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Medicating the ADA - Sutton v. United Airlines, Inc.: Considering Mitigating Measures to Define Disability

Ian D. Thompson

Medicating the ADA—*Sutton v. United Airlines, Inc.*: Considering Mitigating Measures to Define Disability

I. INTRODUCTION

Contrary to common perceptions, a person who is physically or mentally impaired is not necessarily disabled.[1] The Americans with Disabilities Act ("ADA" or "the Act") protects physically or mentally impaired individuals from employment discrimination.[2] In order to decide whether the ADA protects an individual, the individual first must qualify as disabled under the meaning set forth by the ADA.[3] An individual's impairment is considered a disability if it substantially limits a major life activity.[4] Whether the impairment should be assessed in its mitigated or unmitigated state is an issue that has long been debated.[5]

The Supreme Court's opinion in *Sutton v. United Airlines, Inc.*,[6] firmly resolved this debate by determining that all impairments must be assessed in their mitigated state when considering whether a claimant can successfully prove he or she has a disability under the ADA.[7] The *Sutton* opinion disentangles nearly a decade of differing decisions regarding mitigating measures and the ADA.[8] In addition to providing a clear template for deciding what constitutes a disability, the Court in *Sutton* affirmed the ADA's congressionally appointed power to limit the number of claimants who qualify as disabled in America today.[9]

This Note will examine the Supreme Court's decision in *Sutton* and discuss its repercussions on future disability discrimination analysis. Part II of this Note studies the legal history behind the Supreme Court's decision in *Sutton* and presents an overview of the application of the Equal Employment Opportunity Commission ("EEOC") regulations.[10] Part III details the facts and procedural

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1. *See infra* notes 78-115 and accompanying text.
2. *See* 42 U.S.C. § 12101 (West 2000).
3. *See infra* notes 28-30 and accompanying text.
4. *See* 42 U.S.C. § 12102(2)(A) (West 2000).
5. *See infra* notes 50-62 and accompanying text.
6. 527 U.S. 471 (1999).
7. *See id.* at 482.
8. *See infra* notes 50-62 and accompanying text.
9. *See Sutton*, 527 U.S. at 483-84. *See* Jonathan A. Segal, *The Sutton Ruling: More Than Meets the Eye*, 44 HR MAG. 1, at 5 (1999); 42 U.S.C. § 1201(a)(1) (West 2000); *see also infra* notes 78-115 and accompanying text.
10. *See infra* notes 15-62 and accompanying text.

history of *Sutton*,[11] followed by an analysis of the majority, concurring, and dissenting opinions in Part IV.[12] Part V discusses the impact of *Sutton* on the courts, Congress, and society at large.[13] Part VI illustrates the practical impact of the *Sutton* Court's ruling.[14]

II. HISTORICAL BACKGROUND

A. *The History of the Americans with Disabilities Act*

Congress enacted the ADA in 1990[15] "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[16] For this reason, the ADA was organized into five separate titles. Title I strictly addresses employment matters.[17] Title II regulates state and local government service provisions and public transportation issues.[18] Title III tackles the quagmire of public accommodations and services operated by private entities.[19] Title IV addresses telecommunications issues.[20] Title V includes various miscellaneous provisions including laws regulating building construction, attorney's fees, removal of state immunity, and congressional compliance.[21] Each of the above titles requires that an executive agency formulate regulations and interpretive guidance to carry out the specified purpose of the ADA.

Specifically, Title I of the ADA prohibits employers from discriminating against an individual with a disability because of that individual's disability in employment situations.[22] The employment provisions of the ADA were derived

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11. *See infra* notes 63-77 and accompanying text.
12. *See infra* notes 78-148 and accompanying text.
13. *See infra* notes 149-218 and accompanying text.
14. *See infra* note 219 and accompanying text.
15. *See* 42 U.S.C. § 12101 (West 2000).
16. § 12101(b)(1). The purpose of the ADA is also "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." § 12101(b)(2). The federal government is to play a central role in enforcing the requirements of the act. § 12101(b)(3).
17. §§ 12101-12117.
18. §§ 12131-12150.
19. §§ 12181-12189.
20. 47 U.S.C. § 225(c) (West 2000).
21. 42 U.S.C. §§ 12201-12213.
22. § 12112(a). Title I explicitly provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.*

Under the EEOC regulations, a covered entity is defined as "an employer, employment agency, labor organization, or joint labor management committee." 29 C.F.R. § 1630.2(b) (1999). The definition of an employer is "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year . . . ." § 1630.2(e). An employee is defined as "an individual employed by an employer." § 1630.2(f).

from Title V of the Rehabilitation Act of 1973[23] ("Rehabilitation Act"), which continues to prohibit federal government agencies and private organizations that receive federal funding from discriminating against qualified individuals with handicaps.[24] Although Congress intended the discrimination analysis within the ADA to be similar to the analysis of the Rehabilitation Act, the ADA broadened the scope of the Rehabilitation Act by aiming to eliminate discrimination against individuals with disabilities in the private sector, in state and local governmental agencies, and in the Senate.[25]

Individuals who wish to bring an employment discrimination claim under the ADA must sufficiently demonstrate the following: the individual has a disability within the meaning of the ADA, the individual is qualified for the job with or without reasonable accommodation,[26] and the individual was discriminated against

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The ADA protects an individual if he or she is a qualified individual with a disability. 42 U.S.C. § 12111(8). A "'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.*

23. *See* 29 U.S.C. § 701 (West 2000). The ADA expressly requires its provisions to be interpreted in a way that "prevents imposition of inconsistent or conflicting standards for the same requirements" under the two statutes. 42 U.S.C. § 12117(b). Congress intended relevant case law developed under the Rehabilitation Act to be generally applicable to analogous inquiries under the ADA. *See* H.R. No. 101-485(I), at 50, *reprinted in* 1990 U.S.C.C.A.N. 267.

24. *See* Maureen R. Walsh, Note, *What Constitutes a "Disability" Under the Americans with Disabilities Act: Should Courts Consider Mitigating Measures?*, 55 WASH. & LEE L. REV. 917, 921 (1998) (stating that before the ADA was enacted, the Rehabilitation Act was the principal statutory shield for individuals with disabilities); *see also* Elizabeth A. Chang, *Who Should Have it Both Ways?: The Role of Mitigating Measures in an ADA Analysis*, 64 BROOK. L. REV. 1123 at 1125-26 (1998) (stating that the ADA was not intended to supersede the Rehabilitation Act, just expand its scope). "The Rehabilitation Act . . . prohibits recipients of federal financial assistance from discriminating against otherwise qualified handicapped persons solely by reason of their handicap." Timothy Stewart Bland, *The Determination of Disability Under the ADA: Should Mitigating Factors Such As Medications Be Considered?*, 35 IDAHO L. REV. 265, 273 (1998) (explaining the similarities between the Rehabilitation Act and the ADA, for example, "the definition of 'handicap' under the Rehabilitation Act parallels the ADA's definition of 'disability'").

The scope of the Rehabilitation Act, however, was too limited to effectively remedy discrimination against the numerous Americans with disabilities because the Rehabilitation Act only protected federal employees from discrimination. *See* Walsh, *supra*, at 921. Congress placed much of the language from the employment sections of the Rehabilitation Act into Title I of the ADA as a reaction to the Rehabilitation Act's limitations. *See supra* notes 22-35 and accompanying text.

25. *See* Tami A. Earnhart, Note, *Medicated Mental Impairments Under the ADA: Diagnosing the Problem, Prescribing the Solution*, 74 IND. L.J. 251, 253-54 (1988) (noting the ultimate need for the federal government to play a large part in promulgating and enforcing "consistent standards regarding the treatment of individuals with disabilities" because of the pervasive nature of "discrimination in major areas of life such as employment, housing, . . . education, transportation, communication, [and] recreation").

26. Milton v. Scrivner, Inc., 53 F.3d 1118, 1123 (10th Cir. 1995) (quoting White v. York Int'l Corp., 45 F.3d 357, 360-61 (10th Cir. 1995)). A plaintiff must describe the reasonable accommodation and demonstrate that he or she "is able to perform the essential functions of the job." *Id.*

in an employment decision because of the alleged disability.[27] To elucidate the threshold element of a prima facie case under Title I, Congress provided in the ADA a three-prong definition of the term "disability."[28] "The term 'disability' means, with respect to an individual-(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[29] The first prong of the disability definition covers actual disabilities, while the second and third prongs "include stereotypes, stigmas, and perceptions that cause people to be treated as if they have a covered disability."[30]

Within the definition of an actual disability, a physical or mental impairment is described as any physiological disorder which "affect[s] one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory . . . cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine."[31] Mental disorders such as mental and emotional illnesses, learning disabilities, and mental retardation are also protected by the Act.[32] Moreover, an impairment must substantially limit a major life activity to be classified as a disability.[33] These categories and definitions serve to narrow the coverage of the Act;[34] however, the statutory language is still vague because it appears to include an extraordinarily large group of people within its definition. Beyond this broadly constructed statutory language, the ADA lacks any indication as to what represents a disability.[35]

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27. Sutton v. United Air Lines, Inc., 130 F.3d 893, 897 (10th Cir. 1997) (holding that twin sisters with severe myopia were not disabled because the sisters were not significantly limited in a life activity by the alleged disability, thus, disqualifying them from asserting a valid claim under the ADA), *aff'd*, 527 U.S. 471 (1999). A discussion of the latter two prongs of a discrimination claim under the ADA is beyond the scope of this case note. The discussion will be limited to the first and most crucial prong.

28. 42 U.S.C. § 12102(2).

29. *Id.*

30. John Parry, OVERVIEW OF KEY FEDERAL DISABILITY LEGISLATION, IN REGULATION, LITIGATION AND DISPUTE RESOLUTION UNDER THE AMERICANS WITH DISABILITIES ACT: A PRACTITIONER'S GUIDE TO IMPLEMENTATION 3 (1996).

31. 29 C.F.R. § 1630.2(h)(1) (1998).

32. § 1630.2(h)(2).

33. § 1630.2(g)(1).

34. *See generally*, William Brent Shellhorse, *The Untenable Stricture: Pre-Mitigation Measurement Serves to Deny Protection Under the Americans with Disabilities Act*, 4 TEX. WESLEYAN L. REV. 177 (1998).

35. *See* Walsh, *supra* note 24, at 925.

B. Interpreting the ADA: The Equal Employment Opportunity Commission Regulations and Interpretive Guidelines

The language of the ADA does not expressly state whether a claimant qualifies as disabled under the statute.[36] One year after the enactment of the ADA, Congress vested in the EEOC the authority and responsibility to issue regulations to clarify any ambiguities in the ADA for courts and claimants.[37] Congress

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36. *See* Sheryl Rebecca Kamholz, *The Americans with Disabilities Act: Advocating Judicial Deference to the EEOC'S Mitigating Measures Guidelines*, 8 B.U. PUB. INT. L.J. 99, 100 (1998) (recognizing that the EEOC interpretive guidelines correctly interpret the ADA regarding the role of mitigating measures).

37. *See* Walsh, *supra* note 24, at 922-23 (directing EEOC to issue regulations for the ADA (citing 29 C.F.R. § 1630 (1998) and 42 U.S.C. § 12116 (West 2000)). The EEOC is the executive agency within the United States government charged with overseeing the enforcement of anti-discrimination laws in employment. Ronald D. Wenkart, Commentary, *Public Employment, Reasonable Accommodation and the ADA*, 133 EDUC. L. REP. 647, 651 (1999) (stating that Congress has the power to order such agencies to issue regulations to be considered by courts when courts interpret provisions in the United States Code).

Congress did not explicitly define the terms "physical or mental impairment," "substantially limits," or "major life activities," which appear within the ADA's definition of "disability." 42 U.S.C. § 12102(2). Therefore, the EEOC seized the responsibility to define a "physical or mental impairment" to include:

> Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or [a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h)(1)-(2) (1998). The regulations provide that a disability "substantially limits" a major life activity if the person with the disability is:

> Unable to perform a major life activity that the average person in the general population can perform; or [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

§ 1630.2(j)(1)(i)-(ii).

Whether an individual is "substantially limited" in a major life activity is determined considering "[t]he nature and severity of the impairment; [t]he duration or expected duration of the impairment; and [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." § 1630.2(j)(2)(i)-(iii). Major life activities include functions such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." § 1630.2(i). Regardless of the definitions the EEOC regulations supply, regulations promulgated by agency are only binding on courts if Congress has spoken to the precise question at issue by mandating the regulations, and the regulations constitute an acceptable construction of the statute in question. *See* Walsh, *supra* note 24, at 923-24 (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (stating that if authority to clarify a particular provision of the statute through regulation is expressly delegated, it is given deference unless it is "arbitrary, capricious or manifestly contrary to the statute")). Thus, the judicial branch of government decides whether Congress has delegated authority to an agency, but an agency's interpretation of the United States Code controls if it is within the scope of such

possesses the power to give administrative agencies, such as the EEOC, the duty to regulate its acts pursuant to the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[38] In *Chevron,* the Court provided that "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[39]

The EEOC took the Court's statement in *Chevron* literally and constructed interpretive guidelines in the appendix to the Code of Federal Regulations to further assist in interpreting the terms of the ADA.[40] Unlike the EEOC regulations, however, Congress did not request the EEOC to produce these guidelines.[41] In view of the fact that the EEOC interpretive guidelines are not congressionally mandated, the guidelines are binding on courts only to the extent that the courts unequivocally adopt the interpretation of the agency.[42] Nevertheless, the controlling weight of these interpretive guidelines in determining what constitutes a disability has been the source of intense debate in the federal court system since the announcement of the guidelines in 1991.[43] At the heart of this debate is the provision stating that the determination of whether an individual is "substantially limited in a major life activity must be made on a case-by-case basis without regard to mitigating measures."[44] According to the EEOC guidelines, in employment discrimination cases where a claimant's impairment is controlled by a mitigating measure, such individuals have disabilities under the ADA even if they do not experience, and have never

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delegation. *See* Jonathan Bridges, Note, *Mitigating Measures Under the Americans with Disabilities Act: Interpretation and Deference in the Judicial Process*, 74 NOTRE DAME L. REV. 1061, 1073-74 (1999) (noting that the courts must perform *Chevron's* two-step test for determining whether deference to a particular agency's interpretation of law is appropriate).

38. 467 U.S. 837 (1984).

39. *Chevron*, 467 U.S. at 843 (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)). If the policy by the EEOC is a reasonable accommodation of conflicting policies that were under the agency's care, a reviewing court should not disturb it unless it appears from a reading of the statute or the legislative history that the accommodation is not one that Congress would have sanctioned. *See id.* at 845 (citing United States v. Shimer, 367 U.S. 374, 382-83 (1961)).

40. *See* Erica Worth Harris, *Controlled Impairments under the Americans with Disabilities Act: A Search for the Meaning of "Disability,"* 73 WASH. L. REV. 575, 579 (1998) (citing the EEOC interpretive guidelines at 29 C.F.R. app. § 1630 (1997)).

41. *See Walsh*, *supra* note 24, at 923-24.

42. *See id.*

43. *See id.*, at 932; *see generally* Bridges, *supra* note 37 (summarizing the disparate views of many federal court cases throughout, some adherent in their analysis to the interpretive guidelines, others choosing to ignore the guidelines); *see also* Elizabeth A. Crawford, *The Courts' Interpretations of a Disability Under the Americans with Disabilities Act: Are They Keeping Our Promise to the Disabled?*, 35 HOUS. L. REV. 1207, 1218 (1998) (noting that the Interpretive Guidance constitutes a body of experience and informed judgment, which courts may use for guidance).

44. Wenkart, *supra* note 37, at 651 (stating that mitigating measures such as medicines and prosthetic devices should not be considered when determining the definition of disability). For a complete discussion of mitigating measures see *infra* notes 78-148 and accompanying text.

experienced, any limitation from their condition.[45] Facing this issue in cases involving vision impairment,[46] diabetes,[47] hypertension,[48] and adult Still's disease,[49] the circuit courts have split, some deferring to the EEOC interpretive guidelines, others finding the EEOC interpretation converse to the plain meaning of the term disability in the statute.

C. Interpretive Guidelines Versus Plain Meaning: A Multitude of Cases Join the Mitigating Measures Debate

The first analysis of the issue of mitigating measures and their effect on the definition of disability under the ADA came from the Seventh Circuit in *Roth v. Lutheran General Hospital*.[50] The *Roth* court found that the Plaintiff's vision impairment had to be assessed without regard to mitigating measures.[51] Two years after *Roth*, the Sixth Circuit expanded upon the mitigating measures issue in

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45. *See* Bridges, *supra* note 37, at 1061 n.8 ("A 'controlled impairment' is one that would substantially limit a major life activity if untreated, but that does not limit any such activity when treated with some mitigating measure . . . ."); *see also* Arthur F. Silbergeld and Rowdy B. Meeks, *Federal Appellate Courts Are Split on How to Treat Plaintiffs with Chronic Health Conditions that Can Be Mitigated, Under the Americans with Disabilities Act*, 20 NAT'L L.J., MAY 4, 1998, at B4 (noting that "[t]he question employers still face is whether disability laws cover employees who use mitigating measures to control such conditions").

46. *See* Roth v. Lutheran Gen. Hosp., 57 F.3d 1446 (7th Cir. 1995); *see also infra* notes 50-51 and accompanying text. *But see* Sutton v. United Air Lines, Inc., 130 F.3d 893, 897 (10th Cir. 1997), *aff'd*, 527 U.S. 471 (1999).

47. *See* Gilday v. Mecosta County, 124 F.3d 760 (6th Cir. 1997); *see also infra* notes 52-53 and accompanying text; Arnold v. United Parcel Serv., Inc., 136 F.3d 854 (1st Cir. 1998); *see infra* note 54 and accompanying text.

48. *See* Murphy v. United Parcel Serv. Inc., 946 F. Supp. 872, 873 (D. Kan. 1996), *aff'd*, 527 U.S. 516 (1999); *see also infra* note 102 and accompanying text.

49. *See* Jones, et al., *Disabilities Must Be Assessed in Unmedicated State*, 11 LA. EMPLOYMENT L. LETTER 2, at 1 (1999) (citing Washington v. HCA Health Servs. of Tex., Inc., 152 F.3d 464 (5th Cir. 1998), *vacated*, 527 U.S. 1032 (1999)); *see also supra* note 37 and accompanying text.

50. *See Roth*, 57 F.3d at 1446. Roth applied to become a resident at Lutheran General Hospital. *Id.* at 1450. He was denied the job after the extensive interviewing process; Roth sued Lutheran General for discriminating against an individual with a disability under the ADA. *Id.* at 1452. Roth did not meet his burden of establishing that he was disabled within the meaning of the statute. *Id.* at 1453; see *also supra* note 28 and accompanying text. This burden was not met because Roth adapted well to daily activities and possessed the visual capacity to function well in most medical specialties. *Id.* at 1455.

The *Roth* court did not take into consideration mitigating measures, deferring automatically to the EEOC interpretive guidelines. *Id.* at 1454 (stating that "not every impairment that affects an individual's major life activities is a substantially limiting impairment") (citing 29 C.F.R. § 1630.2(j)(1)(ii)(1999)). Due to the foregoing reasons, Roth's condition was not found to be substantially limiting, even though Roth was impaired. *Id.* at 1458.

51. *Id.* at 1455-60.

Gilday v. Mecosta County.[52] In *Gilday*, the court determined that deference should be given to the EEOC's interpretation of the statute.[53] Subsequent decisions by the First Circuit[54] and the Fifth Circuit[55] opined that the EEOC's interpretation was consistent with the legislative history and purpose of the ADA.[56]

The mitigating measures debate intensified in *Sutton v. United Airlines, Inc.*,[57] where the aforementioned findings that disability determinations are to be

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52. 124 F.3d 760 (6th Cir. 1997) (concluding that the EEOC guidelines correctly interpret the ADA).

53. *Id.* at 763. The court in *Gilday* looked to the EEOC guidelines because the ADA is not sufficiently clear in its definition of disability. *See id.*

In *Gilday*, Gilday was forced to control his diabetic condition with the use of insulin, otherwise, Gilday became immediately frustrated and irritable. *Id.* at 761. Unlike Sutton and Hinton, who were simply not hired because they did not meet United Air Lines qualifications for a pilot, Gilday was working for Mecosta County and was then fired from his position. *Id.* The Sixth Circuit considered whether Gilday presented sufficient evidence of a disability to avoid summary judgment on his claim. *Id.* Discussing the ADA's definition of disability, the *Gilday* court decided that the EEOC is consistent with the text and the purpose of the ADA, and that the legislative history of the ADA strongly supports this reading. *Id.* at 763-65.

However, Judge Cornelia Kennedy's opinion in *Gilday* maintained that the statutory language of the ADA is unambiguous and cannot stand to be burdened by a broad agency interpretation. *Id.* at 766-68 (Kennedy, J., concurring in part and dissenting in part). Judge Kennedy's main propositions for why the statute should be afforded deference were the following: the EEOC's position on mitigating measures appears not in the regulations, but in an appendix to the regulations; the EEOC conflicts with the statute itself; and the statute's plain meaning is unambiguous and should be read as such. *Id.* at 766-67 (Kennedy, J., concurring in part and dissenting in part). Judge Kennedy admitted that the ADA's legislative history lended support to the EEOC's interpretive guidelines, however, she qualified that argument as one that was subsumed by the plain meaning of the statute's text. *Id.* at 767 (Kennedy, J., concurring in part and dissenting in part) (quoting Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994)) ("[W]e do not resort to legislative history to cloud a statutory text that is clear.") Judge Kennedy also stated that the legislative history might be misleading given that Congress did not intend to protect all individuals whose life activities would hypothetically be substantially limited were they to stop taking medication. *Id.* (Kennedy, J., concurring in part and dissenting in part).

54. *See* Arnold v. United Parcel Serv., Inc., 136 F.3d 854 (1st Cir. 1998). In *Arnold*, the court had to determine if Arnold was disabled under the ADA, and, if he was, whether the United Parcel Service denied him employment because of his disability. *Id.* at 858-59. Arnold suffered from insulin-dependent diabetes, which he controlled through daily injections of insulin. *Id.* at 856. The court noted that a reasonable person could interpret the plain statutory language of the ADA to require an evaluation either before or after ameliorative treatment. *Id.* at 859. This ambiguity caused the court to look to the legislative history of the ADA. *Id.* The difference in allowing the legislative history to control the outcome of *Arnold* is that "Congress spoke directly to the medical condition at issue in this case: 'persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity' are considered to have an actual disability, 'even if the effects of the impairment are controlled by medication.'" *Id.* (quoting H.R. REP. NO. 101-485, pt. 2, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334). The court explained that the holding in this case was limited to the specific condition diabetes milletus. *See id.* at 866.

55. *See* Jones, et al., *supra* note 49, at 1 (citing Washington v. HCA Health Servs. of Tex., Inc., 152 F.3d 464 (5th Cir. 1998), *vacated,* 527 U.S. 1032 (1999)). After Washington started work as an accountant at HCA Health Services, he was diagnosed with adult Still's disease, which he controlled by taking medication four times daily. *Id.* The issue before the court was whether an individual claiming a disability should be assessed in his medicated or unmedicated state. *Id.* Looking to the legislative history, the court declined to overrule the EEOC. *Id.* at 2 (concluding, nonetheless, that it is more reasonable to take mitigating measures into account).

56. *See supra* notes 15-35 and accompanying text.

57. 130 F.3d 893 (10th Cir. 1997), *aff'd*, 527 U.S. 471 (1999).

evaluated without regard to mitigating measures were rejected. In the opinion, the Tenth Circuit held the EEOC findings to be in direct conflict with the actual language of the ADA.[58] The court argued that the Plaintiffs' uncorrected vision only hypothetically limited the major life activity of seeing because the Plaintiffs' corrected vision allowed them to function similarly to individuals without impairment.[59] Thus, the Plaintiffs were not considered disabled in light of the statutory language of the ADA.[60]

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58. *See id.* at 893; *see also supra* notes 28-35 and accompanying text. The ADA states that a disability must be defined as a "physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A) (West 2000). The Plaintiffs argued that, according to the EEOC's interpretive guidelines, the court should evaluate their vision in its uncorrected state. *Sutton*, 130 F.3d at 896. With the aid of such an evaluation, the Plaintiffs argued that they had a disability under the ADA and were entitled to the ADA's protection. *Id.* Taking the definition of impairment from the *Roth* court above, the court in *Sutton* found the Plaintiffs established that their severe myopia was a physical impairment within the meaning of the ADA. *Id.* at 899-900 (quoting Roth v. Lutheran Gen. Hosp., 57 F.3d 1446, 1454 (7th Cir. 1995))("If the underlying disorder or condition makes worse or diminishes in a material respect any of the enumerated body systems of the individual, then it should be considered an 'impairment,' regardless of whether the individual compensates for this worsening or diminishment by corrective measures.").

The Plaintiffs in *Sutton* utilized corrective measures to mitigate their severe myopia. *Id.* at 895. Because the court considered this mitigating measure, the court reasoned that there was no substantial limitation on a major life activity, and the Plaintiffs were not disabled within the meaning of the ADA. *Id.* at 902-03. The court further stated that if a court does not consider mitigating measures in the assessment of the impairment, it cannot truly evaluate the actual impact of the disability. *Id.* at 903; *see generally* Katherine A. Stanton and Thomas A. Caswell, *The Americans with Disabilities Act as it Relates to Employment in Aviation Industry: Navigating Through Uncontrolled Airspace*, 64 J. AIR L. & COM. 459 (1999). *See Sutton*, 130 F.3d at 902-03 (stating that "while Plaintiffs' uncorrected vision would undoubtedly 'substantially limit' their major life activity of seeing, this is a hypothetical situation"). "Plaintiffs cannot have it both ways." *Id.* at 903. The court stated that the Plaintiffs were either disabled because their uncorrected vision substantially limited their major life activity of seeing, and they were not qualified individuals for a pilot position with United, or they were qualified for the job because their vision was correctable and did not substantially limit the major life activity of seeing. *Id.*; *see also* Murphy v. United Parcel Serv., Inc., 946 F. Supp. 872, 878 (D. Kan. 1996) (stating that defendant was trying to have it both ways by claiming he was disabled due to hypertension, but that it was controlled so that he could adequately perform the job), *aff'd*, 527 U.S. 516 (1999).

59. *See Sutton*, 130 F.3d at 902-03 (stating that "while Plaintiffs' uncorrected vision would undoubtedly 'substantially limit' their major life activity of seeing, this is a hypothetical situation"). "Plaintiffs cannot have it both ways." *Id.* at 903. The court stated that the Plaintiffs were either disabled because their uncorrected vision substantially limited their major life activity of seeing, and they were not qualified individuals for a pilot position with United, or they were qualified for the job because their vision was correctable and did not substantially limit the major life activity of seeing. *Id.*; *see also* Murphy v. United Parcel Serv., Inc., 946 F. Supp. 872, 878 (D. Kan. 1996) (stating that defendant was trying to have it both ways by claiming he was disabled due to hypertension, but that it was controlled so that he could adequately perform the job), *aff'd*, 527 U.S. 516 (1999).

60. *See Sutton*, 130 F.3d at 906. In *Sutton*, the Tenth Circuit also dealt with the third prong of the disability definition by questioning whether United regarded the Plaintiffs as disabled. *Id.* at 903. For the definition of disability under the ADA, see 47 U.S.C. § 225(c) (West 2000).The EEOC regulations provide three ways an individual is "regarded as" being disabled: the individual "[h]as a physical or mental

The Supreme Court's decision in *Sutton* ends the uncertainty that had plagued the lower courts since the inception of the ADA.[61] By aligning the disparate methods of statutory interpretation with recent case law, one of the original purposes of the ADA–"to provide consistent, enforceable standards on discrimination against individuals with disabilities"–becomes a reality.[62]

III. FACTUAL AND PROCEDURAL BACKGROUND

A. *Facts*

In 1992, twin sisters, Karen Sutton and Kimberly Hinton, applied for commercial airline pilot positions with United Air Lines, Inc. ("United").[63] Both Sutton and Hinton met United's basic pilot employment requirements and, after submitting their applications for employment, were invited to interview with United.[64] During their interviews, Sutton and Hinton were informed that they had

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impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;" the individual "[h]as a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment;" or the individual "[h]as none of the impairments defined in [29 C.F.R. § 1630.2(h)(1)-(2) (1999)], but is treated by a covered entity as having a substantially limiting impairment. 29 C.F.R. § 1630.2(l)(1)-(3) (2000). "Thus, [a] person is 'regarded as' having an impairment that substantially limits the person's major life activities when other people treat that person as having a substantially limiting impairment . . . ." *Sutton*, 130 F.3d at 903 (citing MacDonald v. Delta Air Lines, Inc., 94 F.3d 1437, 1444 (10th Cir. 1996) (citations omitted)).

The court observed that United did not regard the Plaintiffs as having an impairment that substantially limited a major life activity because the Plaintiffs only showed that their impairment prevented them from working a single job, not a class of jobs. *Sutton*, 130 F.3d at 904-05. For an individual to demonstrate that an impairment substantially limits the major life activity of working, an individual must show "significant[] restrict[ion] in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i).

A "class of jobs" is defined as "[A] job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment." 29 C.F.R. § 1630.2(j)(3)(ii)(B). The definition of a "broad range of jobs in various classes" is, in pertinent part, "[t]he job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment." 29 C.F.R. § 1630.2(j)(3)(ii)(C). Nevertheless, "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i). Thus, the Plaintiffs in *Sutton* were not specifically precluded from a class of jobs. *Sutton*, 130 F.3d at 904.

61. *See* Sutton v. United Airlines, Inc., 527 U.S. 471 (1999) (holding that mitigating measures should be considered in determining whether an individual is disabled under the ADA).

62. 42 U.S.C. § 12101(b)(2); *see also Sutton*, 527 U.S. at 471.

63. *Sutton*, 130 F.3d at 895. At that time, Plaintiffs were commercial airline pilots for regional commuter airlines. *Id.*

64. *Sutton*, 527 U.S. at 475-76. The Plaintiffs were eligible for employment at United because they met United's "basic age, education, experience, and FAA certification qualifications." *Id.* The Plaintiffs were also invited by United to participate in several flight simulator tests. *See id.* at 476.

been invited mistakenly because Sutton and Hinton did not meet United's minimum uncorrected visual acuity requirement for pilot positions.[65]

Sutton and Hinton both suffer from severe myopia; their uncorrected vision is 20/200 in the right eye, and 20/400 in the left eye.[66] With the use of corrective glasses or contact lenses, however, each has vision that is 20/20 or better.[67] Due to their failure to meet United's vision requirement, neither Sutton nor Hinton was offered a pilot position.[68]

B. Opinions of the Lower Courts

Relying on the EEOC's interpretation of ADA Title I regulations, Sutton and Hinton responded to United's rejection by filing a charge of disability discrimination with the EEOC under the ADA.[69] Sutton and Hinton alleged that United discriminated against them in United's hiring process because of Sutton and Hinton's disability, or, in the alternative, that United regarded them as having a disability.[70]

The United States District Court for the District of Colorado dismissed Sutton and Hinton's claims, stating that Sutton and Hinton had failed to state a claim that they were disabled under the ADA because Sutton and Hinton's impaired vision did not substantially limit them in any major life activity.[71] In the decision, the court refused to expand disability protection beyond the scope of the ADA to include individuals, like Sutton and Hinton, whose vision is wholly correctable.[72]

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65. *See id.* United's minimum visual acuity requirement was 20/100 or better in both eyes. *See id.*; *see also Sutton*, 130 F.3d at 895 (explaining that United's pilot positions are considered global airline pilot positions generally in the commercial airline industry).

66. *Sutton*, 130 F.3d at 895 (explaining that severe myopia is tantamount to acute nearsightedness).

67. *Id.*; *see also Sutton*, 527 U.S. at 475 (stating that each Plaintiff cannot see to conduct many daily activities such as driving, watching television, and shopping).

68. *Sutton*, 527 U.S. at 476.

69. *Id.*

70. *Id.*; *see also Sutton*, 130 F.3d at 895. Sutton and Hinton specifically alleged that due to their severe myopia they actually have a substantially limiting impairment or are regarded as having such an impairment. *Sutton*, 527 U.S. at 476; *see also Sutton*, 130 F.3d at 895.

71. Sutton v. United Airlines, Inc., Civ. A. No. 96-S-121, 1996 WL 588917, *1, *6 (D. Colo., Aug. 28, 1996). Sutton and Hinton claimed no restrictions on their life activities other than their inability to gain employment as airline pilots for United. *Id.* at *3. They did not allege any medical restrictions either. *See id.* "Plaintiffs do not allege any activity that they are unable to perform that the average person in the general population can perform, nor do they state that they suffer from any significant restrictions in any activities as compared to the average person." *Id.* (explaining that with the assistance of corrective measures Plaintiffs were able to function identically to individuals without a similar impairment).

72. *Sutton*, 130 F.3d at 896 (stating that if this court were to expand the scope of the ADA the term disabled would become meaningless due to the sizeable number of individuals with serious visual impairments).

The court also refused to rule that United regarded Sutton and Hinton as being disabled because "[a]n employer's belief that an employee is unable to perform one task with an adequate safety margin does not establish per se that the employer regards the employee as having a substantial limitation on the employee's ability to work in general."[73]

Sutton and Hinton appealed, offering two theories for recovery: "first, that they were qualified applicants with a disability that substantially limited the major life activity of seeing; and second, that United regarded them as having an impairment that substantially limited the major life activity of working."[74]

The United States Court of Appeals for the Tenth Circuit affirmed the district court's holding in a unanimous decision, similarly relying on a narrow interpretation of the ADA.[75] The court chose to disregard the relevant portion of the EEOC Interpretive Guidance as inconsistent with the statutory language of the ADA and held that mitigating measures should be considered when determining whether a disability substantially limits a major life activity.[76]

Accordingly, the United States Supreme Court granted certiorari to resolve the issue surrounding whether mitigating measures should be taken into account when judging whether an individual is disabled under the ADA.[77]

IV. ANALYSIS OF THE CASE

A. The Majority Opinion

Justice O'Connor, writing for the Court,[78] commenced her opinion by

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73. *Sutton*, 1996 WL 588917, at *5.

74. *Statutory Interpretation—Americans with Disabilities Act—Tenth Circuit Holds that Courts Should Consider Mitigating Measures in Evaluating Disability—Sutton v. United Air Lines, Inc., 130 F.3d 893 (10th Cir. 1997)*, 111 HARV. L. REV. 2456, 2457 (1998) (noting that for appeal Plaintiffs alleged they were substantially limited in the major life activity of working, not seeing as they had alleged to the district court).

75. *Sutton*, 130 F.3d at 906.

76. *Id.* at 902-03.

77. *Sutton*, 527 U.S. at 477. Due to the similar issues in the following three cases, the Supreme Court chose to review Sutton v United Air Lines, Inc., 527 U.S. 471 (1999), Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999), and Albertson's v. Kirkingburg, 527 U.S. 555 (1999), on the same date.

78. *Sutton*, 527 U.S. at 471. Justices O'Connor, Rehnquist, Scalia, Kennedy, Souter, Thomas, and Ginsburg joined in the majority opinion. *Id.* Justice Ginsburg filed an opinion concurring in judgment. *Id.* at 494 (Ginsburg, J., concurring). Justice Stevens authored a dissenting opinion, joined by Justice Breyer. *Id.* at 495 (Stevens, J., dissenting). Justice Breyer also authored a separate dissenting opinion. *Id.* at 513 (Breyer, J., dissenting).Justice O'Connor first articulated that the EEOC regulations were not delegated the authority to interpret the term "disability," therefore, the degree of deference afforded to the regulations was not necessary to determine the case. *Id.* at 479-80. The EEOC was delegated by Congress the ability to issue regulations governing Title I of the ADA, 42 U.S.C. §§ 12111-12117 (West 2000), pursuant to § 12116, however, no agency was given authority to issue regulations defining provisions included in §§ 12101-12102. Justice O'Connor also observed that the amount of deference given to the EEOC's interpretive guidelines, although the guidelines persuasive force was in dispute, was not integral

identifying the first issue before the Court as "whether [Petitioners] have alleged that they possess a physical impairment that substantially limits them in one or more major life activities."[79] Because the Petitioners were not actually disabled within the meaning of the ADA if mitigating measures were taken into account, the Court narrowed the discussion of the first issue to whether a disability is to be determined with or without reference to mitigating measures.[80] Having established this issue, the Court determined that the positive and negative effects of mitigating measures on a physical or mental impairment "must be taken into account when judging whether [an individual] is 'substantially limited' in a major life activity and thus 'disabled' under the [ADA]."[81]

The Court first turned its attention to the phrase "substantially limits," noting that the phrase is written in the present indicative verb form in the ADA statutory provision, thus, requiring an individual to be presently substantially limited to prove a disability.[82] In other words, to be afforded disability protection within the ADA, an individual cannot have an impairment that is corrected by mitigating measures because the impairment would only hypothetically or potentially substantially limit a major life activity.[83] Nonetheless, the Court articulated that a claimant whose impairment is corrected by mitigating measures is still categorized as having an impairment.[84] However, if "the impairment is corrected, it does not 'substantially limit' a major life activity."[85]

Next, the Court dismissed the EEOC agency guidelines as divergent from the plain meaning of the ADA because the guidelines cause courts to speculate about an individual's possible disability rather than make an individualized inquiry into

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to the case. *Sutton*, 527 U.S. at 479-80; *see also* Walsh, *supra* note 24 and accompanying text.

79. *Id.* at 481 (citing § 12102(2)(A) (stating the issue technically as "whether Petitioners have stated a claim under subsection (A) of the disability definition"). The parties referred to as "Petitioners" are Karen Sutton and Kimberly Hinton, formerly referred to as "Plaintiffs" in their prior case. *See Sutton*, 527 U.S. at 475; *see also* Sutton v. United Air Lines, Inc., 130 F.3d 893 (10th Cir. 1997), *aff'd*, 527 U.S. 471 (1999).

80. *Sutton*, 527 U.S. at 480-81. Petitioners alleged that with corrective measures their vision was 20/20 or better. *Id.* at 475.

81. *Id.* at 482. The majority in *Sutton* did not consider the ADA's legislative history. *See id.* The dissent considered the ADA's legislative history to bolster the proposition that individuals should be examined in their uncorrected state. *See id.* at 499-500 (Stevens, J., dissenting).

82. *Id.* at 482.

83. *See id.* at 482-83. "A 'disability' exists only where an impairment 'substantially limits' a major life activity, not where it 'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken." *Id.* at 482.

84. *Id.* at 483.

85. *Id.* In *Bragdon v. Abbot*, 524 U.S. 624 (1998), *cert. denied*, 526 U.S. 1131 (1999), the Court concluded that whether a person has a disability under the ADA is an individualized inquiry.

whether an individual has a tangible disability.[86] Contesting the agency guidelines, the Court reasoned that the guidelines create an unfavorable, self-defeating system where people are not treated as individuals, but instead, classified as members of a group or class of people with similar impairments.[87]

The Court's final argument supporting the consideration of mitigating measures explained that Congress, in drafting the ADA, did not intend the ADA to protect all individuals whose unmitigated impairments amount to disabilities.[88] The text of the ADA lists the number of Americans estimated by Congress as disabled at 43,000,000,[89] and the Court concluded that the number enumerated by Congress was significantly inconsistent with the over-inclusive definition of disability for which Sutton and Hinton argued.[90] The Court also cited to a different source, which took a nonfunctional approach to defining disability and states that 100,000,000 Americans have vision impairments, another 50,000,000 have high blood pressure, and more than 28,000,000 Americans have impaired hearing.[91] Considering the exceedingly high number of impaired Americans, the Court deduced that protecting all individuals with corrected impairments under the ADA would extend the protected class beyond the intent of Congress.[92]

The Court again relied on a plain reading of the statutory provisions of the

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86. *Sutton*, 527 U.S. at 483. As an illustration of this principal, the Court stated that, under the aforementioned view, courts would certainly find all diabetics to be disabled because if the diabetic failed to administer insulin, they would be substantially limited in a major life activity. *See id.* However, a diabetic who is not impaired in his or her daily functions would be considered disabled merely because he or she has the malady. *See id.*

87. *Id.* at 483-84. The guidelines approach also forbids courts to consider negative side effects caused by the use of mitigating measures when determining whether a disability exists. *See id.* at 484 (explaining that the implications would be great if negative side effects cannot be considered because this result would not be consistent with the individualized approach of the ADA); *see also infra* notes 206-211 and accompanying text.

88. *See Sutton*, 527 U.S. at 484.

89. *Id.* (citing 42 U.S.C. § 12101(a)(1) (2000)) ("Congress found 'that some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older . . . .'").

90. *Id.*

91. *Id.* at 487 (citing NATIONAL ADVISORY EYE COUNCIL, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, VISION RESEARCH—A NATIONAL PLAN: 1999-2003, at 7 (1998) (finding that "more than 100 million people need corrective lenses to see properly") (citing Tindall, *Stalking a Silent Killer; Hypertension*, BUS. & HEALTH 37 (1998) (finding that 50 million Americans suffer from hypertension))).

92. *Id.* The Court reasoned that Congress would have included a higher number in its pre-ADA findings had it wanted to protect a greater class of individuals. *Id.* That Congress did not do so evidences that the scope of the ADA is limited to individuals whose impairments are not ameliorated by corrective measures. *Id.*

At oral arguments in April of 1999, the Court expressed frustration at having to interpret the term disability. *See Supreme Court Limits Definitions of Disabilities*, LIABILITY WEEK (June 28, 1999) [hereinafter LIABILITY WEEK]. Justice Scalia noted with sarcasm that "it's sort of nice that more than half of all Americans can claim the benefits of the Americans with Disabilities Act," also stating "that he couldn't hold his own job without glasses." *Id.* Scalia duly stated that "[t]he only limitation in putting on eyeglasses is putting on eyeglasses," thus refuting the proposition that Sutton and Hinton's extreme myopia might be substantially limiting and constitute a disability. *Id.*

ADA, taking literally the data compiled by Congress when construing the protected class of disabled individuals under the ADA.[93] The specific origin of the exact number of disabled Americans in Congress' findings was not a matter of great importance to the majority.[94] Instead, the Court found support in the findings of the drafter of the original ADA bill introduced in Congress in 1988.[95] These findings reported a similar, but even smaller, figure in contrast to the findings of Congress in the final version of the ADA: 36,000,000 Americans suffer from a substantially limiting disability.[96]

Responding to the Court's principal dissent, the majority renounced Justice Stevens' contention that those individuals who have prosthetic limbs, or use mitigating measures to control epilepsy or high blood pressure, would be excluded from protection.[97] Under the majority's reading of the ADA, as long as the particular individual is substantially limited in a major life activity, notwithstanding the use of mitigating devices, that individual is disabled.[98] The majority also allowed that an impaired person whose impairment is cured by the use of mitigating measures still may be "regarded as" disabled by an employer and thus protected by the third prong of the definition of disability.[99] "The use or nonuse of a corrective device does not [factor into the determination] of whether an individual is disabled; that determination depends on whether the limitations

93. *Sutton*, 527 U.S. at 483-84.

94. *See id.*

95. *See id.* at 484-85. The Court cited the findings of Robert L. Burgdorf, Jr., discussed in a Law Review article Burgdorf authored. *Id.* (citing Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV.C.R.-C.L.L. REV. 413, 434 n.117 (1991)). The Court was staunch in its adherence to the plain meaning of the statute, and, accordingly, elects to direct its focus away from Congressional intent based on Legislative Hearings on the ADA. This citation of Burgdorf's article as the seed of the Congressional disability number of 43,000,000, illustrates the majority's willingness to follow a preliminary, and seemingly magical, finding of fact by the original drafter of the ADA, rather than bow to a more expansive reading of Congressional intent, which, arguably, is evidenced by the Legislative Hearings concerning the ADA.
See id. at 485.

96. *See id.* at 484-85.

97. *See id.* at 488 (suggesting the use of mitigating measures does not, by itself, relieve an individual's disability). *See id.* at 496, 507-08 (Stevens, J., dissenting) (illustrating that a diabetic who lapses into a coma without the assistance of insulin would be substantially limited because the individual cannot perform major life activities without the assistance of medication).

98. *Id.* at 487-88. By this reasoning the Court ignored the 50,000,000 Americans who suffer from hypertension. *See id.* at 487. The Court did not fully admit that high blood pressure, mitigated or unmitigated, would be substantially limiting. *See id.* at 488. However, by refusing the dissent's suggestion that viewing individuals in their corrected state would exclude those individuals from protection, the majority left room for error. *See id.* at 487-88. The number of disabled individuals in America could be much larger than Congress' ADA figure. *See id.* at 487.

99. *Id.* at 488.

[particular to the impaired individual] are, in fact, substantially limiting."[100] In sum, the Court determined that the proper statutory reading, pertaining to whether an individual has a disability under the ADA, is made with reference to mitigating measures.[101]

The Court next addressed whether United's vision requirement meant that United mistakenly believed that Petitioners' physical impairments substantially limited them in the major life activity of working.[102] The Court noted that the mere inclusion of work as a major life activity was conceptually dubious because of the circular reasoning involved in the analysis.[103] Instead, Sutton and Hinton should have alleged that they were regarded as disabled under the third prong of the disability definition by stating that they were substantially limited in the major life activity of seeing.[104] Sutton and Hinton, nonetheless, supported their claim by alleging that United's vision requirement was solely based on myth and

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100. *Id.*

101. *Id.*

102. *Id.* at 489-90. Under the statutory definition of the third prong, it is necessary that a covered entity have misconceptions about the individual. *Id.* at 489. The covered entity "must believe either that [an individual] has a substantially limiting impairment that [they really do] not have, or that [an individual] has a substantially limiting impairment when [such] impairment is not so limiting." *Id.* (citing 29 C.F.R. § 1630.2(l) (1999) (explaining that the "regarded as" prong protects individuals from job rejection due to unfounded employer fears associated with disabilities)).Similar to the *Sutton* decision, the Court debated the issue of mitigating measures, as well as the issue pertinent to the "regarded as" prong of the disability statute in Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999).

In *Murphy*, the United Parcel Service fired Murphy because his high blood pressure level was in violation of the Department of Transportation ("DOT") regulation for commercial drivers. *Id.* at 518. Murphy had been on medication for many years. *Id.* at 519. Unmedicated, his blood pressure was 250/160, far . The first issue in *Murphy* was whether the determination of Murphy's disability was to be made with reference to mitigating measures. *Id.* at 521. Using the same reasoning the Court employed in *Sutton*, the *Murphy* Court found that the use of mitigating measures should be examined. *Id.*

The Court also resolved the second issue in its opinion in *Sutton*. *Id.* at 521-22. The Court stated that the United Parcel Service did not regard Murphy as substantially limited in the major life activity of working because Murphy was precluded only from a particular job (a UPS mechanic), not a class of jobs. *Id.* at 522. Murphy had many jobs available to him utilizing his skills as a driver. *Id.* at 523-24.

As in *Sutton*, Justice Breyer joined Justice Stevens in dissenting to the majority's holding. *Id.* at 525 (Stevens, J., dissenting). Justice Stevens observed that *Murphy* was unlike *Sutton* in that Congress specifically intended severe hypertension to be covered under the ADA, and, consequently, *Murphy* found a disability under the ADA. *Id.* (Stevens, J., dissenting). Further, Justice Stevens mentioned that the case should be remanded because the lower court did not address an integral issue: whether Murphy was qualified or "whether he could perform the essential job functions." *Id.* (Stevens, J., dissenting).

103. *Sutton*, 527 U.S. at 492. "[I]t seems 'to argue in a circle to say that if one is excluded . . . by reason of [an impairment, from working with others] . . . then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap.'" *Id.* (quoting Tr. Of Oral Arg. In School Bd. Of Nassau County v. Arline, O.T. 1986, No. 85-1277, P.15 (argument of Solicitor General)). The EEOC has also been reluctant to define major life activities to include working. *See id.* In fact, the EEOC has suggested that working be considered only as a last resort "if an individual is not substantially limited with respect to *any other* major life activity." *Id.* (citing 29 C.F.R. pt. 1630, App. § 1630.2(j) (1998) (alteration in original)).

104. *Id.* at 490. The Court believed that because Sutton and Hinton were physically impaired, it was erroneous of them to assert that their myopia substantially limited them in the major life activity of working. *See id.*

stereotype.[105] The Court stressed that an employer is allowed the autonomy to prefer some physical characteristics, such as height and build, for particular jobs as long as employers do not base employment decisions on physical characteristics that are substantially limiting.[106]

Sutton and Hinton further alleged that United's vision requirement for the positions of "global airline pilot" substantially limited them in the life activity of working because Sutton and Hinton were precluded from a class of employment.[107] The Court surmised that the position of global airline pilot was simply a single position for which they did not qualify.[108] Therefore, other employment in the same class as the position, such as regional pilot and pilot instructor, was available to Sutton and Hinton.[109]

Finally, the Court added that imputing the hypothetical adoption of vision requirements similar to United's to other airline companies would not affect the Court's holding.[110] Sutton and Hinton failed to sufficiently demonstrate that

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105. *Id.*

106. *Id.* at 490-91; *see also* Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999) (holding that "individuals with monocular vision are not per se 'disabled' within the meaning of the ADA").

The *Sutton* Court looked to the EEOC regulations definition of "substantially limits" and decided that the Petitioners were not significantly restricted in the ability to perform a "class of jobs" or a "broad range of jobs" under the aforesaid definition because Petitioners merely alleged that United regarded their vision as precluding them from the single job of global airline pilot. *Sutton*, 527 U.S. at 491-93. The Court rightly deferred to the EEOC definitions to explain the major life activity of working because there is no definition anywhere else in the ADA. *See id.* at 491-92. However, the majority previously noted the Court's apathy toward giving credence to the EEOC. *See id.* at 475-82. In *Albertson's*, Kirkingburg applied for a commercial truckdriving job with Albertson's. *Albertson's*, 527 U.S. at 558. Kirkingburg was afflicted with a vision condition, and although he had more than a decade of driving experience and performed favorably during Albertson's road test, he was not certifiable under the DOT's standards. *Id.* at 558-60.

The main issue for the Supreme Court in Albertson's was whether, under the ADA, "an employer who requires as a job qualification that an employee meet a[] . . . federal safety regulation must justify enforcing the regulation solely because its standard may be waived in an individual case." *Id.* at 558. First, the Court held that the monocular vision did not substantially limit Kirkingburg because he had adjusted completely to his vision impairment. *Id.* at 565-66. The Court cited its decision in *Sutton* for the proposition that mitigating measures must be taken into account to determine whether or not an individual has a disability within the purview of the ADA. *Id.*

Similarly, the Court found that Albertson's could screen out the unqualified applicants at will, unless they were screened out for their substantially limiting impairments. *See id.* at 568. Unlike the *Sutton* case, Albertson's relied on DOT regulations prescribed by the government rather than employment qualifications required by a private employer. *See id.* at 570.

107. *See Sutton*, 527 U.S. at 490.

108. *See id.* at 493. "The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i).

109. *See* Sutton, 527 U.S. at 493.

110. *Id.* at 493-94. Sutton and Hinton argued that if the Court were to assume that a large number of airlines have vision requirements similar to United's, Sutton and Hinton "would be substantially limited in the major life activity of working." *Id.* at 493 (citing Brief for Petitioners 44-45). The Court dismissed this

United's vision requirement reflected a belief that United regarded them as disabled.[111]

B. Justice Ginsburg's Concurrence

Justice Ginsburg's principal argument bolstered the majority's contention that the statutory language does not extend protection to the legions of individuals with corrected disabilities.[112] In her opinion, Justice Ginsburg emphasized that Congress intended individuals protected by the ADA to be limited to a "confined, and historically disadvantaged, class,"[113] and not to encompass the "large numbers of diverse individuals with corrected disabilities . . . ."[114] Justice Ginsburg felt that to categorize the mass numbers of diverse individuals with corrected disabilities as a "discrete and insular minority," was counterintuitive to the express intent of Congress.[115]

C. The Dissenting Opinions

1. Justice Stevens

Justice Stevens dissented, joined by Justice Breyer.[116] Justice Stevens focused the beginning of his opinion on the statutory construction of the ADA, faulting the majority for giving the statute a miserly interpretation rather than being true to the Act's remedial purpose.[117] Based on the decisions rendered by eight of the nine Federal Courts of Appeals,[118] and the three Executive agencies that have issued

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argument expediently, not allowing the imputation. *See id.*

111. *Id.* at 494.

112. *See id.* (Ginsburg, J., concurring); *see also supra* notes 80-85 and accompanying text.

113. *Sutton*, 527 U.S. at 494-95 (Ginsburg, J., concurring) (quoting 42 U.S.C. § 12101(a)(7) (1995)). "The Congress finds that . . . individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment and relegated to a position of political powerlessness in our society . . . ." 42 U.S.C. § 12101(a)(7) (West 1995).

114. *Sutton*, 527 U.S. at 954 (Ginsburg, J., concurring).

115. *Id.* (Ginsburg, J., concurring). "Congress' use of the phrase [discrete and insular minority] . . . is a telling indication of its intent to restrict the ADA's coverage to a confined, and historically disadvantaged, class." *Id.* (Ginsburg, J., concurring).

116. *Id.* at 494 (Stevens, J., dissenting).

117. *See id.* (Stevens, J., dissenting). Justice Stevens quipped about Congress' "legislative myopia" because Congress may not have realized that their limited definition of disability might actually encompass two to three times more Americans than originally perceived. *Id.* (Stevens, J., dissenting).

118. *Id.* at 496 n.1 (citing Bartlett v. N.Y. State Bd. of Law Exam'rs, 156 F.3d 321, 329 (2d Cir. 1998), *aff'd in part and rev'd in part*, 2000 U.S. App. Lexis 22212 (2d Cir. 2000); Washington v. HCA Health Servs., 152 F.3d 464, 470-71 (5th Cir. 1998), *vacated*, 527 U.S. 1032 (1999); Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 629-30 (7th Cir. 1998); Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 859-66 (1st Cir. 1998); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937-38 (3d Cir. 1997); Doane v. Omaha, 115 F.3d 624, 627 (8th Cir. 1997); Harris v. H & W Contracting Co., 102 F.3d 516, 520-21 (11th Cir. 1996); Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996)). Gilday v. Mecosta

regulations interpreting the statute,[119] Justice Stevens opined that the determination of a disability must be made without considering mitigating measures.[120] Justice Stevens chastised the majority for scrutinizing the syntax of the statute rather than deferring to a reading of the statute as a whole.[121]

Justice Stevens emphasized the importance of referring to the ADA's legislative history to remove any doubt concerning the meaning of the statutory text.[122] In Justice Stevens's opinion, the Committee Reports and the uniform agency regulations support the meaning of disability conveyed in the text of the ADA.[123] He discussed how the Senate and House Reports,[124] in addition to the

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County, 124 F.3d 760, 766-68 (6th Cir. 1997), could also be read as expressing doubt about the majority rule in *Sutton*. *See id.* (Stevens, J., dissenting); *see also supra* note 53 and accompanying text. Furthermore, only the Tenth Circuit's holding in *Sutton* is contrary to the above authority. *See Gilday*, 124 F.3d at 766-68. (Stevens, J., dissenting); *see also supra* notes 57-60 and accompanying text.

119. *See infra* notes 125-28 and accompanying text.

120. *Sutton*, 527 U.S. at 495-96 (Stevens, J., dissenting). Justice Stevens explained that the majority "charted its own course" by not following the one that has been well marked by Congress. *Id.* at 513 (Stevens, J., dissenting).

121. *See id.* at 498-99 (Stevens, J., dissenting). The majority's strict reading hinders impaired individuals who make themselves more employable by mitigating their permanent impairment. *Id.* (Stevens, J., dissenting). It is Justice Stevens' proposal that the ADA read as a whole inquires into the existence of an impairment, past or present that substantially limits, or did limit, the individual. *Id.* (Stevens, J., dissenting).

122. *Id.* (Stevens, J., dissenting). Although Chief Justice Rehnquist was in the majority in the *Sutton* opinion, Justice Stevens cited his quote regarding judicial deference to legislative history. *See id.* (Stevens, J., dissenting) (quoting Zuber v. Allen, 396 U.S. 168, 186 (1969)) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill...."). Arguably, this prior statement was not contradictory to Chief Justice Rehnquist's opinion with the *Sutton* majority because the majority refused to look at the legislative history in deference to the ADA's plain statutory language. *Id.* at 483-84.

123. *See id.* at 500-02 (Stevens, J., dissenting).

124. *Id.* at 499-500 (Stevens, J., dissenting). The House Committee on Education and Labor report states that "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." *Id.* at 499 (Stevens, J., dissenting) (quoting H.R. REP. NO. 101-485, pt. II at 52 (1990)). Justice Stevens, however, did not discuss that the House Report contains some inconsistencies with the Senate Reports below. Bridges, *supra* note 37, at 1077. In describing the effect of the "regarded as" prong for disability, the Report ensures that "persons with medical conditions that are under control, and that therefore *do not currently limit major life activities*, are not discriminated against on the basis of their medical conditions." *Id.* at 1077 & n.123 (quoting S. REP. NO. 101-116, at 24 (1989)) (emphasis added).The Report of the House Committee on the Judiciary states that when determining whether an impairment substantially limits a major life activity, the impairment should be considered without the effects of mitigating measures. *Sutton*, 527 U.S. at 500 (Stevens, J., dissenting) (citing H.R. REP. NO. 101-485, pt. III, at 28-29 (1990) (continuing that a person with epilepsy is covered under this test, as is a person with minimal hearing)).

Justice Stevens again ignored a possible inconsistency within the legislative history. *See id.* (Stevens, J., dissenting). As stated above, the Report clearly states that a disability should be assessed without regard to the availability of mitigating measures, however, the Report also clearly states that an impairment is not considered a disability "for the purposes of the ADA unless its severity is such that it results in a 'substantial limitation of one or more major life activities.'" *See* Bridges, *supra* note 37, at

EEOC Interpretive Guidance,[125] the Department of Justice regulations,[126] and the Department of Transportation regulations,[127] have each interpreted the ADA as a statutory protector for "individuals who have 'correctable' substantially limiting impairments from unjustified employment discrimination on the basis of those impairments."[128]

Justice Stevens's focus then shifted to question whether the majority's reading of the statute would exclude individuals with impairments from statutory protection that Congress did not intend to exclude.[129] Here, Justice Stevens noted that the Court prematurely denied the right of Sutton and Hinton to assert a claim under the ADA.[130] He expressed belief that Congress enacted the ADA, like the Age Discrimination in Employment Act of 1967,[131] and Title VII of the Civil Rights Act of 1964,[132] as remedial legislation and should justly be "construed broadly to effectuate its purposes."[133] Justice Stevens analogized the judicial expansion of those statutes to the necessity for the *Sutton* Court to "include comparable evils within [the ADA's] coverage," even when such evils are "beyond Congress' [express] concern [or contemplation] in passing the legislation."[134] The Court's normal predilection is to broadly construe anti-discrimination statutes.[135] A broad construction of the ADA enables remedial statutes to protect a class of

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1078 (quoting H.R. REP. NO. 101-485, pt. II, at 52 (1990)). Because whether an impairment is severe is closely related to mitigating measures, the Report created inconsistent obligations by requiring courts to conduct a case-by-case inquiry into the impairment, and to do so considering the impairment in its hypothetical state. *See id.*

125. *Sutton*, 527 U.S. at 502 (Stevens, J., dissenting); *see also supra* note 37 and accompanying text.

126. *Sutton*, 527 U.S. at 502 (Stevens, J., dissenting) (citing 28 C.F.R. pt. 35, App. A, § 35.104 (1998) (providing that a person's disability should be assessed without regard to mitigating measures)).

127. *Id.* (Stevens, J., dissenting) (citing 49 C.F.R. pt. 37.3 (1998)).

128. *Id.* at 502-03 (Stevens, J., dissenting).

129. *See id.* (Stevens, J., dissenting). Justice Stevens also noted that a narrow reading of the ADA was not necessary to avoid the danger of compelling United to hire pilots who might pose a hazard to passengers because of the considerable burden of proving a discrimination claim under the ADA. *See id.* at 504 (Stevens, J., dissenting) (citing 42 U.S.C. § 12113(a)-(b) (1999) (noting that an employer may overcome liability if it demonstrates that the employment criteria are job related and consistent with business necessity or if such vision would pose a health or safety hazard)).

130. *Id.* at 504 (Stevens, J., dissenting).

131. *Id.* (Stevens, J., dissenting) (citing 29 U.S.C. § 631(a) (1994)).

132. *Sutton*, 527 U.S. at 504 (Stevens, J., dissenting).

133. *Id.* (Stevens, J., dissenting) (citing Tcherepnin v. Knight, 389 U.S. 332, 336 (1967)).

134. *Id.* at 505 (Stevens, J., dissenting) (citing Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193, 202-03 (1979) (explaining that Congress first intended only African-Americans to be covered by the Civil Rights Act of 1964, however the Court expanded the meaning to include Hispanic-Americans and Asian-Americans). *See e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279-80 (1976) (noting that the Court further expanded the Civil Rights Act of 1964 to include Caucasians); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79-80 (1998) (applying the Civil Rights Act to cover claims of same-sex sexual harassment); H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 245 (1989) (rejecting the argument that the Racketeer Influenced and Corrupt Organization Act should be construed to cover only organized crime). The "comparable evils" that Justice Stevens sought to encompass are the vision impairments. *See Sutton*, 527 U.S. at 505-08 (Stevens, J., dissenting).

135. *See id.* at 505 (Stevens, J., dissenting).

individuals previously not contemplated for inclusion into the protected class.[136]

Although not all eyesight hindrance is substantially limiting, Justice Stevens clarified that Sutton and Hinton's 20/200 vision in one eye and 20/400 vision in the other is substantially limiting if not properly treated.[137] He articulated that an individual who has such an impairment that is covered by the remedial purpose of the ADA should be protected against "irrational stereotypes and unjustified disparate treatment on that basis."[138]

In agreement with the majority, Justice Stevens stated that the ADA mandates an individualized disability inquiry.[139] Nevertheless, in Justice Stevens' view, the majority ironically condoned treating individuals as members of a group.[140] The majority's "misdirected approach permits any employer to dismiss . . . every person who has uncorrected eyesight worse than 20/100 without regard to the specific qualifications of those individuals or the extent of their abilities to overcome their impairment."[141] Justice Stevens also dismissed the theory that a flood of litigation would result if the courts treated correctable impairments as disabilities by noting that the *Sutton* holding was limited in scope.[142] In summary, Justice Stevens would have held that the Petitioners' impairments were disabilities covered by the ADA.[143]

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136. *See id.* (Stevens, J., dissenting).

137. *Id.* at 507 (Stevens, J., dissenting). "Only two percent of the population suffers from such myopia." *Id.* (Stevens, J., dissenting).

138. *Id.* (Stevens, J., dissenting). "So long as an employer explicitly makes its decision based on an impairment that in some condition is substantially limiting, it matters not under the structure of the Act whether that impairment is widely shared or so rare that it is seriously misunderstood." *Id.* (Stevens, J., dissenting).

139. *Id.* at 508 (Stevens, J., dissenting). Justice Stevens stated his position by agreeing with the majority that the ADA was designed to deter decision making based on group stereotypes, however, he stated that the agencies' interpretation of the ADA did not fall into that trap. *Id.* (Stevens, J., dissenting). This careful manipulation of the majority's reasoning was an attempt to discredit the majority's assertion that considering a disability in an unmitigated state would cause courts to speculate about a hypothetical condition. *See id.* (Stevens, J., dissenting). He further asserted that, "[i]t is just as easy individually to test petitioners' eyesight with their glasses on as with their glasses off." *Id.* at 509 (Stevens, J., dissenting).

140. *See id.* (Stevens, J., dissenting). Justice Stevens again lambasted the Court's approach, observing that the Court would ostensibly allow an employer to refuse to hire every epileptic or diabetic that is monitored by medicine. *See id.* (Stevens, J., dissenting).

141. *Id.* (Stevens, J., dissenting).

142. *See id.* at 510 (Stevens, J., dissenting). Justice Stevens believed the facts in *Sutton* limited the holding to encompass airline pilot job discrimination. *See id.* at 510-11 (Stevens, J., dissenting). Justice Stevens noted that in most strata of the economy, whether or not an employee wears glasses does not matter to future employers. *See id.* at 511 (Stevens, J., dissenting).

143. *See id.* at 513 (Stevens, J., dissenting).

2. Justice Breyer

Justice Breyer, in addition to joining Justice Stevens' dissent,[144] authored a brief dissent of his own.[145] Noting the legislative history, purpose, and structure of the ADA, Justice Breyer focused on the need to draw a statutory line and to give the ADA a broad statutory construction.[146] Justice Breyer also proposed that the EEOC regulations should be refined to draw finer definitional lines and restrict the possible proliferation of lawsuits by functioning as a weed-out mechanism for claims brought without merit.[147] Addressing the majority's concerns about the EEOC's power to draw these lines, Justice Breyer asserted that Congress wanted to bestow upon the EEOC the power to issue regulations consonant with the ADA, expressly for factual scenarios akin to the one in *Sutton*.[148]

V. IMPACT OF THE COURT'S DECISION

A. Judicial Impact

Sutton's main contribution to American disability law is undoubtedly its textual resolution of the ambiguity that beleaguered the lower courts since the introduction of the ADA.[149] Lower courts are now provided with federal precedent defining the class of impaired individuals who may bring a disability claim under the ADA.[150] The subsequent question is whether *Sutton* sufficiently interpreted the language of the ADA, and whether lower courts will apply the Supreme Court's definition with uniformity.

Sutton interpreted the language of the ADA to define the term disability as it appears in the statute without the aid of interpretive guidelines or the legislative

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144. *Supra* notes 116-143 and accompanying text.

145. *Sutton*, 527 U.S. at 513 (Breyer, J., dissenting).

146. *See id.* (Breyer, J., dissenting). Justice Breyer preferred to be over-inclusive in carrying out Congress' statutory intent rather than exclude individuals that Congress intended to protect. *See id.* at 513-14 (Breyer, J., dissenting).

147. *See id.* at 514 (Breyer, J., dissenting). The EEOC could perform these functions for disability discrimination suits that proved without merit because the EEOC has the power to define the protected class. *See id.* (Breyer, J., dissenting). Hearkening back to the majority's questioning of the EEOC's regulation-writing authority, Justice Breyer also believed that the EEOC had the power to regulate the definitions in the employment sections of the ADA because the subchapters' location within the statute is reflective of the drafting and not the substantive objectives of the ADA. *See id.* (Breyer, J., dissenting) (clarifying that the employment subchapter has definitional language in 42 U.S.C. § 12112 and the initial subchapters 42 U.S.C. §§ 12101 and 12102).

148. *Id.* at 514-15 (Breyer, J., dissenting).

149. *See id.* at 488 (1999) (deciding that "disability under the Act is to be determined with reference to corrective measures . . . .").

150. *See supra* notes 80-111 and accompanying text.

history.[151] By taking into account mitigating measures, the Court refused to extend ADA protection to individuals with impairments that, although severe, are not substantially limiting in a major life activity.[152] The Court walked a fine line in its application of the agency deference guidance it mandated in *Chevron U.S.A. v. National Resources Defense Council, Inc.*[153] Under the holding in *Chevron*, if the intent of Congress is clear, or the agency interpretation is inconsistent with the plain language of the statute, the matter is over.[154] However, if the statute is ambiguous then courts must decide whether the agency's interpretation is based on a prudent reading of the statute.[155] In *Sutton*, the Court found the statute's language unambiguous and the EEOC guidelines in direct conflict with the purpose of the statute, despite conflicting information mentioned by Congress in the legislative history of the ADA.[156]

The consideration of mitigating measures is likely to lead to an individualized inquiry into whether a person is eligible to bring a disability claim.[157] It will be difficult for a person with an impairment to bring a claim under the ADA if, with the assistance of mitigation, that person is not substantially impaired.[158] However, the *Sutton* ruling does not dismiss the possibility that a person might use corrective devices and still be substantially limited in a major life activity.[159] The Court

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151. *See supra* notes 82-85 and accompanying text.

152. *See Sutton*, 527 U.S. at 483; *see also supra* notes 97-101 and accompanying text.

153. 467 U.S. 837 (1984).

154. *See generally* id. at 844 (1984).

155. *See id.* at 845-47; *see also* Shellhorse, *supra* note 34, at 199 (standing for the prospect that courts should not focus on mitigating measures when determining disability, thus denying protection to many disabled persons).

156. *See* Rob Duston, *Supreme Court Decisions Narrow ADA Protections* (last visited Nov. 8, 1999) <http://www.saspc.com/art_806.htm> (stating that the Court's interpretation of the EEOC's power "will have great significance in future cases, since those provisions define not only 'disability' but other critical terms such as 'reasonable accommodation' and 'undue hardship'").

157. *See Sutton*, 527 U.S. at 483. The Court also asserted that assessing an individual in his or her unmitigated state forces courts and employers to participate in a guessing game about hypothetically impaired conditions if the individual is aided by corrective measures. *See id.* This becomes particularly problematic if the impaired individual has taken advantage of modern medicine and has a completely corrected physical or mental condition. *See* Bland, *supra* note 24, at 281-82. It should be noted that if employees do not deal with each potentially disabled person on an individual and un-stereotyped basis, they are likely to be open to ADA discrimination actions. *See* James E. Hall, *Supreme Court Decisions Require ADA Revision*, WORKFORCE, Aug. 1, 1999, at 60.

158. *See Sutton*, 527 U.S. at 482-83; *see also supra* notes 94-96 and accompanying text.

159. *See Sutton*, 527 U.S. at 481-84. The Court did not illustrate a specific situation where a corrected impairment would still be substantially limiting. *See id.* It does seem odd that the majority did not supply an example to refute the dissent, however, their illustrations concerning prosthetic limbs, epilepsy, and hypertension are as close as the Court ventured. *See id.* at 487-88.

The Court could have illustrated, to further append their point, an example where the medication or mitigating measure is itself substantially limiting. *See* Harris, *supra* note 40, at 599. For example, an

remained equivocal on the issue by listing permanent disabilities that may not be excluded totally in their mitigated form: epilepsy, high blood pressure, and having a prosthetic limb.[160] While considering this issue, the Court may have given credence to the House Report on the ADA which states that "persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication."[161] It is unlikely that the holding in *Sutton* goes so far as to prohibit corrected epilepsy and the use of prosthetics from being considered disabilities; however, the Court held in *Murphy* that corrected high blood pressure did not meet the threshold requirement to be classified as a disability.[162]

The Court in *Sutton* shied away from drafting a specific list of per se impairments that would always qualify as disabilities, probably because a definite list would fail to achieve consensus in all cases. The individualized inquiry into the severity of the impairments advocated by the majority, however, could "leave too much room for disagreement and [be] inefficient at the summary judgment stage."[163] Thus, to give full effect to the Court's wishes that *Sutton* set an easily enforceable standard of judging disabilities under the ADA, the Court's consideration of mitigating measures arguably should be applied equally to all individuals, no matter the severity of the disability.[164]

Somewhat surprising is the ostensible judicial inconsistency of the *Sutton* decision with the Court's decision in *Bragdon v. Abbot*,[165] one year prior to *Sutton*. In *Bragdon*, the Court held that an individual with asymptomatic HIV was covered

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individual's medication for schizophrenia could produce dyslexia, thus, substantially limiting that individual's capacity to learn. *See id.* The Court did, without example, note that neglecting to take mitigating measures into account would preclude individuals from claiming disability protection when those individuals experienced negative side effects. *See Sutton*, 527 U.S. at 484; *see also supra* note 97 and accompanying text.

160. *See Sutton*, 527 U.S. at 487-88.

161. H.R. REP. NO. 101-485, pt. 2, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334; *see also* Michael J. Puma, Note, *Respecting the Plain Language of the ADA: A Textualist Argument Rejecting the EEOC'S Analysis of Controlled Disabilities*, 67 GEO. WASH. L. REV. 123, 127 (1998) (reasoning that courts should defer to the plain language of the ADA and take mitigating measures into consideration when determining whether an individual is disabled).

162. *See supra* note 99 and accompanying text. The majority in *Sutton* believed that individuals suffering from corrected hypertension would be able to bring a claim under 42 U.S.C. § 12102(2)(C), the "regarded as" prong, however, this would prove to be more difficult for claimants. *See Sutton*, 527 U.S. at 488-89.

163. *See* Isaac S. Greaney, *The Practical Impossibility of Considering the Effect of Mitigating Measures Under the Americans with Disabilities Act of 1990*, 26 FORDHAM URB. L.J. 1267, 1296 (1999).

164. *See* Carolyn V. Counce, *Corrective Devices and Nearsightedness Under the ADA*, 28 U. MEM. L. REV. 1195, 1233-34 (1998). Simply because myopia can be easily measured by an objective sight test, and impairments such as epilepsy, diabetes, deafness, and heart trouble are rarer, courts should not favor those impairments to qualify for disability status because confusion and inefficiency in the courts may be unfair and overwhelming. *See id.*

165. 524 U.S. 624 (1998).

by the ADA.[166] The *Bragdon* ruling lead judicial observers to believe that the Court would interpret the definition of disability broadly; however, as evidenced by *Sutton*, this was not the case.

Instead, the *Sutton* Court relied heavily on Congress' finding that 43,000,000 Americans are disabled.[167] The Court refused to expand upon the ten-year-old number, implying that those individuals with corrected vision impairments and others similarly situated are not part of the "discrete and insular minority" who have historically been discriminated against.[168] Congress' 1990 findings exclude millions of impaired people, many of whom suffer from corrected vision impairments, because those individuals are too great in number to be considered a minority.[169] A correctable vision impairment is a vastly different impairment than asymptomatic HIV; nonetheless, in *Sutton*, the Court sent a sobering message to future disability litigants by drastically diminishing the scope of its ruling in *Bragdon*.[170]

The Supreme Court ruling in *Sutton* also defied many United States Courts of Appeals' decisions;[171] however, the Court followed the greater weight of case authority on the matter, whereby employers have won ninety-two percent of the ADA cases resolved in court.[172] In the wake of *Sutton*, lower courts, with exception, have been able to administer the precedent set by the Court with ease.[173] A select few lower courts insist that *Sutton's* holding is narrow in its scope,[174]

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166. *See id.* at 635-37.

167. *See Sutton*, 527 U.S. at 494 (Ginsburg, J., concurring).

168. *See id.* (Ginsburg, J., concurring); *see also* Harris, *supra* note 40, at 600 (concluding that under the "no mitigating measures" guideline, the number of ADA Plaintiffs is steadily increasing)

169. *See* Harris, *supra* note 40, at 599-600 (stating that a functional approach to the term disability is consistent with the legislative purpose). *But see Sutton*, 527 U.S. at 495 (Stevens, J., dissenting). Justice Stevens observed that, contrary to the majority's perception, the Court had observed in a previous case that a statement of congressional findings was a poor basis for a statutory reading. *See id.* at 511 (citing Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 260 (1994)).

170. *See Sutton*, 527 U.S. at 483 (limiting the individualized inquiry standard in *Bragdon*).

171. *See supra* note 118 and accompanying text.

172. *See* Pete Williams, *Court Limits Reach of Disability Law: Poor Eyesight, High Blood Pressure Not Covered*, (June 22, 1999) <http://www.msnbc.com/news/282627.asp> (listing the statistics of ADA court cases from 1992-1997); *see also* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 99-100 (1999) (enumerating empirical evidence that "defendants prevail in more than ninety-three percent of reported ADA employment discrimination cases decided on the merits at the trial court level").

173. *See* Bland, *supra* note 24, at 283 (urging the Supreme Court to decide in favor of mitigating measures so that the issue will be resolved and no longer plague the lower courts).

174. Several cases have either declined to extend the *Sutton* ruling, or distinguished it outright. *See* Fjellstad v. Pizza Hut of Am., Inc., 188 F.3d 944, 954 (8th Cir. 1999) (holding that the Plaintiff was substantially limited in the major life activity of working); *see also* Kolovos v. Sheahan, No. 97-C4542, 1999 WL 1101919, at *3 (N.D. Ill. Nov. 30, 1999); Morris v. Dempsey Ing, Inc., No. 99 C 3455, 1999 WL 1045032, at *1 (N.D. Ill. Nov 12, 1999); Matlock v. City of Dallas, No. Civ.A.3:97-CV-2735-D,

striving to give impaired individuals the fullest protection under the ADA. The majority of lower court decisions, however, have followed the Court's language in *Sutton* with uniformity, finding that, in the interests of judicial economy, the ADA protects only those who are "disabled" as defined by the Court.[175]

B. Legislative Impact

In championing the plain meaning of the ADA, the *Sutton* decision simultaneously handed Congress both a victory and a defeat.[176] On one hand, the *Sutton* holding championed Congress' clear legislative drafting.[177] On the other hand, the Court failed to consider the ADA's legislative history.[178] If the Court, in fact, encroached upon the intent of Congress, *Sutton* will probably affect the way Congress words legislation and expresses its findings in the future.[179]

1999 WL 1032601, at *2 (N.D. Tex. Nov 12, 1999); Belk v. Southwestern Bell Tel. Co., 194 F.3d 946, 950 (8th Cir. 1999) (holding that Plaintiff's leg brace made him substantially limited in a major life activity, walking); Barnett v. Revere Smelting & Ref. Corp., 67 F. Supp. 2d 378, 389-90 (S.D.N.Y. 1999) (holding that defendant did not correctly apply the holding in *Sutton*); Keys Youth Servs., Inc. v. City of Olathe, Kansas, 67 F. Supp. 2d 1228, 1231 (D. Kan. 1999).

175. *See* Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 302 (3d Cir. 1999); *see also* Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 265 (1st Cir. 1999); Muller v. Costello, 187 F.3d 298, 312 (2d Cir. 1999); Ivy v. Jones, 192 F.3d 514, 515 (5th Cir. 1999); E.E.O.C. v. R.J. Gallagher Co., 181 F.3d 645, 653 (5th Cir. 1999); Schneiker v. Fortis Ins. Co., 200 F.3d 1055, 1060-61 (7th Cir. 2000); Shipley v. City of Univ. City, 195 F.3d 1020, 1022 (8th Cir. 1999); Weber v. Strippit, Inc., 186 F.3d 907, 913 (8th Cir. 1999); Spades v. City of Walnut Ridge, Arkansas, 186 F.3d 897, 899 (8th Cir. 1999) McAlindin v. County of San Diego, 192 F.2d 1226, 1236 (9th Cir. 2000); Broussard v. Univ. of Cal., at Berkeley, 192 F.3d 1252, 1256 (9th Cir. 1999); Sorensen v. Univ. of Utah Hosp., 194 F.3d 1084, 1087 (10th Cir. 1999); Mullins v. Crowell, 74 F. Supp. 2d 1067, 1079-81 (N.D. Ala. 1999); Scott v. Estes, 60 F. Supp. 2d 1260, 1268 (M.D. Ala. 1999); Phillips v. Wal-Mart Stores, Inc., 78 F. Supp. 2d 1274, 1280 (S.D. Ala. 1999); Finical v. Collections Unlimited, Inc., 65 F. Supp. 2d 1032, 1036 (D. Ariz. 1999); Whitney v. Apfel, No. C-98-1119, 1999 WL 786369, at *2 (N.D. Cal. Sept. 28, 1999); Piascyk v. City of New Haven, 64 F. Supp. 2d 19, 26 (D. Conn. 1999); Hoffman v. Town of Southington, 62 F. Supp. 2d 569, 572 (D. Conn 1999); Barney v. U.S. Sugar Corp., No. 980224-Civ-FTM-19D, 1999 WL 1125038, at *1 (M.D. Fla. Nov. 17, 1999); Haiman v. Vill. of Fox Lake, 55 F. Supp. 2d 886, 890 (N.D. Ill. 1999); Baker v. Chi. Park Dist., No. 98 C 4613, 1999 WL 519064, at *3 (N.D. Ill. July 15, 1999); Stensrud v. Szabo Contracting Co., Inc., No. 98 C 878, 1999 WL 592110, at *6 (N.D. Ill. Aug 2, 1999); United States E.E.O.C. ex rel. Keane v. Sears, Roebuck & Co., Inc., No. 97 C 3971, 1999 WL 977072, at *3 (N.D. Ill. Oct. 22, 1999); Llante v. Am. NTN Bearing Mfg. Corp., No. 99 C 3091, 1999 WL 1045219, at *6 (N.D. Ill. Nov. 15, 1999); Marasovich v. Prairie Material Sales, No. 98 C 2070, 1999 WL 1101244, at *5 (N.D. Ill. Dec. 1, 1999); Tzoumis v. Tempel Steel Co., No. 96 C 6945, 1999 WL 1101257, at *10 (N.D. Ill. Dec. 1, 1999); Robb v. Horizon Credit Union, 66 F. Supp. 2d 913, 918 (C.D. Ill. 1999); Ortega v. Southwest Airlines Co., No. Civ.A.98-2782, 1999 WL 1072543, at *3 (E.D. La. Nov. 24, 1999); Hurley v. Modern Cont'l Const. Co., Inc., 54 F. Supp. 2d 85, 93 (D. Mass. 1999); Dickerson v. United Parcel Serv., Inc., No. Civ.A. 3:95-CV-2143D, 1999 WL 966430, at *3 (N.D. Tex. Oct 21, 1999); Todd v. Academy Corp., 57 F. Supp. 2d 448, 452 (S.D. Tex. 1999); Real v. City of Compton, 87 Cal. Rptr. 2d 531, 537, 541 (Ct. App. 1999); Davis v. Computer Maint. Serv., Inc., No. 01A01-9809CV00459, 1999 WL 767597, at *1 (Tenn. Ct. App. 1999).

176. *See supra* notes 78-111 and accompanying text.

177. *See id.*

178. *See id.*

179. *See* Harris, *supra* note 40, at 603.

Sutton discernibly deviated from judicial precedent regarding the interpretation of anti-discrimination statutes drafted and passed by Congress.[180] The Court has uniformly given remedial legislation a broad construction in the past.[181] This deviation from the norm may be justified because the ADA is a vastly different statute than other civil rights statutes.[182] In cases concerning other civil rights statutes, it is quite clear as to whether the claimant is afforded the enumerated statutory protections, such as with age discrimination protection, a plaintiff is either fifty years old or not.[183] The ADA, however, "contemplates a softer, individualized, case-by-case inquiry to determine whether a particular impairment substantially limits a major life activity."[184] It should be noted, however, that the ADA is necessarily a more fact sensitive species of civil rights protection because the rights and degree of protection afforded to disabled individuals has been a legislative and judicial conundrum for the better part of this century.[185]

Beyond denying the claimants a broad reading of the statute, the *Sutton* holding also excludes individuals that both the House and Senate sought to include in the ADA's protected class, as evidenced by the House and Senate Reports.[186] The aforesaid inconsistencies regarding *Sutton* presumably will cause Congress to exercise a greater degree of care in researching and conveying the intent of proposed legislation.[187] Because Congress is the branch of our government with the power to make laws, if the legislators in Washington feel that their intent was impaired by the aggrandizement of the Court in the *Sutton* ruling, Congress should affirmatively exercise its power to amend the language in the ADA in order to sufficiently carry out congressional intent.

Justice Stevens' dissent can be read as encouraging Congress to amend the ADA statute in favor of the EEOC guidelines.[188] Recent congressional and judicial history supports Justice Stevens' position and the possibility of an ADA

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180. *See* Sutton v. United Airlines, Inc., 527 U.S. 417, 503-06 (1999) (Stevens, J., dissenting).

181. *See id.* at 505 (Stevens, J., dissenting).

182. *See* David A. Skidmore, Jr., *Mitigating Measures and the ADA UPS Caught in a Split Between the Circuits*, 45 FED. LAWYER 36, 39 (Nov.-Dec. 1998).

183. *See id.*

184. *See id.*

185. The first time the rights of the disabled became a major legislative question was in 1920. The Fess-Kenyon Act of 1920, 41 Stat. 735, was the first major legislation to challenge the then prevailing notion that a disability equated to a lifelong economic dependency. *See* H.R. REP. NO. 101-485(I), pt. 3, at 25 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 448.

186. *See* Sutton v. United Airlines, Inc., 527 U.S. 471, 498-506 (1999) (Stevens, J., dissenting).

187. *See* Harris, *supra* note 40, at 604.

188. *See Sutton*, 527 U.S. at 495-513 (Stevens, J., dissenting).

amendment by Congress in the near future.[189] In 1989, the Court issued decisions gutting Title VII of the Civil Rights Act of 1964, which prohibited employers from discriminating based on race, gender, national origin or religion, Congress answered directly by issuing the Civil Rights Act of 1991 as remedial legislation.[190]

Conversely, if Congress intended to protect only 43,000,000 disabled Americans under the ADA, the *Sutton* holding is a triumph in concise legislative drafting.[191] In either scenario, Congress certainly will have to reexamine its drafting techniques, due to the disparate and dire consequences in producing legislation wherein congressional intent is latently ambiguous and thus not clear.[192] The Supreme Court raised the bar on the definition of disability with its ruling in *Sutton*. Whether or not *Sutton* is consistent with the intention of Congress in passing the ADA is a question for Congress to resolve, either through silence or corrective legislation.

C. Social Impact

In the private sector, where the ADA functions to protect those who have substantially limiting impairments from employment discrimination, business and management groups are cheering the *Sutton* Court's interpretation of the term "disability."[193] The Society for Human Resource Management proclaimed the Court's ruling a "victory for employers and employees alike," adding that "[t]he Court's principled, common-sense approach will facilitate employers' compliance with the Americans with Disabilities Act, while also protecting those persons who are truly disabled whom Congress intended the ADA to protect."[194] With few resources to accommodate physically limited employees, employers agree that impaired individuals who are not truly disabled should not usurp ADA protection from those who are disabled.[195]

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189. *See* ADA COMPLIANCE GUIDE: SPECIAL ISSUE ON THE U.S. SUPREME COURT'S JUNE 1999 ADA DECISIONS 1, 4 (Thompson Publishing Group, 1999) [hereinafter COMPLIANCE GUIDE].

190. *See id.* (stating that even if the federal law is not altered in the future, state laws might be able to cure the now narrow definition of disability); *see also infra* note 218 and accompanying text.

191. *See Sutton*, 527 U.S. at 484-87; *see also* Counce, *supra* note 164, at 1233 (noting that it is doubtful that Congress intended to allow almost any myopic Plaintiff to show a substantial limitation in the major life activity of seeing, which would enable them to recover under the ADA).

192. *See* Harris, *supra* note 40, at 603.

193. *See* Williams, *supra* note 172 (reporting the effects of the holding on the day of the Supreme Court's decision in *Sutton*, *Murphy*, and *Albertson's*).

194. COMPLIANCE GUIDE, *supra* note 189, at 5.

195. *See U.S. Supreme Court Narrows Reach of Disability Law*, (June 22, 1999) <http://legalnews.findlaw.com/scripts/ legalnews> (reporting that business groups warned the Court not to dramatically expand the scope of the ADA because they did not want to be exposed to unnecessary lawsuits). *Sutton* gives employers the leverage to fire an employee who is impaired, but does not permit impaired individuals to reach the merits of their discrimination claim without being dismissed at the threshold question: whether they are disabled under the ADA. *See Sutton*, 527 U.S. at 508-13 (Stevens, J., dissenting); *see also* Williams, *supra* note 172 (stating that the *Sutton*, *Murphy*, and *Albertson's* results

On the other hand, disability rights activists are enraged by the Supreme Court's decision and *Sutton* will likely spur them to lobby Congress to amend the disability laws as they now stand.[196] Activists are complaining that "the Court created a 'devastating hole in the ADA.'"[197] Although the Court in *Sutton* relied in part on a law review article written by Robert Burgdorf Jr., the author of the original ADA bill introduced to Congress in 1988, Burgdorf stated that he was "disappointed that this major civil rights law . . . was being interpreted in a very narrow, technical and uninformed way" by the Court.[198] Burgdorf's accusation is founded partly in the Court's textual reading of Congress' numerical findings, which suggest that exactly 43,000,000 slots protect America's disabled, leaving no room for error.[199] If the Court intends to steadfastly adhere to this requirement, disabilities more "substantially limiting" than poor vision and hypertension may be excluded in the future.[200] The Court may have commenced a slide down the slippery slope of exclusion with the perceived narrow holding of the *Sutton* case.[201] If Congress strongly feels that the laws, which they drafted and passed, were unnecessarily infringed upon by the Court's ruling in *Sutton*, legislation should be introduced to overturn and amend the Supreme Court's view of disabilities.

The ruling in *Sutton* may also invite open warfare on the EEOC regulations from a management standpoint because the Court decided that the EEOC regulations and interpretive guidance were not entitled to due deference.[202] For

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produce the absurd result that a person might be disabled enough to be fired from a job, but not disabled enough to challenge the firing in court).

196. *See* COMPLIANCE GUIDE, *supra* note 189, at 5.

197. *Id.*

198. *Id.* Burgdorf also stated that he thought the law deserved more understanding than the majority in Sutton afforded it. *See id.* "I don't think the Court realizes that they've gutted the law. I would be even more disappointed if they did realize that." *Id.*

199. *See Sutton*, 527 U.S. at 503 (Stevens, J., dissenting) (reasoning that the Court's narrow approach may have the effect of denying coverage to a sizeable portion of the 43,000,000 because the Court failed to consider the ADA Committee Reports).

200. *See* Williams, *supra* note 172 (reporting that the holding in *Sutton* produced an absurd outcome).

Nevertheless, the Court may be right on the mark concerning a strict reading of Congressional findings: "As the world's population grows older and experiences more widespread age-related impairments and as new impairments and diseases surface, more individuals will qualify as having disabilities even though medical science is simultaneously discovering new ways to manage and cure such impairments." Harris, *supra* note 40, at 600.

201. *See* Arlene Mayerson, *Amicus Brief in Sutton v. United Air Lines, Inc.* (last visited Nov. 8, 1999) <http://www.dredf.org/amicus.html> (concluding that the plain language of the statute is ambiguous and should be broadly construed with help from the explicit legislative history).

202. *See Sutton*, 527 U.S. at 475-81 ("No agency . . . has been given authority to issue regulations implementing the generally applicable provisions of the ADA . . . which fall outside Titles I-V.").

example, the Court questioned working as a major life activity.[203] The EEOC believes that the decision in *Sutton* inappropriately narrows the scope of the law for people who are disabled and deserve protection under the ADA.[204] Therefore, this dismissal of the EEOC interpretive authority ultimately could work against employers and employees alike by forcing confusion as to what the guiding definitions should be when making complex disability determinations.[205]

Moreover, the *Sutton* holding arguably provides a disincentive for impaired individuals to correct their impairment if mitigating measures provide a complete remedy.[206] The Supreme Court's opinion seems only to address correctable disabling conditions that employees choose to correct, and neglects to discuss correctable disabling conditions that employees choose not to correct.[207] Even though the Court clearly did not intend this scenario in its textual holding, this glaring oversight would afford greater ADA protection to correctable disabling conditions left uncorrected than to those that are corrected.[208] Unfortunately, however, if the Supreme Court's analysis is applied literally, it could produce this absurd result.[209] Individuals who do not attempt to remedy their disabilities may

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203. *See* COMPLIANCE GUIDE, *supra* note 189, at 5; *see also* Duston, *supra* note 156 (mentioning Sutton and Hinton did not allege they were impaired in the major life activity of seeing, instead, they alleged a limitation in the activity of working).

204. *See* COMPLIANCE GUIDE, *supra* note 189, at 3 (noting the EEOC's disappointment in the *Sutton* decision).

205. Some EEOC critics think that confusion over EEOC deference should be remedied by encouraging the EEOC to soften some of its more extreme positions on employment. *See* Thomas G. Hungar, *A Clear-Sighted View of the ADA*, WALL ST. J., June 24, 1999, at A22. If they do not, critics postulate, "the business community faces a long and expensive battle against the government's efforts to use the ADA to transform the American workplace in ways that few members of Congress envisioned they enacted the law." *Id.* at 2.

206. *See* Harris, *supra* note 40, at 600 (realizing that "malingerers" may be a potential cost of recognizing mitigating measures by encouraging some individuals to stop investing in the management of their maladies so they can qualify for protection).

Under-investment in the ability to mitigate a disability carries with it disincentives as well. *See id.* Conducting a cost/benefit analysis, if the cost of living with an unmitigated, yet correctable, substantially limiting impairment outweighs the benefits of ADA protection, then those individuals will not manipulate the system. *See id.* Any incentive to keep substantially limiting impairments unmitigated could prove fatal when considering the effects of certain physical and mental impairments, such as epilepsy or hypertension.Economics might factor into the analysis as well. *See id.* For example, an individual who has a correctable impairment, but cannot afford to purchase mitigating measures, justly is considered disabled under *Sutton*. *See supra* notes 97-101 and accompanying text. A similar individual who can afford mitigating measures, however, will not want to invest in a remedy because he is no longer substantially limited in a major life activity.

207. *See* Phil Milsk, *Supreme Court Supports Community Based Placements*, *at* http://www.thearcofil.org/ govt/g062399.html (last visited Nov. 8, 1999) (opining that the issue of correctable conditions is far from over and will be litigated for quite some time).

208. *See Sutton*, 527 U.S. 471, 482-83 (1999) ("Because the phrase 'substantially limits' appears in the Act in the present indicative verb form, we think the language is properly read as requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability.").

209. *See* Jonathan A. Segal, *The Sutton Ruling: More Than Meets the Eye*, 44 HR MAG. 1, (July 21, 1999).

have more legal protection than those who do.[210] This problem, however, may have been adequately remedied by both the Court's proposed individualized inquiry into the question of disability, and the decision that an impairment constitutes a disability only if it is substantially limiting.[211] The majority opinion also recognizes that, in certain cases, the use of medication may actually turn an insubstantial impairment into a substantial impairment that is covered under the ADA, thus assisting employees.[212]

Nevertheless, critics of the *Sutton* decision believe that the Court's simple solution will further occlude disability determinations for employers and employees.[213] Employers should beware of employees who use mitigating measures that improve, but do not completely ameliorate, their medical conditions.[214] If such individuals continue to be substantially limited in a major life activity, they are still disabled under the law.[215] Employers ultimately must be cautious in determining through a case-by-case inquiry whether or not an employee is substantially limited in a major life activity so as to avoid all liability. When he signed the ADA into law, former President George Bush proclaimed the ADA an "historic new civil rights Act . . . the world's first comprehensive declaration of equality for people with disabilities."[216] Bush added that with the signing of the ADA, "every man, woman, and child with a disability can now pass though the once-closed doors into a bright new era of equality, independence, and freedom."[217] The *Sutton* decision redefined the rights and protection given to impaired individuals under the ADA. With its decision, the Court may have slammed the doors of equality on the disabled by narrowly construing the language of the ADA because Americans with disabilities are uniquely underprivileged and

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210. *Id.*; *see also* Part VI.

211. *See supra* notes 79-87 and accompanying text.

212. *See Sutton*, 527 U.S. at 482-83 (stating that both the positive and negative effects of mitigating measures must be taken into effect when judging whether an individual is substantially limited); *see also* Timothy S. Bland, *The Supreme Court Focuses on the ADA*, 44 HR MAG. 12, (Sept. 1,1999) (stating that medications may not only prevent someone from being disabled, they may also cause a disability). Employers must examine this portion of the Court's ruling closely. *See id.* For example, suppose an employee has cancer, but the individual feels fine at this point. His or her medical condition is not yet a disability. If this individual undergoes chemotherapy and the person becomes so limited in the major life activity of working or another, this individual is now disabled under the ADA—not because of the effects of the cancer, but because of the effects of the treatment of the cancer. *See id.*

213. *See* COMPLIANCE GUIDE, *supra* note 189, at 5.

214. *See* Bland, *supra* note 212, at 5.

215. *See id.*

216. Burgdorf, *supra* note 95, at 413-14 n.3 (quoting President George Bush, Remarks by the President During Ceremony for the Signing of the Americans with Disabilities Act of 1990, 2 (July 26, 1990), *on file with the Harvard Civil Rights-Civil Liberties Law Review*).

217. *Id.*

disadvantaged.[218] The practical ramifications of *Sutton* in the workplace, however, remain to be seen.

The Court's decision in *Sutton* will upset those who believe a broad construction of the term disability is necessary to protect impaired individuals in the workplace, while those who prefer a plain reading of the statute will embrace the ruling as a deterrent to excessive litigation.

VI. CONCLUSION

Imagine that a school district hires two new elementary school teachers. Both teachers are qualified and both suffer from similar cases of clinical depression. One of the teachers, Tim, chooses to take anti-depressant medicine, which corrects the depression completely. James, the other teacher, decides not to take anti-depressants. Under *Sutton*, if the school district fires Tim because of his clinical depression, Tim has no legal recourse because presently he is not disabled under the ADA. Under *Sutton's* individualized inquiry, however, if James were fired for his depression he would have standing to sue because he is substantially limited in a number of major life activities.

After nine years of uncertainty following the enactment of the ADA, the *Sutton* decision has medicated the ADA by providing lower courts with a rule determining the definition of disability. The impact of this decision is decidedly uncertain; however, what has been made certain by *Sutton* is that individuals with physical or mental impairments who feel that they have been discriminated against by an employer must closely inspect the language of the ADA before filing a disability discrimination claim under the statute.[219]

IAN D. THOMPSON[220]

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218. *See* H.R. REP. NO. 485, pt. 2, at 31 (1990) *reprinted in* 1990 U.S.C.C.A.N. 4079, 4312 (quoting Humphrey Taylor).

219. Employees who cannot allege a disability under the ADA should examine his or her state law remedies, which often have a much broader standard for disability than the one supplied by *Sutton*. *See* Todd J. Krouner and Joshua A. Marcus, *Asthma as Disability: Allowed Under ADA but Judicial Relief Elusive*, 222 N.Y.L.J. 1 *See* Jonathan A. Segal, *The Sutton Ruling: More Than Meets the Eye*, 44 HR MAGAZINE 1, at 4-5 (1999); *see also supra* note 190 and accompanying text.

220. J.D. Candidate 2001.