

**Responses of Andre M. Davis
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Written Questions of Senator Richard J. Durbin**

- 1. Some prominent disability rights groups have criticized your record. They believe you have unfairly ruled against disabled plaintiffs in a number of employment discrimination cases. However, as you testified at your hearing, you have ruled in favor of disabled plaintiffs in a number of public accommodations cases, such as your 1998 ruling that Baltimore city courthouses were not wheelchair-accessible and violated the ADA.**

What can you say to the disability rights community to offer assurance that you will be fair and impartial when it comes to employment discrimination claims brought by disabled plaintiffs?

Response: I have spent my entire professional career abiding by a deep belief in equality of opportunity for all. In every case I have decided, I have applied the law to the facts before me fairly and impartially. I am fully committed to equality of treatment for the disabled, in employment and in all facets of American life, goals justly embodied in the Rehabilitation Act and the Americans with Disabilities Act (and its recent amendments). In this area as in all others, I have been and I remain fully and unconditionally committed to giving the remedial statutes which are the law of our land the full sweep intended by the Congress.

- 2. The Alliance for Justice examined your record in employment discrimination cases generally and wrote: “Judge Davis’ record indicates a propensity toward awarding summary judgment in favor of the defendant employers.... Because the result of summary judgment is so severe – the case is thrown out of court before the matters in question are resolved – the court is required to view all the evidence in the light most favorable to the plaintiff.”**

Do you believe this is an accurate description of your record? Please explain.

Response: I do not believe this is an accurate description of my record. In every case I have decided, I have applied the law to the facts before me fairly and impartially.

- 3. Making reasonable accommodations for people with disabilities sometimes costs money. Some people believe that tight state budgets should mean that people with disabilities should not receive the reasonable accommodations they need in order to participate equally in state programs and services
What is your view? How should a federal judge analyze such issues?**

Response: The Congress clearly understood in enacting the ADA (and its recent amendments) that costs would be entailed to both private and public employers in

carrying out the duties imposed by those statutes. The statutory scheme enacted by Congress provides the means by which all factors necessary to full implementation of Congress' goals could be achieved. My role as a judge is to follow the law as written by Congress and interpreted by higher courts.

4. **The Supreme Court has issued a number of rulings over the years that took a narrow interpretation to the ADA. As a result of these rulings, Congress passed the ADA Amendments Act last year, which makes it clear that Congress intended the ADA to be interpreted broadly in order to adequately protect the rights of the disabled.**

A. What is your understanding of the changes to the definition of “disability” under the ADA Amendments Act?

Response: I have not yet had a case in which I was required to apply the ADA amendments. Therefore, I have not had the opportunity to review and analyze this new statutory regime. However, I do understand that Congress has sought to expand the definition of disability under the ADA in significant ways, including expanding the list of major life activities, no longer considering mitigating measures, and applying the “regarded as” test to impairments that are not transitory and minor. As this is a legal issue that could actually come before me in an actual case if I am confirmed, I believe that to maintain both the appearance of impartiality as well as the actuality of impartiality, I must decline to express my views on this legal issue.

B. Do you think some of your decisions in which you took a narrow interpretation of the ADA would have come out differently under the new ADA Amendments Act? If so, please provide examples.

Response: I have not yet had a case in which I was required to apply the ADA amendments. Therefore, I have not had the opportunity to review and analyze this new statutory regime. However, I understand that Congress sought to overturn the approach that the Supreme Court developed in its *Sutton* trilogy that disability should be determined by reference to the ameliorative effects of mitigating measures and to reject the holding in *Toyota* that the ADA requires a “demanding standard” for establishing coverage and requires that an impairment severely restrict major life activities. As this is a legal issue that could actually come before me in an actual case if I am confirmed, I believe that to maintain both the appearance of impartiality as well as the actuality of impartiality, I must decline to express my views on this legal issue.

C. Do you understand the ADA Amendments Act to change the “regarded as” prong of the disability definition by permitting a plaintiff to establish a disability by showing that he or she has been discriminated against because of an actual or perceived physical or mental impairment, regardless of whether it substantially limits a major life activity?

Response: I have not yet had a case in which I was required to apply the ADA amendments. Therefore, I have not had the opportunity to review and analyze this new statutory regime. However, I understand that Congress sought to change the “regarded as” prong and expand coverage to anyone subjected to an action prohibited by the ADA because of a real or perceived physical or mental impairment that is not transitory and minor. As this is a legal issue that could actually come before me in an actual case if I am confirmed, I believe that to maintain both the appearance of impartiality as well as the actuality of impartiality, I must decline to express my views on this legal issue.

D. In deciding whether a plaintiff has a disability and is protected by the ADA, how do you go about determining whether a person’s impairment “substantially limits” a major life activity? Do you think your approach is consistent with Congress’s intent?

Response: I have sought to adhere scrupulously to binding precedents from the Supreme Court and the Fourth Circuit in the adjudication of all cases, including discrimination cases.

5. **A 2001 study by Professor Ruth Colker (published in the Ohio State Law Review) found that federal courts have ruled for defendants and against plaintiffs in 94% of ADA employment cases. The study found that the 4th Circuit had the lowest rate of decisions in favor of ADA employment discrimination plaintiffs among all the federal appeals courts, finding for plaintiffs in only 0.3 % of cases, compared to the 6% average among other appeals courts.**

Based on your experience as a federal district judge in the 4th Circuit, do you have an explanation or opinion as to why ADA employment discrimination plaintiffs lose so often in that circuit?

Response: I am unfamiliar with Professor Colker’s study and cannot provide detailed comments upon it.

6. **Many scholars have characterized the Supreme Court’s decisions invalidating parts of the ADA, the Violence Against Women Act, and the Age Discrimination in Employment Act as efforts to second-guess Congress’s judgment as to whether abrogation of state sovereign immunity is necessary to remedy a pattern of discriminatory behavior. In his dissent in *Tennessee v. Lane*, Justice Scalia complained that the test set forth in these cases casts the Court as a “taskmaster” that “must regularly check Congress's homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional.”**

A. Do you agree with this analysis by Justice Scalia?

Response: I have followed the holdings of the Supreme Court as announced in opinions signed by a majority of the justices in every case. Dissenting opinions provide me with no guidance in my duties as a judge.

B. Do you agree with the majority analysis of the Supreme Court in *Tennessee v. Lane* about the history of unconstitutional discrimination against persons with disabilities?

Response: I will follow the precedent of the Supreme Court, regardless of my personal opinions. However, the findings of the Americans with Disabilities Act make clear that it is a response to a history of discrimination against persons with disabilities in our country.