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**AMERICANS WITH DISABILITIES ACT (Senate - September 07, 1989)**

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The Senate continued with the consideration of the bill.

Mr. HELMS. Mr. President, for the record, I wish to ask the distinguished manager a few questions about this bill, the Americans With Disabilities Act of 1989.

In the bill, the definition of `individuals with disabilities' includes anyone with a physical or mental impairment limiting one of life's major activities, and anyone regarded as having such an impairment.

The report lists many mental and physical disorders and therefore it must have been the intent of S. 933's authors that it be an all-encompassing bill; is that correct?

Mr. HARKIN. Well, the Senator's question was, Did we intend for the bill to be all-encompassing?

Mr. HELMS. Yes.

Mr. HARKIN. Within the definition the Senator just read, that is correct.

Mr. HELMS. I thought the Senator would say that, so I will be specific. Does the list of disabilities include pedophiles?

Mr. HARKIN. What?

Mr. HELMS. P-e-d-o-p-h-i-l-e-s?

Mr. HARKIN. I can assure the Senator no.

Mr. HELMS. How about schizophrenics?

Mr. HARKIN. Schizophrenics, yes.

Mr. HELMS. Kleptomania?

Mr. HARKIN. Well, I am not certain on that.

Mr. HELMS. Manic depressives?

Mr. HARKIN. Manic depressives, yes. I can state that.

Mr. HELMS. People with intelligence levels, as measured on standardized tests such as the IQ test, which are so far below standard average levels as to limit substantially one or more major life activities, but who do not have any identifiable mental disease?

Mr. HARKIN. It is my understanding that they would be covered in this bill. If I understood the Senator correctly to say that it was so low that it did limit one or more, I do think I heard the Senator say that. I did hear the Senator say the IQ is so low that it limited one or more life activities.

Mr. HELMS. Correct.

Mr. HARKIN. Yes; in that case.

Mr. HELMS. How about a person with psychotic disorders?

Mr. HARKIN. I am told, yes. I am informed by staff it covers that.

Mr. HELMS. Homosexuals?

Mr. HARKIN. No; absolutely not.

Mr. HELMS. The Senator is certain about that?

Mr. HARKIN. I am absolutely certain.

Mr. HELMS. Transvestites?

Mr. HARKIN. Absolutely not.

Mr. HELMS. People who are HIV positive or who have active AIDS disease?

Mr. HARKIN. Just a moment, I may have misspoken.

Let us back up to transvestite . I said no, but I am told by staff that one court at one time held that a transvestite was mentally impaired, and I further understand the Senator from North Carolina added an amendment to the fair housing amendments last year that took care of that, and it was accepted.

Mr. HELMS. Where does that leave us with respect to this bill?

Mr. HARKIN. I do not know. Just a minute.

If the Senator would like to offer an amendment, we will accept it. If can I ask the Senator, if it could be drafted the same way you did last year on the Fair Housing Act.

Mr. HATCH. I agree. I think the Senator is doing a service by pointing that out.

Mr. HELMS. I thank the Senator.

Mr. HATCH. If we can also work on other similar problems, we can work them out as fast as we can.

Mr. HELMS. I will ask the managers of the bill, with respect to the categories I have identified which meet the act's definition of disabilities, will this act make it unlawful to take those conditions into account in making employment decisions if the employer cannot prove that the condition in question will prevent the employee from performing the functions of the job in question?

Mr. HARKIN. I am sorry, could the Senator repeat that? It is a legal question, and I have to make sure I understand it.

Mr. HELMS. Let me give the Senator the short form. Does an employer's own moral standards enable him to make a judgment about any or all of the employees identified in our previous question?

Mr. HARKIN. Are you talking about transvestites?

Mr. HELMS. Pardon?

Mr. HARKIN. Are you talking about transvestites?

Mr. HELMS. Right, or kleptomaniacs or manic depressives. You said they are covered and that schizophrenics are covered as well. How far does your covered list of individuals go in denying the small businessman--so often referred to on this floor--the right to run his company as he sees fit?

Mr. HARKIN. All we are saying in this bill is that those persons who are identified as being covered by this act, and we just talked about some of them, they are covered by the act, that just means--we are talking about title I employment--that these people have to be judged on the basis of their abilities and not on the basis of a disability, taking into account what they can do and how they can perform on a job and are they qualified for the job.

Mr. HELMS. Who makes that judgment?

Mr. HARKIN. The employer.

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Mr. HELMS. And you think he ought to have a right to make that judgment? Is that the intent of this act?

Mr. HARKIN. He should have the right to make that judgment in the manner in which the act provides for such judgments.

Mr. HELMS. I thank the manager of the bill for stating that for purposes of the legislative history on this act.

Mr. HARKIN. The Senator is right.

Mr. HELMS. So the employer makes the judgment. Does the Senator also say the employer should not, under this act, be hauled into court for making that judgment?

Mr. HARKIN. The employee would have the right. If the employees feel they were discriminated against on the basis of their handicap, then they would have the right first to go to EEOC. They have to exhaust their administrative remedies first. They would go to EEOC and file a complaint.

Mr. HELMS. I understand, but the EEOC is not exactly a dispassionate, disinterested party in this. These questions and your answers are meant to give some guidance to the EEOC and everybody else involved as to the intent of this legislation. So what does the legislation intend to do in the instances I have mentioned?

Mr. HARKIN. In which case?

Mr. HELMS. All of them the individuals whose handicaps you said were covered under this bill.

Mr. HARKIN. The act intends, if you are talking about the employment section--and that is what we are talking about--that employers will treat employees or prospective employees based on their abilities to perform the job or jobs in question, not based upon any disability that that person might have had at one time or may have had previous to that one point in time.

Mr. HELMS. Which means according to the Senator's answers that an employer cannot really exercise his judgment in the case of schizophrenia or with a manic-depressive; that is what I understand the Senator to have just said.

Mr. HARKIN. That is not exactly what the Senator said.

Mr. HELMS. What exactly did my friend say?

Mr. HARKIN. What this Senator said, in cases where a person has a disability, let us say schizophrenia, the employer has obviously every right to determine what that disability is and whether or not it would affect the performance of that person's job, the ability of that person to perform the job or the jobs in question. If it did, then the employer could say this person was not qualified. If, however, the disability in question, whether schizophrenia, manic-depressive or whatever it might be is, let us say, controlled by drugs, the person is under a doctor's care, and the person is qualified for the job, then the employer can say, 'Well, I am not going to hire you based on your disability,' but the employee then would be able to go to the EEOC and file a complaint and show, A, that that employee is qualified; B, that the disability in question does not inhibit his or her performance on that job. Then it would be up to the employer to respond.

Mr. HELMS. Then this bill runs full tilt into more and more bureaucracy. How is an employer, or prospective employer, supposed to find out whether a man is a pedophile or schizophrenic. An employer cannot even inquire about such a handicap under this act, can he?

Mr. HARKIN. I think I have it clear, if the Senator will ask the question.

Mr. HELMS. Is it true that under this bill, a prospective employer is prohibited from even inquiring of a job applicant whether or not that applicant is a schizophrenic or a manic-depressant or if he has any of the other disabilities the Senator says are covered in S. 933. So how is an employer supposed to know when he cannot ask? An employer cannot ask, correct?

Mr. HARKIN. It is my understanding that that would not be permissible as a first step in the employment process. But after a conditional offer of employment is made--I understand that is the term of art--after a conditional offer of employment is made, then the employer can ask that they fill out a medical history and all that kind of thing and they can inquire into that. The point is that in the initial stages the approach would be that the employer wants to find out: Is this person qualified for the job? Can this person perform the job in question?

After that, then there comes a conditional offer of employment based upon other things. And that is when they fill out the medical history.

Mr. HELMS. Let me go to title 3, covering public accommodations which as used in this bill includes an adoption agency. Can an adoption agency, for example, take any of the disabling conditions into consideration before allowing the completion of an adoption?

Mr. HARKIN. Under title 3, is the Senator talking about under public accommodations?

Mr. HELMS. Yes.

Mr. HARKIN. Can an adoption agency do what?

Mr. HELMS. Take any of the disabling conditions that the Senator and I have been discussing into consideration in connection with a proposed or requested adoption?

Mr. HARKIN. I am sorry, I just do not understand the question. I have to be honest, I do not understand.

Mr. HELMS. The Senator has said that the long word that I used for one who has had relations with a child, a pedophile, is not covered by this act. Is that correct?

Mr. HARKIN. That is correct.

Mr. HELMS. But a schizophrenic is covered, the Senator said. But I want to know if an adoption agency is forbidden to take that into consideration if the prospective adopter is a schizophrenic or manic-depressive.

Mr. HARKIN. Let me rephrase it and see if I understand. The Senator is saying, let us say, there is an adoption agency and a couple comes in that want to adopt a child.

Mr. HELMS. Right.

Mr. HARKIN. Can the adoption agency inquire? Is that what the Senator is asking? Can they inquire as to whether or not---

Mr. HELMS. First, I am asking if they may inquire. And second, if the adopters are otherwise qualified to adopt, does the adoption agency--under the definitions of this act--have the right to say, "No, sorry about that, but you are a manic-depressive by your own acknowledgment; we cannot let you have the child?" Will the adoption agency be able to do that without being hauled into court?

Mr. HARKIN. I would respond that I do not believe so just as a general rule. I think they would have to do that on an individual basis.

When the Senator uses the term manic-depressive, that is like an IQ level. There are various stages of being a manic-depressive; it may be a slight manic-depressive completely controlled by prescription drugs, or it could be a manic-depressive so severely impaired they just cannot handle themselves any longer. Each case has to be handled on its own merits and that is what the adoption agency, I am sure, would look at.

I am sure there are plenty of manic-depressives in this country--I know some. I have met some who are completely controlled under doctors' orders as long as they are on prescription drugs. They may have a slight case of it. But each case would have to be handled on its own merits.

Mr. HELMS. The Senator said that homosexuals are not covered in the definitions.

Mr. HARKIN. That is correct. Homosexuality is not a disability.

Mr. HELMS. I want to be sure about that.

Mr. HARKIN. Yes.

Mr. HELMS. We have an amendment in process with respect to transvestites. But the Senator says that--well, the committee report says, as a matter of fact, if I recall correctly, that those who are HIV positive or who have active AIDS disease are covered.

Does that mean that an adoption agency cannot inquire about HIV infection under this bill? I apologize for raising all these questions but I need to know the answers.

Mr. HARKIN. Again, I would ask what is the relevancy to an adoption agency whether or not a person has tested HIV positive? What is the relevancy of that to whether or not they can be good parents?

Mr. HELMS. If I understood the Senator's question, I hope he is not serious. What is the relevancy of somebody who tests HIV positive or who has AIDS with respect to the adoption of a child, is that what the Senator is asking me?

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Mr. HARKIN. Is this something that is absolutely relevant to whether or not one or both parents can be good parents? I am asking the Senator.

Mr. HELMS. I think it is absolutely relevant.

Mr. HARKIN. In that case, if it is relevant, and that is proven, the adoption agency can take that into account.

Mr. HELMS. What does the bill say, though? What is the intent of the bill with regard to this?

Mr. HARKIN. Maybe I should ask the Senator, and again I ask the Senator why it would be relevant if someone tests HIV positive? Maybe there is something I do not understand.

Mr. HELMS. I think the Senator does understand.

Mr. HARKIN. No. I do not understand.

Mr. HELMS. You want to put a child up for adoption and subject him to a terrible risk.

Bear in mind, Senator that approximately 85 percent of the HIV-positive people in this country are drug users and /or homosexuals.

Mr. HARKIN. Then they can take that into account.

Homosexuals are not covered by this on the basis of their homosexuality. And current drug users, I might add, are not covered by this, either on the basis of their current illegal drug use. It is people who have AIDS and HIV infection who are covered on the basis of those disabilities.

Mr. HELMS. I thank the Senator. I think we have made some important legislative history today.

Mr. HARKIN. Because they are HIV-positive, I point that out, that makes them covered.

Mr. HELMS. Mrs. Helms and I were blessed many years ago with the privilege of adopting a child who has been the biggest blessing to us. And you will not believe the questions that the adoption agency asked. The questions were endless.

So the Senator is telling me, I hope, that nothing will be changed about that, that the adoption agencies can continue to ask the questions, and that they can continue to refuse to assign a child to prospective adopters. Is that what the Senator is saying, under this bill?

Mr. HARKIN. If I understand the Senator's question correctly, the Senator is correct. What the bill is saying is they just cannot refuse to go forward simply because someone has a disability. They can take a lot of factors into account; but not on the basis of disability.

Mr. HELMS. I hope this act is not going up one side of the street and down the other on its definitions.

But let me move on. Under section 102(c), preemployment screening is virtually eliminated. Would the Senator agree with that?

Mr. HARKIN. As I said before, a preemployment type of screening is not permitted, but as a possible condition of employment, it is.

Mr. HELMS. Then could a hospital, for example, or other health care provider, or a day care provider for that matter, be permitted to make inquiries regarding the following factors before offering a person employment as a physician.

Mr. DOMENICI. Mr. President, could we have order?

The PRESIDING OFFICER. The Senate will be in order. Those who have business other than that before the Senate at this time will please remove themselves from the floor.

The Senator from North Carolina.

Mr. HELMS. I thank the Chair. I hate to inconvenience my colleagues, but I am interested in the answers I am getting.

Let me start again. Could a hospital or other health care provider or day care provider be permitted to make inquiries regarding various disabling conditions before offering a person employment as a physician, or a psychiatric or psychological counselor, nurse, paramedic, hospital orderly, or a teacher?

Mr. HARKIN. Could the hospital do what?

Mr. HELMS. Make inquiries regarding these various conditions. Let me state three or four such factors.

Can they ask, for example, whether the applicant is infected with any contagious disease, such as HIV? Can they ask that question?

Mr. HARKIN. Again, after a conditional offer of employment is made, the answer is yes.

Mr. HELMS. May they ask regarding a history of psychosis, neurosis, or other mental, psychological disease or disorder?

Mr. HARKIN. If I might be a little bit more specific on this, the purpose of this prohibition--that is, the prohibition on initial asking of these questions--is to ensure that employers do not inappropriately screen out people with disabilities at the initial stage of the application process by simply reacting to a prejudice or stereotype about a person's disability.

Of course, in some jobs, medical examinations are necessary or useful prerequisites for a job. Therefore, the amendment allows employers completely at their discretion to institute medical examinations of job applicants after such applicants have received conditional offers of employment. There is no restriction on the scope of these medical examinations. Therefore, if an employer chooses, this examination may include a test for HIV. There are three requirements on the use of these medical exams. The tests must be given to all job applicants, the results must be kept confidential, as described in the Act, and the results may be used only in accordance with the amendment. That is, if test results show an applicant is in fact not qualified for the job, the results may then legitimately be used to justify withdrawing the conditional job offer. And this way, applicants know why the job offer has been withdrawn and can contest it if necessary. These requirements all derive from the basic concepts underlying the amendment, and have been in place for 15 years under section 504.

Mr. HELMS. So the Senator is saying that if a job applicant comes into the Tom Harkin Pharmacy, in Iowa, and he would like to talk to you about a job, you say OK. Let us go back in the office. You cannot ask that applicant any of these questions at that point. It is only at the time, according to my understanding of the Senator's answer, that you offer him a job that you can ask him these legitimate questions? Is that correct?

Mr. HARKIN. Well, no. It is a conditional offer of employment.

Mr. HELMS. Which is what I said.

Mr. HARKIN. That is right. Then you ask the questions.

Mr. HELMS. Will the Senator tell me what is the purpose of that? Why take Tom Harkin, the pharmacist Tom Harkin, who says, 'Look, I don't want any drug user, I don't want anybody with a history of psychosis, neurosis, or mental or psychological difficulties or disorder--do you have any of those problems?' This is before a conditional job offer is made. He is prohibited at that point from even asking the question.

Mr. HARKIN. I will respond to the Senator by saying that at that point you can ask about the applicant's ability to do the job. If I had a pharmacy, and the person came in for a job, you name the job. What job is it, Pharmacist?

Mr. HELMS. I use that as an example.

Mr. HARKIN. Let us say they came in to be a pharmacist. You want a job as a pharmacist.

Mr. HELMS. Not necessarily. It can be a clerk.

Mr. HARKIN. OK. They want to be a checkout clerk. Well, I might inquire as to their experience, what job they have held before. They know how to run a cash register. What is your job history? What is your previous job? Have you ever had any experience working at a checkout counter? I might check into all of that. Are you qualified for that position? And if, first of all, I determine they are not qualified, they have never had a job like that, I would say, well, I need someone who is qualified. But if I determine, that they are qualified, at that point I can then say, 'OK, I will offer you this job conditionally.' Now I have to know some other things.

The idea, if I might respond to the Senator quite frankly, is that the testimony that we have received in our committee demonstrates instances when individuals were judged on the basis of their disabilities and not their abilities. I can tell the Senator it happens every day all over this country.

There is a wellspring of fears and unfounded prejudices about people with disabilities, unfounded fears, whether people have mental disorders, whether they are manic depressives or schizophrenia or paranoia, or unfounded fears and prejudices based upon physical disabilities. The point of the bill is to start breaking down those barriers of fear and prejudice and unfounded fears, to get past that point so that people begin to look at people based on their abilities, not first looking at their disability.

That is really what the point of this legislation is, is to get past that initial barrier. Certainly, at the point of conditional offer of employment, of course, an employer can inquire about all sorts of things, as long as all applicants are asked. I thought I would clarify that as to the intent of what this bill is seeking to do.

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