the
Notice of Proposed Rule Making for the ADA Amendments Act of 2008 **(NPRM)**

The following comments to the NPRM, published by the Equal Employment Opportunity Commission (EEOC) on September 23, 2009, are proposed and submitted on behalf of the Philadelphia Bar Association and the Legal Rights of Persons with Disabilities Committee of the Philadelphia Bar Association.

I. Comments Regarding the Proposed Regulations Generally and Some Proposed Introductory Language

Congress recognized that the purpose of the ADAAA is "to reinstate a broad scope of protection" by expanding the definition of the term "disability." Consistent with this broad purpose, we recommend that the proposed regulations include an introductory statement which recognizes that the ADAAA is intended to afford protections for two categories of persons: 1) those who need a reasonable accommodation as those terms are defined by the Act and 2) those who are treated differently and adversely because of their disabilities - real or perceived. In either instance, an analysis about whether a person is disabled as defined by the Act is really not warranted.

For those who fit the first category and therefore seek the Act's protections in order to make an accommodation request, whether this request can be granted without placing an undue burden on the business from whom an accommodation is requested, should be the only question. Otherwise the burden on the disabled person, to prove that they even qualify for the Act's protections before getting to the question of whether what they seek would create an undue burden is too great and unnecessarily time and cost-consuming.

Considering the matter concretely; most employers are easily able to justify a rejection of an accommodation of time off, part-time schedules or flex schedules under the "undue burden" analysis. Where this cannot be justified, an employee who provides medical documentation that such accommodation is needed should be granted his or her request. Requiring that such an employee first prove that their disability meets the Act's

definition places an unnecessary and costly burden on the disabled employee who is still going to have to provide documentation that her accommodation request is medically justified before getting to the undue burden analysis. In other words, the definition's requirement is duplicative and unnecessary.

For those persons in the second category (perceived disability), whether or not they are actually disabled under the Act is immaterial if an employer, place of public accommodation or government entity, because of his or own perceptions, treated the individual adversely. For example, a dentist who refuses to treat a person with HIV/AIDS simply because they have an HIV/AIDS diagnosis is guilty of discrimination based on a perception of disability. No analysis regarding the person's viral load, t-cell count or other impact that HIV-disease has on their lives is relevant. The relevant inquiry is whether the dentist denied a service to a person for the sole reason that the person suffers from a disease. It does not matter whether that disease is "disabling" as defined by the Act. It matters that the dentist had a perception, based on ignorance, myth, fear or stereotype, that the person could not safely be treated.

Similarly, an employer who fires a person who has been diagnosed with cancer, can not be permitted to do so if the firing was about a perception that the diagnosis meant that the employee would no longer be reliable or that insuring them was too expensive or for some other reason related to fear and ignorance rather than fact. An employee diagnosed with cancer who seeks an accommodation that would be an undue burden to grant, can be fired. However, the same employee who needs no accommodation and who is as reliable as all of his or her cancer-free colleagues cannot be fired. If that employee is fired anyway, there is no need, again, to do any individualized assessment about whether this employee meets the definition of "disabled" under the Act. The employer can still allege that the firing was for a legitimate non-discriminatory reason but if that burden is not met and the employee can establish that the firing was about the cancer, this, without any analysis of substantial limitation, should satisfy the employee's burden under the Act.

The same situation can arise where an employee has been diagnosed with mental illness. The employee may have no symptoms which are substantially limiting in the workplace or in any way impair the employees' ability to perform the essential functions of the job. However, where an employer sees a medication bottle for an antidepressant and then takes an adverse action against the employee because of a fear that because of this medication, the employee will cost the company money, take time off or otherwise disrupt the work place, this is discrimination intended to be covered under the Act. The employee should not bare the burden of proving

substantial limitation of a major life activity or bodily function. The adverse employment action was based on myth, fear and stigma, not based on actual limitations.

On the basis of these examples, we recommend an introductory statement which explicitly refers to the two categories of disability-based discrimination meant to be eradicated under the Act as a means to remedy the confusion that occurred prior to the ADA Amendments. Such language should ensure that analysis of whether the Act even applies does not stand in the way of analyzing the merits of actual claims of discrimination.

II. Comments Regarding the Proposed Definitions of Disability

We applaud the wording of proposed regulation Section 1630.2(j)(2)(i), "Consistent with Congress's clearly expressed intent in the ADA Amendments Act that the focus of an ADA case should be on whether discrimination occurred, not on whether an individual meets the definition of 'disability', . . . the term 'substantially limits' . . . shall be construed in favor of broad coverage of the individuals to the maximum extent permitted by the terms of the ADA and should not require extensive analysis." (citations omitted). But if, as the proposed regulations state, the focus is to be on discrimination and not the definition of disability, there are those rather obviously disabling ailments, as listed in section (j)(5)(i) which should not require an "individualized assessment" at all.

The proposed regulations list impairments that will "consistently result in a determination that the person is substantially limited in a major life activity" and therefore qualify for the Act's protections, but this consistent result is still only reached after "an <u>individualized assessment</u>". See Proposed Regulation Section 1630.2(j)(5)(i) (emphasis added). If the intention is to ensure that certain impairments automatically qualify a person for the Act's protections, then there should be no need for individualized assessment. Conversely, if an individualized assessment is required in every case, the regulations' supposed focus on ensuring broad coverage without resort to "extensive analysis" is undermined.

It is our belief that this paradox, as well as many of the other proposed regulations which continue to discuss level of impairments, mitigating measures and major life activities were written in response to fears that those who were not "truly disabled" would seek the Act's protections. However, practically speaking, these fears are unfounded. Any employee who seeks an accommodation pursuant to the Act, must prove that they in fact, need the accommodation that they request by providing medical documentation. A person who is "not truly disabled", i.e., is suffering merely from a cold or the flu, could not meet this burden. Even assuming, *arguendo*, that they could, the employer could easily show that granting an accommodation for a person with the flu or a cold would be an undue burden on their business.

We propose, in light of all of the above, that the EEOC add language to proposed 29 CFR 1630.2 (5) to make clear the low threshold that is necessary to establish these impairments as

disabilities. Specifically, we recommend deleting the reference to "individualized assessment" in favor of the following, "an individualized assessment of the listed impairments is only necessary where a request for reasonable accommodation is made and the interactive process is triggered. This assessment is not part of the threshold determination of whether an individual with these impairments meets the definition of disability."

Additionally, for further support of this point, we recommend the following language change in proposed 29 CFR 1630.2 (5) (page 48441): in parts A through H, substitute the phrase "because it substantially limits. . . ." for the current phrase "which substantially limits. . . ". For example, part A would now read, "Autism, because it substantially limits major life activities such as communicating, interacting with others, or learning;"

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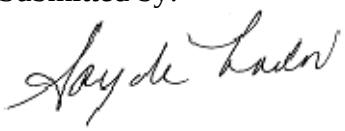

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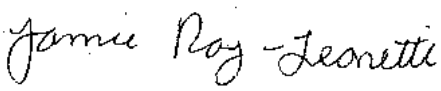

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