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NOTE

WHO SHOULD HAVE IT BOTH WAYS?: THE ROLE OF MITIGATING MEASURES IN AN ADA ANALYSIS

INTRODUCTION

Great confusion has arisen in the federal court system over what role mitigating measures¹ should play in determining whether an individual has a disability which qualifies for the protection of the Americans with Disabilities Act of 1990 ("ADA").² Much of this confusion stems from the duplicitous arguments made by both parties in cases involving mitigating measures. A typical plaintiff/employee will first assert that she qualifies under the ADA as an individual with a disability because she has an impairment which, if left uncorrected, would substantially limit one or more of her major life activities. This same employee then asserts that she is qualified for the job she seeks because mitigating measures correct her impairment and allow her to function without restriction.

Defendant employers use the same type of circular reasoning to advance their position. A defendant/employer will assert that the plaintiff/employee does *not* qualify for the protection of the ADA because her impairment is corrected by mitigating measures and thus does not substantially limit any of her major life activities. In the next breath, however, this employer cites the employee's impairment and inability to fulfill the job requirements as a legal justification for not hiring or retaining her.

¹ Mitigating measures include medicines, assistive devices, or prosthetics. 29 C.F.R. app. § 1630.2(j) (1998).

² 42 U.S.C. §§ 12101-13 (1994).

This Note examines the complex issue of mitigating measures and offers a possible solution to the inconsistent rulings it fosters. Part I provides a short history of the ADA (with a special focus on Title I of the Act) and a brief explanation of its administrative procedures. Part II presents a summary of the most prevalent arguments made on both sides of the issue, formulated from an analysis of leading federal circuit court cases. Part III suggests that unless or until Congress or the Supreme Court clarifies the issue,³ the severity of an individual's untreated impairment should be part of the ADA's "substantially limits" evaluation. However, since the effect of mitigating measures is only one factor that may influence a "substantially limits" evaluation, the weight of its importance should be decided on a case-by-case basis. The Note concludes that this approach effectively integrates the actual language of the statute with its agency interpretation, creating an equitable approach to the law in this area.

³ *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), was heralded in the main stream media as "hav[ing] a[] . . . far-reaching effect," Joan Biskupic & Amy Goldstein, *Disability Law Covers HIV, Justices Hold*, WASH. POST, June 26, 1998, at A01, because the respondent's asymptomatic HIV was found to be a substantially limiting disability. However, the Supreme Court decision did not attempt to settle the question of what role mitigation measures should play when evaluating the severity of a person's disability. Although Justice Kennedy's opinion did hold that the respondent has a physical disability which substantially limits a major life activity, the Court specifically declined to address the issue of whether "the substantiality of a limitation [should] be assessed without regard to available mitigating measures." 118 S. Ct. at 2206.

In her concurrence, Justice Ginsburg alluded to her position on the issue of mitigating measures when she stated "[n]o rational legislator . . . would require nondiscrimination once symptoms become visible but permit discrimination when the disease, though present, is not yet visible." *Id.* at 2213-14. On the other hand, Chief Justice Rehnquist, joined by Justices Scalia and Thomas concurring in the judgment in part and dissenting in part, took the position that an individual's disability must actually limit a major life activity, not have the potential to do so. *Id.* at 2216 ("[T]he ADA's definition of a disability is met only if the alleged impairment substantially 'limits' (present tense) a major life activity.") (citation omitted).

I. BACKGROUND ON THE AMERICANS WITH DISABILITIES ACT

A. *The ADA in General*

The Americans with Disabilities Act provides broad anti-discrimination protection for qualified individuals with disabilities by ensuring their rights of equal access and equal opportunity. Congress hoped to establish "clear, strong, consistent, enforceable standards" regarding discrimination to be administered nationally, in large part by the federal government.⁴ To accomplish these goals, the ADA was organized into five discrete titles. Title I addresses all aspects of employment.⁵ Title II regulates state and local government services and public transportation.⁶ Title III deals with public accommodations and services operated by private entities.⁷ Title IV addresses telecommunications.⁸ Title V contains miscellaneous provisions including laws regulating the construction of buildings, attorney's fees, congressional compliance and removal of state immunity.⁹ Each title designates an executive agency to promulgate regulations and interpretive guidance. Taken together, these five titles provide a sweeping and complex body of law prohibiting discrimination against individuals with disabilities.¹⁰

The ADA was not intended to replace or supersede other federal anti-discrimination laws, such as the Rehabilitation Act of 1973.¹¹ Instead, the ADA broadened the scope of federal anti-discrimination law to cover people with disabilities. The Rehabilitation Act continues to prohibit federal government agencies and private organizations which receive federal fund-

⁴ 42 U.S.C. § 12101(b)(1-3).

⁵ See *id.* §§ 12101-17.

⁶ See *id.* §§ 12131-50.

⁷ See *id.* §§ 12181-89.

⁸ See 47 U.S.C. § 225(c) (1994).

⁹ See 42 U.S.C. §§ 12201-13 (1994).

¹⁰ "Disability" is defined in the ADA as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; a record of such an impairment; or being regarded as having such an impairment." *Id.* § 12102(2)(A-C).

¹¹ 29 U.S.C. §§ 791-94 (1994); see also 42 U.S.C. §§ 3601 *et seq.* (1994) (The Fair Housing Amendments Act made it illegal to discriminate against persons with disabilities in renting or buying housing and mandates reasonable accommodations be made to ensure persons with disabilities may obtain housing).

ing from discriminating against qualified individuals with handicaps.¹² Title I of the ADA expands the protections provided by the Rehabilitation Act into the private sector,¹³ state and local governmental agencies,¹⁴ and the Senate.¹⁵

Title I also adopted the Rehabilitation Act's definition of "physical or mental impairment"¹⁶ and provided for consistent enforcement standards among the agencies responsible for enacting the Rehabilitation Act and the ADA.¹⁷ Additionally, the format of Title I's implementation regulations was modeled after Rehabilitation Act regulations, and the Equal Employment Opportunity Commission ("EEOC") based its Title I regulations on case law interpreting the Rehabilitation Act.¹⁸ Con-

¹² The Rehabilitation Act, 29 U.S.C. §§ 701-69 (1994), uses the term "handicap" instead of disability; however, the interpretive guidance to Title I of the ADA makes it clear that

[s]ubstantively, these terms are equivalent. As noted by the House Committee on the Judiciary, "[t]he use of the term 'disabilities' instead of the term 'handicaps' reflects the desire of the Committee to use the most current terminology. It reflects the preference of persons with disabilities to use the term rather than 'handicapped' as use in previous laws

29 C.F.R. app. § 1630.1(a) (1998) (quoting H.R. REP. NO. 101-485, pt. III, at 26 (1990)). Today, the term "disability" and its derivatives are used in both ADA and Rehabilitation Act cases.

Sections 501 and 503 of the Rehabilitation Act regulate hiring, placement and advancement opportunities for qualified individuals. See 29 U.S.C. §§ 791(b), 793. Section 504 mandates that organizations receiving federal funds provide disabled individuals with opportunities to participate in federal programs and activities on an equal basis with non-disabled persons. See *id.* § 794.

¹³ See 42 U.S.C. § 12111(5)(A) (1994) (defining an entity subject to the statute as "a person affecting in an industry affecting commerce who has 15 or more employees.").

¹⁴ See *id.* § 12131 (1994).

¹⁵ See *id.* § 12209 (1994).

¹⁶ 29 C.F.R. app. § 1630.2(h) (1998). The Rehabilitation Act defines "physical or mental impairment" as

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 any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

34 C.F.R. § 104.3(j)(2)(i) (1998).

¹⁷ See 42 U.S.C. § 12117(b) (1994) ("The [Equal Employment Opportunity] Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish [] coordinating mechanisms . . . in regulations implementing this subchapter and the Rehabilitation Act of 1973").

¹⁸ See 2 AMERICANS WITH DISABILITIES: PRACTICE AND COMPLIANCE MANUAL

gress amended the Rehabilitation Act in 1992 to reflect its unity with the ADA,¹⁹ and courts have continued to honor this continuity by considering precedent decided under one law binding upon similar issues brought under the other.²⁰

B. *Title I*²¹

Title I of the ADA regulates all aspects of employment "including the application process, hiring, advancement, benefits, and discharge."²² It is the most heavily litigated section of the ADA.²³ To achieve its goal of "remov[ing] barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities,"²⁴ Title I necessitates a case-by-case analysis.²⁵ Each employee's disability claim must be evaluated

§7:9 (Thomas R. Trenkner ed., Lawyers Coop. Pub. 1992).

¹⁹ See 29 U.S.C. § 794(d) (1994) (amending 29 U.S.C. § 794 (1973)) ("The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under Title I of the Americans with Disabilities Act of 1990"); 29 U.S.C. § 794(a) (amending U.S.C. § 794 (1973)) (substituting "a disability" for "handicaps" and "disability" for "handicap").

²⁰ See, e.g., *Bragdon v. Abbott*, 118 S. Ct. 2196, 2202-05 (1998); *Chandler v. City of Dallas*, 2 F.3d 1385, 1391 & nn.18-22 (5th Cir. 1993) (discussing the similarities between the ADA and the Rehabilitation Act and applying the EEOC's interpretation of the ADA to a case brought under the Rehabilitation Act); *Fallacaro v. Richardson*, 965 F. Supp. 87, 91 n.4 (D.D.C. 1997) (same); *Taylor v. Dover Elevator Sys., Inc.*, 917 F. Supp. 455, 460 n.1 (N.D. Miss. 1996) ("[I]t was Congress' intent that the case law developed under the Rehabilitation Act be generally applicable to the term disability under the ADA. (citation omitted) This decision is based upon case law from both the Rehabilitation Act and the ADA.").

²¹ 42 U.S.C. §§ 12101-17 (1994).

²² 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* (John Parry ed. 1996) [hereinafter *REGULATION UNDER THE ADA*].

²³ See Kristi Bleyer Johnson, *Enforcement & Remedies*, in *MENTAL DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT 19* (2d ed. 1997) ("The [EEOC], the federal agency responsible for administratively enforcing Title I's employment provisions, reports over 68,200 ADA complaints filed, with over 52,400 resolutions through the administrative enforcement process recovering nearly \$105 million for affected individuals.") [hereinafter *MENTAL DISABILITIES*].

²⁴ 29 C.F.R. app. § 1630, Background (1998).

²⁵ See *id.*; see also *Bragdon*, 118 S. Ct. at 2214 ("It is important to note that whether respondent has a disability covered by the ADA is an individualized inquiry.") (Rehnquist, C.J., concurring in part and dissenting in part); *Homeyer v. Stanley Tulchin Assocs., Inc.*, 91 F.3d 959, 962 (7th Cir. 1996) (holding that "a

and decided in light of the specific functions of the job the employee holds or seeks.²⁶ Although the ADA delineates basic parameters of law and supplies a common terminology to be used when discussing disabilities, the ADA's applicability to a discrete situation can be determined only after examining the unique facts of an individual case.²⁷

The ADA, like the Rehabilitation Act, defines "disability" in three ways: "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; a record of such an impairment; or being regarded as having such an impairment."²⁸ The first definition of disability covers actual disabilities, while the second and third "include stereotypes, stigmas, and perceptions that cause people to be treated as if they have a covered disability."²⁹ Within the definition of an actual disability,³⁰ 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 (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine."³¹ Mental and psychological disorders, including emotional and mental illnesses, some learning disabilities and mental retardation, are also encompassed within the purview of the Act.³²

determination of disability must be made on an individualized, case-by-case basis); *Katz v. City Metal Co., Inc.*, 87 F.3d 26, 32 (1st Cir. 1996) (same); *Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 59-60 (4th Cir. 1995) (summarizing case holdings which found that disability status must be made on a case-by-case basis); *Hendler v. Intelcom USA, Inc.*, 963 F. Supp. 200, 207 (E.D.N.Y. 1997) ("[P]laintiff's argument . . . is precisely the message conveyed in the EEOC regulations: that each disability determination must be made on a case-by-case basis.").

²⁶ See 29 C.F.R. app. § 1630, Background.

²⁷ See *id.*

²⁸ 42 U.S.C. § 12102(2)(A-C) (1994).

²⁹ John Parry, *The Meaning of Disability Under the ADA*, in REGULATION UNDER THE ADA, *supra* note 22, at 9.

³⁰ Since this Note focuses solely on the issue of the effect mitigating measures have on an actual disability, only the first part of the ADA's disability definition will be examined. For further explanation of what having a record of or being regarded as having a disability means see 29 C.F.R. app. § 1630.2 (k-l) (1998).

³¹ *Id.* § 1630.2(h)(1).

³² See *id.* § 1630.2(h)(2). The following are specifically excluded from the ADA's definition of a disability: any condition stemming from the current illegal use of drugs and/or alcohol (although disabilities arising from past use of drugs

Although the ADA's definition of a physical or mental disability appears to include an extraordinarily large group of people,³³ its requirement that a disability "substantially limit a major life activity" greatly restricts the actual coverage of the ADA. Major life activities include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working"³⁴ but may also include sleeping, reading, thinking, concentrating, and interacting with others.³⁵ To be substantially limiting, a disability must cause an individual to be "unable to perform a major life activity that the average person in the general population can perform" or must "significantly restrict[]" performance of that major life activity.³⁶ The extent to which a disability restricts a major life activity is to be determined by examining the "nature and severity," "duration or expected duration," and "permanent or long-term impact" of the individual's impairment.³⁷

If an individual seeking the protection of Title I of the ADA is found to have a physical or mental disability that substantially limits a major life activity, that individual must still prove that s/he is qualified for the position of employment held or desired.³⁸ A qualified individual with a disability is one "who satisfies the requisite skill, experience, education, and other job-related requirements of the . . . position."³⁹ The disabled individual must prove that s/he is able to perform the essential functions of the job with or without reasonable accommodations.⁴⁰ By ensuring that the disabled applicant

and/or alcohol are protected), 42 U.S.C. § 12114(a-b) (1994); homosexuality, bisexuality, transvestism, and all other sexual behavior disorders not resulting from a physical impairment, 29 C.F.R. § 1630.3(d)(1), (e) (1998); and compulsive gambling, kleptomania, and pyromania. *Id.* § 1630.3(d)(2).

³³ See text accompanying *supra* note 28-32.

³⁴ 29 C.F.R. § 1630.2(i).

³⁵ See EQUAL EMPLOYMENT OPPORTUNITY COMM'N, ADA ENFORCEMENT GUIDANCE: AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES 5 (Mar. 25, 1997).

³⁶ 29 C.F.R. § 1630.2(j)(1)(i-ii).

³⁷ *Id.* § 1630.2(j)(2)(i-iii).

³⁸ See 42 U.S.C. § 12112(a) (1994) ("No covered entity shall discriminate against a *qualified individual* with a disability . . .") (emphasis added).

³⁹ 29 C.F.R. § 1630.2(m).

⁴⁰ See 42 U.S.C. § 12111(8) (1994).

has the qualifications necessary to perform the job, employers are protected from being legally required to hire incompetent employees.

The requirement that disabled individuals be qualified for the position of employment they seek is juxtaposed with the requirement that employers provide "reasonable accommodations" for qualified individuals with known disabilities.⁴¹ Title I requires an employer to modify certain employment practices—such as the job application process, the work environment, or how a job is performed—if the modification would help a qualified individual with a disability overcome her particular impediment and perform the essential functions of the position. These reasonable accommodations are only required, however, when such modification will not cause the employer "undue hardship."⁴² Undue hardship is generally defined as "significant difficulty or expense in, or resulting from, the provisions of the accommodation," taking into account the "financial realities" of the particular employer and other similar factors.⁴³ Here again, the ADA requires a case-specific evaluation to be made regarding job modifications to ensure the accommodation is "tailored to match the needs of the disabled individual with the needs of the job's essential functions."⁴⁴

C. *Administrative Procedures for Enforcing Title I of the ADA*

In section 12117(a) of Title I of the ADA, Congress adopted the administrative mechanisms and remedies of Title VII of the Civil Rights Act of 1964 for enforcement of the employment provisions of the ADA.⁴⁵ The most important of these inherited mechanisms is the Equal Employment Opportunity Commission. The EEOC issues regulations, offers interpretive guidance on the implementation of Title I and provides administrative remedies for ADA violations.

⁴¹ See 29 C.F.R. § 1630.2(o).

⁴² *Id.*

⁴³ 29 C.F.R. app. § 1630.2(p) (1998).

⁴⁴ *Id.* in Background.

⁴⁵ See 42 U.S.C. § 12117(a) (1994) ("The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides . . .").

Before a complainant can file a state or federal lawsuit claiming a violation of the ADA, the complainant must file a formal charge with the EEOC within 180 days from the alleged discriminatory behavior.⁴⁶ The EEOC then investigates the charges and, if reasonable cause is found, attempts to resolve the matter through negotiation or mediation.⁴⁷ If the EEOC is unable to resolve the issue through mediation, it may choose to file suit against allegedly non-compliant private employers.⁴⁸ Cases against governmental entities are referred by the EEOC to the Attorney General.⁴⁹ The EEOC, the Department of Labor and the Department of Justice coordinate the filing of complaints under Title I of the ADA and sections 503 and 504 of the Rehabilitation Act in order to avoid inconsistent resolutions.⁵⁰

"If the EEOC has found reasonable cause to believe that the ADA has been violated . . . and has decided not to bring a civil action"⁵¹ a complainant may choose to file an individual civil suit against an employer for allegedly violating Title I. Before filing, the complainant must receive a "right-to-sue letter" from the EEOC, which is issued "180 days after a charge is filed, or sooner if administrative review is likely to take more than 180 days."⁵² A complainant may request, in writing, that a right-to-sue letter be issued only after the expiration of 180 days from the date the charges were filed with the EEOC.⁵³ Once a right-to-sue letter is issued and the complainant has exhausted all available administrative remedies,⁵⁴ a complainant has ninety days to file a civil suit under

⁴⁶ See *id.*

⁴⁷ See Kristi Bleyer Johnson, *Enforcement and Remedies*, in *MENTAL DISABILITIES*, *supra* note 23, at 20.

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ See *supra* text accompanying notes 11-20; see also Kristi Bleyer Johnson, *Enforcement and Remedies*, in *MENTAL DISABILITIES*, *supra* note 23, at 20.

⁵¹ 2 AMERICANS WITH DISABILITIES: PRACTICE AND COMPLIANCE MANUAL, *supra* note 18, § 7:181.

⁵² Kristi Bleyer Johnson, *Enforcement and Remedies*, in *MENTAL DISABILITIES*, *supra* note 23, at 20.

⁵³ See 2 AMERICANS WITH DISABILITIES: PRACTICE AND COMPLIANCE MANUAL, *supra* note 18, § 7:183.

⁵⁴ See Kristi Bleyer Johnson, *Enforcement and Remedies*, in *MENTAL DISABILITIES*, *supra* note 23, at 20; see, e.g., *Sherman v. Optical Imaging Sys., Inc.*, 843 F. Supp. 1168 (E.D. Mich. 1994) (dismissing plaintiff's claim for failing to exhaust

Title I.⁵⁵ Both legal and equitable remedies are available to a plaintiff filing suit under Title I of the ADA.⁵⁶ The aggregate amount of compensatory and punitive damages which can be awarded to a plaintiff is capped according to the total number of employees in the company.⁵⁷ These monetary damages may be awarded in addition to back pay and legal fees.⁵⁸ Before seeking legal remedy, however, a plaintiff suing under Title I of the ADA must have exhausted all administrative remedies, unless the alleged discrimination involves the local, state, or federal government.⁵⁹

II. THE QUANDARY OF MITIGATING MEASURES

In March 1997, the focus of the mainstream media and the legal community alike centered on the question of what weight mitigating measures should be given when evaluating how substantially limited an individual with a disability is.⁶⁰ That

administrative remedies). *But see, e.g.,* *Austin v. Owens-Brockway Glass Container, Inc.*, 844 F. Supp. 1103 (W.D. Va. 1994) (allowing plaintiff to proceed with lawsuit without exhausting administrative remedies when EEOC thrice refused to file the charges.); Kristi Bleyer Johnson, *Enforcement and Remedies*, in *MENTAL DISABILITIES*, *supra* note 23, at 21 ("There is no requirement to exhaust administrative remedies if the alleged discrimination involves local, state, or federal government entities.").

⁵⁵ See 2 AMERICANS WITH DISABILITIES: PRACTICE AND COMPLIANCE MANUAL, *supra* note 18, § 7:182.

⁵⁶ See Kristi Bleyer Johnson, *Enforcement and Remedies*, in *MENTAL DISABILITIES*, *supra* note 23, at 20.

⁵⁷ See 42 U.S.C. § 1981a(b)(3) (1994) (employers with 15-100 employees = \$50,000; 101-200 = \$100,000; 201-500 = \$200,000; more than 500 = \$300,000).

⁵⁸ See *id.* § 1981a(b)(1-2); see also Elizabeth Gleick, *Mental Adjustment: How Far Should Employers Go to Help Someone with a Psychiatric Illness Stay on the Job?*, TIME, May 19, 1997, at 62.

⁵⁹ See Kristi Bleyer Johnson, *Enforcement and Remedies*, in *MENTAL DISABILITIES*, *supra* note 23, at 21.

⁶⁰ For examples of stories in the general media see Stephen Kopfinger, *New Workplace Guidelines on Disability Cause Confusion*, LANCASTER NEW ERA, July 6, 1997, at D1, available in 1997 WL 4308054; Julie Kosterlitz, *Psyched Out*, NAT'L J., May 24, 1997, available in 1997 WL 7228505; Richard E. Vatz, *Muddled Concepts of Mental Disability*, WASH. TIMES (D.C.), May 21, 1997, at A12, available in 1997 WL 3672602; R.A. Zaldivar, *Business Employers get Hints on Helping Mentally Ill*, PORTLAND OREGONIAN, May 4, 1997, at G01, available in 1997 WL 4170048. For examples of stories in the legal media see Peter David Blanck, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act: Who is an Individual with a Disability?*, 42 VILL. L. REV. 345, 407 n.128 (1997); Dana D. Deane, *ADA, FMLA, Workers' Compensation and Their Interplay*, 572 PLI/LIT

month, the EEOC issued new enforcement guidance addressing the ADA and individuals with psychiatric disabilities.⁶¹ Perhaps the most controversial section of this guidance provides: "The ADA legislative history unequivocally states that the extent to which an impairment limits performance of a major life activity is assessed without regard to mitigating measures, including medications."⁶² In a footnote, the agency cited with approval cases where courts determined a person's eligibility under the ADA by evaluating the severity of an unmedicated disability.⁶³ The EEOC continued, making its position on this issue clear: "Cases in which the courts have found that individuals are *not* substantially limited after considering the positive effects of medication are, in the Commission's view, incorrectly decided."⁶⁴ The impact of this statement, both on employees with psychiatric disabilities controlled by medication and their employers, opened up a nationwide debate about the proper interpretation of the ADA.⁶⁵ This debate was recently resurrected in the media coverage of *Brigdon v. Abbott*⁶⁶—the Supreme Court decision holding that a woman infected with HIV but currently asymptomatic was entitled to the protection of Title III of the ADA. Although this case was heralded by some as deciding the issue of mitigating measures,⁶⁷ uncertainty persists since the Court specifically declined to address the general issue of whether a disability should be evaluated in its treated or untreated state.⁶⁸

331, 353 (1997); Bettina B. Plevan, *The Year in Review: Significant Developments in Employment Law*, 571 PLI/LIT 63, 76-79 (1997).

⁶¹ See EQUAL EMPLOYMENT OPPORTUNITY COMM'N, ADA ENFORCEMENT GUIDANCE: AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES (Mar. 25, 1997).

⁶² *Id.* at 6-7.

⁶³ See *id.* at 7 n.22.

⁶⁴ *Id.*

⁶⁵ See, e.g., *supra* note 60.

⁶⁶ 118 S. Ct. 2196 (1998); see also *supra* note 3.

⁶⁷ See Joan Biskupic, *U.S. Asks High Court to Rule AIDS Virus a Disability*, WASH. POST, Feb. 7, 1998, at A06; Chris Black, *Disability Act Covers HIV Patient*, BOSTON GLOBE, June 26, 1998, at A18; Linda Greenhouse, *Supreme Court Considers if Disabilities Act Covers H.I.V. Case*, N.Y. TIMES, Mar. 31, 1998, at A19; Linda Greenhouse, *Supreme Court Weaves Legal Principles From a Tangle of Litigation*, N.Y. TIMES, June 30, 1998, at A20.

⁶⁸ See *Brigdon*, 118 S. Ct. at 2206.

A. *EEOC Interpretive Guidance Addressing Mitigating Measures*

Two sections of the EEOC's interpretive guidance on Title I of the ADA directly address the issue of mitigating measures. The first reference is found in the section interpreting the term "physical or mental impairment."⁶⁹ There, the EEOC states, "[t]he existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices."⁷⁰ This charge—to decide if an impairment exists without considering the effect of corrective measures—has not been extensively challenged in court because the question of whether or not the plaintiff has a qualifying impairment is usually not in dispute.⁷¹ Where disagreements do frequently arise, however, is over whether mitigating measures should be taken into account when determining if the impairment substantially limits any major life activity.⁷²

Section 1630.2(j) of the EEOC's Title I interpretive guidance states that a "substantially limits" determination is to be made "on a case-by-case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices."⁷³ In addition, this section offers two examples of how an impairment can be substantially limiting, even if corrective measures ameliorate its effect.⁷⁴ The guidance states that an individual who is unable to walk without a prosthetic device is substantially limited in the major life activity of walking, just as an individual with diabetes, who would lapse into a coma without insulin, is substantially limited in all major life activities.⁷⁵ In their agency decisions and other guidance materials, the EEOC has consistently supported this statutory interpre-

⁶⁹ 29 C.F.R. app. § 1630.2(h) (1998).

⁷⁰ *Id.* (citations omitted).

⁷¹ See, e.g., *Gilday v. Mecosta County*, 124 F.3d 760, 762 (6th Cir. 1997); *Harris v. H & W Contracting Co.*, 102 F.3d 516, 519-20 (11th Cir. 1996). But see *Sutton v. United Air Lines, Inc.*, 130 F.3d 893 (10th Cir. 1997) (parties disputed whether plaintiffs' nearsightedness was an impairment under the ADA).

⁷² See *infra* notes 78-80.

⁷³ 29 C.F.R. § 1630.2(j) (citations omitted).

⁷⁴ See *id.*

⁷⁵ See *id.*

tation of what it means to be substantially limited.⁷⁶ In the federal court system, however, "substantially limits" has become one of the ADA's most controversial phrases.⁷⁷

B. Case Law Addressing Mitigating Measures

The federal courts have faced the issue of corrective measures primarily in conjunction with three specific impairments—diabetes, mental illness and impaired vision.⁷⁸ Less frequently, the issue has been raised in cases involving other impairments, such as kidney and thyroid disease, hypertension, asthma and breast cancer.⁷⁹ When mitigating measures are crucial to determining who the ADA protects and who it does not, the federal courts are split. Although many circuit courts of appeals have ruled in agreement with the EEOC's guidance on this issue, a few circuit courts disagree with the EEOC or have not yet decided this question.⁸⁰ District courts,

⁷⁶ See, e.g., EQUAL EMPLOYMENT OPPORTUNITY COMM'N, ADA ENFORCEMENT GUIDANCE: AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES 6-7 (Mar. 25, 1997); EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC DEFINITION OF TERM "DISABILITY," (Mar. 14, 1995) ("The investigator also should remember that the 'disability' determination is to be made without regard to the availability of mitigating measures.").

⁷⁷ See *infra* notes 78-80.

⁷⁸ See, e.g., *Sutton v. United Air Line, Inc.*, 130 F.3d 893 (10th Cir. 1997) (denied protection of ADA to plaintiffs with correctable vision impairment); *Sherback v. Wright Automotive Group*, 987 F. Supp. 433 (W.D. Pa. 1997) (extended protection of ADA to plaintiff with post-traumatic stress disorder); *Wilson v. Pennsylvania State Police Dept.*, 964 F. Supp. 898 (E.D. Pa. 1997) (extended protection of ADA to plaintiff with correctable vision impairment); *Krocka v. Reigler*, 958 F. Supp. 1333 (N.D. Ill. 1997) (extended protection of ADA to plaintiff with a dysthymic disorder caused by depression and treated with Prozac); *Moore v. City of Overland Park*, 950 F. Supp. 1081 (D. Kan. 1996) (denied protection of the ADA to insulin-dependent diabetic); *Cannon v. Clark*, 883 F. Supp. 718 (S.D. Fla. 1995) (extended protection of the ADA to insulin-dependent diabetic); *Mackie v. Runyon*, 804 F. Supp. 1508 (M.D. Fla. 1992) (denied protection of Rehabilitation Act to plaintiff with bipolar disorder treated with Lithium).

⁷⁹ See *Harris v. H & W Contracting Co.*, 102 F.3d 516 (11th Cir. 1996) (extended protection of the ADA to plaintiff with Graves' disease, as thyroid disorder); *Ellison v. Software Spectrum*, 85 F.3d 187 (5th Cir. 1996) (denied protection of ADA to plaintiff with breast cancer); *Gilbert v. Frank*, 949 F.2d 637 (2d Cir. 1991) (extended protection of Rehabilitation Act to plaintiff with polycystic kidney disorder); *Hendler v. Intelcom USA, Inc.*, 963 F. Supp. 200 (E.D.N.Y. 1997) (extended protection of ADA to plaintiff with severe asthma); *Hodgens v. General Dynamics Corp.*, 963 F. Supp. 102 (D.R.I. 1997) (denied protection of ADA to plaintiff with hypertension and arrhythmia).

⁸⁰ The First, Second, Third, Seventh, Eighth, Ninth, and Eleventh Circuits have

as well as a few circuit courts, are finding themselves bound by precedent they do not fully agree with and are, therefore, seeking ways to limit or distinguish prior case law which followed the EEOC guidance.⁸¹ Because of this fracturing, any court's ruling on mitigating measures is unclear at best.

The recent Sixth Circuit Court of Appeals' decision in *Gilday v. Mecosta County*⁸² illustrates the divergent judicial opinions raised by the issue of mitigating measures. Kevin

decided cases in support of the EEOC's guidance, refusing to take mitigating measures into consideration when evaluating an individual's level of impairment. *See, e.g.,* *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 866 (1st Cir. 1998); *Bartlett v. New York State Bd. of Exam'rs*, 156 F.3d 321, 329 (2d Cir. 1998); *Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933, 936-37 (3d Cir. 1997); *Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997); *Holihan v. Lucky Stores*, 87 F.3d 362 (9th Cir. 1996); *Harris*, 102 F.3d at 516; *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995); *Gilbert v. Frank*, 949 F.2d 637 (2d Cir. 1991). On the other hand, the Sixth and Tenth Circuits seem unwilling to adhere to the EEOC's interpretation. *See Gilday v. Mecosta County*, 124 F.3d 760 (6th Cir. 1997); *Sutton*, 130 F.3d at 893. The Fifth Circuit recently narrowed the factual setting in which it will apply the EEOC guidance. *Washington v. HCA Health Serv. of Texas, Inc.*, 152 F.3d 464 (5th Cir. 1998). This is a departure from an earlier Fifth Circuit decision in which the court "expressed skepticism over whether Congress really intended that [the court] consider an individual without regard to mitigating measures." *Id.* at 469 n.5 (citing *Ellison*, 85 F.3d at 191-92 n.3). The Fourth Circuit has not had occasion to decide this issue. Search of WESTLAW Database CTA4 (Feb. 23, 1999).

⁸¹ A recent example of this limiting can be found in *Smith v. Horton Indus., Inc.* 17 F. Supp. 2d 1094 (D.S.D. 1998). Although that court found itself bound by Eighth Circuit precedent following EEOC guidance regarding mitigating measures, the *Smith* court writes:

Were this court "writing on a clean slate," the Court would adopt the rationale of the Tenth Circuit in *Sutton* [which took mitigating measures into account when evaluating the extent of the plaintiff's impairment]. By way of personal example, I cannot read at all, hunt successfully or play tennis successfully without the use of eye wear. It would seem to be unfair, if you will, to conclude that uncorrected vision due to the aging process would translate to a disability within the meaning of the ADA.

Id. at 1099.

The Fifth Circuit also recently held that although the EEOC's directive on mitigating measures should be followed, it should only be applied to "serious impairments." *Washington*, 152 F.3d at 470 ("Although we think it is more reasonable to say that mitigating measures must be taken into account, we recognize that our position is not so much more reasonable to warrant overruling the EEOC. Thus, we will follow the EEOC Guidelines and the legislative history, but we read them narrowly.") (footnote omitted); *id.* at 469 ("[W]e think that these cases, which have held that mitigating measures must be taken into account, offer the most reasonable reading of the ADA.").

⁸² 124 F.3d 760 (6th Cir. 1997).

Gilday worked as an emergency medical technician in Mecosta County, Michigan for sixteen years.⁸³ Gilday was diagnosed with non-insulin dependent diabetes in September of 1991.⁸⁴ He treated this condition through a combination of oral medication, a strict diet and regular exercise.⁸⁵ When unable to maintain this treatment regime or when subjected to prolonged stress, Gilday's blood sugar levels would fluctuate wildly, causing him to become easily frustrated, short-tempered and irritable.⁸⁶ In August of 1994, Gilday was fired "for conduct unbecoming a paramedic and a history of rudeness to patients and colleagues."⁸⁷

Upon his termination, Gilday filed suit under the Americans with Disabilities Act in the District Court for the Western District of Michigan against his former employer, Mecosta County, claiming his diabetes qualified as a disability.⁸⁸ He alleged that Mecosta's refusal to transfer him to a less chaotic paramedic station violated the ADA's requirement that employers reasonably accommodate disabled employees.⁸⁹ He further claimed this lack of accommodation increased his stress level, which caused his rude conduct and eventually led to his termination.⁹⁰ Although both parties agreed that Gilday's diabetes qualified as a physical impairment under the ADA,⁹¹ the district court granted Mecosta County's motion for summary judgment on the grounds that this physical impairment did not substantially limit any of Gilday's major life activities.⁹² He did not, therefore, qualify for the protection of the ADA, and his termination was upheld.⁹³

In a unanimous decision, the Sixth Circuit reversed the summary judgment, finding that Gilday did present evidence which could prove he was a qualified individual with a disabili-

⁸³ See *id.* at 761 (citation omitted).

⁸⁴ See *id.*

⁸⁵ See *id.* (citation omitted).

⁸⁶ See *id.* (citation omitted).

⁸⁷ *Gilday*, 124 F.3d at 761 (citation omitted).

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See *id.* at 762 (citations omitted).

⁹² See *Gilday*, 124 F.3d at 761 (citation omitted).

⁹³ See *id.*

ty.⁹⁴ What the panel of three judges could not agree on, however, was whether or not the severity of Gilday's condition should be evaluated in light of the ameliorative effect his corrective regime had on his diabetes.⁹⁵ Each judge set forth his or her own unique answer to the question of "[w]hether [or not] the Court [s]hould [t]ake the [p]resence of [m]itigating [m]easures into [a]ccount [w]hen [d]eciding [w]hether a [d]isability [e]xists."⁹⁶

Judge Karen Moore's opinion fully embraced the EEOC's interpretive guidance on the issue.⁹⁷ She found the EEOC's mandate to examine an individual's impairment without regard to mitigating measures consistent with the statutory language of the ADA, its purpose and its legislative history.⁹⁸

In her opinion, Judge Cornelia Kennedy asserted that EEOC guidance is not binding law, but only an executive agency's interpretation of binding law.⁹⁹ Judge Kennedy reasoned that the EEOC's guidance on this issue should be ignored because it conflicts with the plain, unambiguous language of the ADA itself.¹⁰⁰ Judge Kennedy further warned that if the EEOC's advice is given the force of law and mitigating measures ignored, ADA protection will extend to a class of people Congress did not intend to protect, that is, to "all individuals whose life activities would *hypothetically* be substantially limited were they to stop taking medication."¹⁰¹

Finally, Judge Ralph Guy took a centrist position on the issue of mitigating measures. Not willing to give full effect to the EEOC guidance and also not willing to totally ignore an individual's condition when an impairment is treated, Judge Guy advanced an approach that determines on a case-by-case basis the influence mitigating measures should have in a "sub-

⁹⁴ See *id.*

⁹⁵ Judge Moore found that Gilday presented evidence of material questions of fact as to whether he is a qualified person with a disability after evaluating his untreated condition. *Id.* at 762-66. J. Kennedy and J. Guy, concurring in part and dissenting in part, found material issues of fact as to the substantial limitations of Gilday's impairment even in his treated state. *Id.* at 766-68.

⁹⁶ *Id.* at 762.

⁹⁷ See 29 C.F.R. app. § 1630.2(h), (j) (1998).

⁹⁸ See *Gilday*, 124 F.3d at 763-65.

⁹⁹ See *id.* at 766 (Kennedy, J., dissenting).

¹⁰⁰ See *id.* at 766-67.

¹⁰¹ *Id.* at 767.

stantially limits" evaluation.¹⁰² If a particular plaintiff is "completely functional" due to the positive effects of corrective measures, that individual's disability "should be evaluated as such."¹⁰³ However, if an individual is assisted by mitigating measures and still qualifies as disabled under the ADA, that person should receive the protection of the statute.¹⁰⁴ This single case encapsulates the divergent legal approaches taken in an attempt to solve the problem of mitigating measures. Due to the unsettled nature of this question, a more detailed look at the legal support behind each position is warranted.

C. Arguments Made For and Against Including Mitigating Measures

Although outcomes differ, federal courts do appear to agree on the proper questions to ask when deciding what role mitigating measures should play when evaluating an individual's level of disability. These questions include: 1) how much deference should the EEOC's interpretive guidance be given?; 2) should the legislative history of the ADA be consulted in order to determine the validity of the EEOC's guidance?; and 3) would implementing the EEOC's guidance on this issue extend the protection of the ADA to a group of people Congress did not intend the statute to protect? The following survey of federal case law will concentrate on the reasoning provided for each answer to these three central questions.

1. How Much Deference Should the EEOC's Interpretive Guidance be Given?

The EEOC's position on mitigating measures is clearly pronounced in their interpretive guidance.¹⁰⁵ Since its position is clear, courts must first determine how much weight and deference the guidance should be given. Federal courts have responded to this question in two ways. Some courts give the EEOC's guidance considerable deference since it was promul-

¹⁰² See *id.* at 768 (Guy, J., dissenting).

¹⁰³ *Gilday*, 124 F.3d at 768 (Guy, J., dissenting).

¹⁰⁴ See *id.*

¹⁰⁵ See 29 C.F.R. app. § 1630.2(h), (j) (1998).

gated by the administrative agency designated by Congress to enforce and interpret Title I of the ADA and since it seems to be consistent with the statute.¹⁰⁶ Other federal courts refuse to defer to the guidance because they believe it directly contradicts the plain, unambiguous language of the statute.¹⁰⁷

The Supreme Court has held that the amount of deference afforded an agency interpretation of a statute depends primarily upon the type of regulation the agency issues and whether the interpretation appears to be in agreement or in conflict with the plain meaning of the statute.¹⁰⁸ A very deferential position is taken with respect to "legislative rules"—agency regulations which have been subject to "notice-and-comment" procedures prior to their adoption.¹⁰⁹ On the other hand, "interpretive rules" promulgated by an administrative agency which do not require notice-and-comment "do not have the force and effect of law and are not accorded that weight in the adjudicatory process."¹¹⁰ Both the actual legislative rules promulgated by the EEOC to implement Title I and its interpretive appendix at issue here were subjected to a public notice-and-comment procedure.¹¹¹ This fact gives the EEOC's appen-

¹⁰⁶ See, e.g., *Harris v. H & W Contracting Co.*, 102 F.3d 516, 521 (11th Cir. 1996); *Wilson v. Pennsylvania State Police Dept.*, 964 F. Supp. 898, 904 (E.D. Pa. 1997); *Fallacaro v. Richardson*, 965 F. Supp. 87, 93 (D.D.C. 1997); *Sicard v. City of Sioux City*, 950 F. Supp. 1420, 1435-37 (N.D. Iowa 1996).

¹⁰⁷ See, e.g., *Hodgens v. General Dynamics Corp.*, 963 F. Supp. 102, 107 (D.R.I. 1997); *Sutton v. United Air Line, Inc.*, 130 F.3d 893, 902 (10th Cir. 1997); *Murphy v. United Parcel Serv., Inc.*, 946 F. Supp. 872, 880 (D. Kan. 1996); *Schluter v. Industrial Coils, Inc.*, 928 F. Supp. 1437, 1445 (W.D. Wis. 1996); *Coghlan v. H.J. Heinz Co.*, 851 F. Supp. 808, 813 (N.D. Tex. 1994).

¹⁰⁸ See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations . . .").

¹⁰⁹ See *Sicard*, 950 F. Supp. at 1433-34 (footnote omitted).

¹¹⁰ See *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995); see also *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977) ("[A] court is not required to give effect to an interpretive regulation."); *Snap-Drape, Inc. v. Commissioner*, 98 F.3d 194, 197 (5th Cir. 1996) ("An interpretive regulation . . . is accorded less deference" than a legislative regulation).

¹¹¹ See *Equal Employment Opportunity for Individuals with Disabilities*, 56 Fed. Reg. 8578 (1991) (to be codified 29 C.F.R. § 1630) (proposed Feb. 28, 1991); *Equal Employment Opportunity for Individuals with Disabilities*, 56 Fed. Reg. 35726 (1991) (final rule to be codified in an appendix to 29 C.F.R. § 1630); see also *Wilson*, 964 F. Supp. 898 at 903 & n.4. But see *Washington v. HCA Health Serv. of*

dix more weight than interpretive rules normally receive. However, "administrative constructions which are contrary to clear congressional intent" must be rejected by the courts regardless of their implementation procedures.¹¹² The central question, therefore, is whether the EEOC's guidance, which mandates an impairment be evaluated in its untreated state, is permissible in light of the actual language of the ADA.

Courts which defer to the EEOC regarding mitigating measures find nothing in the language of the statute, its legislative history, or in other agency pronouncements which conflicts with or countermands the EEOC's interpretation of the ADA.¹¹³ These courts have held that the statute's plain meaning supports an examination of an individual's untreated condition¹¹⁴ because Title I uses only the word "impairment" when defining what is protected under the ADA, not "treated impairment" or "impairment plus treatment."¹¹⁵ Ignoring the ameliorative effects of mitigating measures does not, in the opinion of the deferring courts, read the "substantially limits" requirement out of the statute.¹¹⁶ On the contrary, the EEOC's interpretive guidance only answers a question which the statute does not directly address—whether a substantial limitation is to be evaluated with or without regard to mitigating measures.¹¹⁷ The EEOC guidance, therefore, does not contradict

Texas, Inc., 152 F.3d 464, 469 (5th Cir. 1998) ("Because the EEOC's Interpretive Guidelines are not . . . subject to the notice and comment procedure . . . they are not entitled to [a] high degree of deference . . .") (footnote omitted); *Fallacaro*, 965 F. Supp. at 93 (stating that the EEOC rule regarding no mitigating measures was not subject to the notice and comment process).

¹¹² See *Chevron*, 467 U.S. at 843 n.9; see also *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 171 (1989) ("[O]f course, no deference is due to agency interpretations at odds with the plain language of the statute itself.").

¹¹³ See *Harris v. H & W Contracting Co.*, 102 F.3d 516, 521 (11th Cir. 1996) ("nothing in the language of the statute . . . that rules out [the EEOC's] approach."); *Sicard*, 950 F. Supp. at 1436 ("The interpretive regulations here are also entitled to deference when the court considers other factors, including the validity of their reasoning, their consistency with earlier and later agency pronouncements, and whether they were issued contemporaneously with the passage of the statute being interpreted.") (footnote omitted).

¹¹⁴ See *Sicard*, 950 F. Supp. at 1436 ("The EEOC's interpretive regulations simply reflect th[e] plain meaning of the word 'impairment.'").

¹¹⁵ *Id.*

¹¹⁶ See *id.*

¹¹⁷ See *Wilson v. Pennsylvania State Police Dept.*, 964 F. Supp. 898, 904 (E.D. Pa. 1997). At footnote six on the same page, Judge Rendell explains the statute's ambiguity with a illustration:

the statute's requirement that an impairment substantially limit a major life activity. It simply clarifies the fact that the ADA protects individuals who would suffer a substantial limitation if their impairments were left untreated.¹¹⁸

Other federal courts, however, have refused to defer to the EEOC's interpretation and believe its guidance is "at odds with the plain language of the ADA."¹¹⁹ These courts read the words "impairment" and "substantially limits" to connote "the requirement of a real and existing limitation as opposed to a hypothetical one."¹²⁰ They cite the legislature's use of the present tense in the phrase "substantially limits" to indicate Congress' unambiguous intent that an individual's actual ability to perform a major life activity is to be evaluated, rather than what a person may suffer without medication.¹²¹ These courts find it "difficult to see how a condition that has been ameliorated so that it does not affect an individual's ability to function normally can be construed as an 'impairment.'"¹²²

Consider, for example, the analogous case of a patient with a leg injury who requires the use of crutches to be able to walk properly. If this patient's doctor were to ask him, "Are you able to walk down the street?" one can certainly say that the doctor's question, that is, the meaning of the words themselves, is quite clear. However, one would still need to inquire further to know whether the doctor intended for the patient to answer the question with or without regard to his use of crutches. The doctor's question, without more, does not inform the patient as to whether he is being asked whether he can walk down the street on his own without crutches, or whether the doctor wishes to know if the crutches are enabling him to walk down the street. The patient would simply have to know more in order to accurately respond to the doctor's question.

Id. at 904 n.6.

¹¹⁸ See *Sicard*, 950 F. Supp. at 1436.

¹¹⁹ *Sutton v. United Air Line, Inc.*, 130 F.3d 893, 902 (10th Cir. 1997); see also *Hodgens v. General Dynamics Corp.*, 963 F. Supp. 102, 107 (D.R.I. 1997); *Schluter v. Industrial Coils, Inc.*, 928 F. Supp. 1437, 1445 (W.D. Wis. 1996) ("the EEOC's interpretation is in direct conflict with the language of the statute that requires plaintiffs . . . to show that an impairment 'substantially limits' their lives.").

¹²⁰ *Hodgens*, 963 F. Supp. at 107.

¹²¹ See *id.*; *Ellison v. Software Spectrum*, 85 F.3d 187, 191-92 n.3 (5th Cir. 1996) ("[H]ad Congress intended that substantial limitation be determined without regard to mitigating measures, it would have provided for coverage under § 12102(2)(A) for impairments that have the *potential* to substantially limit a major life activity.").

¹²² *Hodgens*, 963 F. Supp. at 107.; see *Schluter*, 928 F. Supp. at 1445:

If an insulin-dependant diabetic can control her condition with the use of insulin or a near-sighted person can correct her vision with eyeglasses or

The EEOC's interpretation is seen as an attempt to "gloss" over the statutory requirement of proving a substantially limiting disability.¹²³ As such, these courts maintain that EEOC guidance should be disregarded as contrary to the language of the statute.

These courts further support their position by pointing out that the instruction to ignore mitigating measures conflicts not only with the language of the statute, but also with later portions of the same EEOC guidance.¹²⁴ The EEOC uses the following example to illustrate a situation where an employee would be protected by the ADA because he is "regarded as" having a disability, even though his disability is not substantially limiting: "For example, suppose an employee has controlled high blood pressure that is not substantially limiting. If an employer reassigns the individual to less strenuous work because of unsubstantiated fears . . . the employer would be regarding the individual as disabled."¹²⁵ This example is read by some courts as conflicting with the EEOC's earlier guidance on actual disabilities, which requires an evaluation of substantial limitations be made without regard to mitigating measures.¹²⁶

Under that mandate, the employee in the example would not need to qualify for the ADA's protection through the "regarded as" category because his unmedicated high blood pressure would be an actual disability.¹²⁷ Yet, according to the interpretive guidance, the employee in the example is not actually disabled, because his "controlled high blood pressure does not affect, in fact, the ability to perform a major life activity."¹²⁸ This employee can only qualify for the protection of the

contact lenses, she cannot argue that her life is substantially limited by her condition. To say that a person who needs insulin or eyeglasses is disabled in fact is to read out of the act's first definition of a disability the requirement that it applies only to those persons who are 'substantially limited' in major life activities.

(citation omitted).

¹²³ See *Coghlan v. H.J. Heinz Co.*, 851 F. Supp. 808, 813 (N.D. Tex. 1994).

¹²⁴ See *Sutton*, 130 F.3d at 902; see also *Murphy v. United Parcel Serv., Inc.*, 946 F. Supp. 872, 880 (D. Kan. 1996).

¹²⁵ 42 U.S.C. § 12102(2)(C) (1996).

¹²⁶ See *Sutton*, 130 F.3d at 902; see also *Murphy*, 946 F. Supp. at 880.

¹²⁷ See *Murphy*, 946 F. Supp. at 880.

¹²⁸ *Sutton*, 130 F.3d at 902.

ADA if he is "regarded as" being disabled. The courts refusing to follow the EEOC guidance regarding mitigating measures read this internal tension as "implicitly suggest[ing] that a person who has controlled his blood pressure by medication does *not* have a[n] [actual] disability."¹²⁹

2. Should the Legislative History of the ADA be Consulted?

Under traditional canons of statutory interpretation, courts are to consider a statute's legislative history only when the language of the statute is ambiguous.¹³⁰ Courts which disregard EEOC guidance on mitigating measures label congressional intent inapplicable, as, they assert, the guidance is in direct conflict with the language of the statute.¹³¹ Since the statutory phrase "substantially limits" is seen as unambiguous and clearly requires the evaluation of an impairment to take mitigating measures into account,¹³² these courts refuse to defer to EEOC guidance, declaring it invalid without any further inquiry into congressional intent. "To paraphrase Justice Holmes' oft-quoted statement, [these courts] do not inquire what Congress meant; [they] only ask what it said."¹³³

On the other hand, courts which do give substantial deference to the EEOC's guidance regard the ADA's legislative history as both applicable and convincing. These courts find the words of Title I ambiguous with regard to mitigating mea-

¹²⁹ *Murphy*, 946 F. Supp. at 880 (emphasis added). *But see* *Gilday v. Mecosta County*, 124 F.3d 760, 763 n.1 (6th Cir. 1997) ("The fallacy of this argument is that it assumes that all uncontrolled high blood pressure is substantially limiting per se . . .").

¹³⁰ *See* *Public Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158, 185 (1989); *Sicard v. City of Sioux City*, 950 F. Supp. 1420, 1437 (N.D. Iowa 1996) (citing *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808 n.3 (1989) (quote omitted)).

¹³¹ *See* *Coghlan v. H.J. Heinz Co.*, 851 F. Supp. 808, 812 (N.D. Tex. 1994) ("If the statutory language at issue, here the word 'limits' is not ambiguous, legislative history and congressional intent are inapplicable to the analysis . . ."). *But see* *Wilson v. Pennsylvania State Police Dept.*, 964 F. Supp. 898, 905 (E.D. Pa. 1997) ("[T]he legislative history of the ADA also represents another aid in this Court's statutory interpretation.").

¹³² *See supra* text accompanying notes 119-23.

¹³³ *Guilzon v. Commissioner*, 985 F.2d 819, 824 n.11 (5th Cir. 1993).

tures.¹³⁴ This statutory ambiguity justifies giving deference to the EEOC's interpretation, so long as its interpretation is not contradicted by the statute's legislative history.¹³⁵ Far from contradicting congressional intent, the deferring courts claim the EEOC's guidance on mitigating measures "directly mimic[s]" the language of the congressional record.¹³⁶ The legislative history of the ADA strengthens these courts' reliance on the EEOC's guidance, since the congressional record can be read to require that impairments be evaluated without regard to the availability of mitigating measures.¹³⁷

3. Does the EEOC's Interpretive Guidance Expand the Scope of the ADA Beyond What Congress Intended?

The policy-based argument made by most courts which examine the issue of mitigating measures, combines the statutory interpretation and congressional intent arguments. Courts that refuse to follow the EEOC's guidance anchor their policy argument to one basic proposition: protecting individuals who have impairments controlled by medication is "an expansion of disability protection beyond the logical scope of the ADA."¹³⁸

¹³⁴ See text accompanying *supra* notes 113-18.

¹³⁵ See, e.g., *Sicard*, 950 F. Supp. at 1438 (using the legislative history to evaluate the validity of the agency's interpretation of the statute); *Wilson*, 964 F. Supp. at 904-05 (using the legislative history to support the agency's interpretation of the unclear statutory language).

¹³⁶ *Sicard*, 950 F. Supp. at 1437; see also *Washington v. HCA Health Serv. of Texas, Inc.*, 152 F.3d 464, 467-68 (5th Cir. 1998) (using the ADA's legislative history to support the EEOC's interpretive guidance). Compare 29 C.F.R. app. § 1630.2(j) (1998) ("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 such as medicines, or assistive or prosthetic devices."), with S. REP. NO. 101-116, at 22 (1989) ("Moreover, whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids."), and, H.R. REP. NO. 101-485, pt. II, at 52 (1990) ("Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids . . . [P]ersons with impairments . . . 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.").

¹³⁷ See *Sicard*, 950 F. Supp. at 1438 ("[T]he court finds that the agency's reliance on clear congressional statements in the legislative history to be a sound basis for the agency's interpretation.").

¹³⁸ *Sutton v. United Airlines, Inc.*, Civ.A.No. 96-S-121, 1996 WL 588917, *5 (D.

The discomfort these courts have with strict adherence to the EEOC's interpretive guidance is exemplified by considering the result of applying the agency's interpretation to an impairment like correctable myopia.¹³⁹

"Seeing" is a major life activity under Title I of the ADA.¹⁴⁰ Myopia is an impairment that substantially limits the major life activity of seeing for many Americans. Myopia is correctable, however, to 20/20 vision or better if mitigating measures such as eyeglasses or contact lenses are used.¹⁴¹ Allowing uncorrected sight to be evaluated in a "substantially limits" test would expand the ADA's coverage to "[m]illions of Americans" who would then qualify as protected individuals; this would, in effect, render "the term disabled . . . a meaningless phrase."¹⁴² "[I]f the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared," the "high purpose" of the ADA would be debased.¹⁴³ If individuals with correctable conditions like myopia, high blood pressure, or insulin-controlled diabetes keep their impairments in check with medication or assistive devices, and if they function in their daily life activities the same way unimpaired individuals do, these courts see no justification in extending the special protections of the ADA and distorting the class of people Congress intended to protect.¹⁴⁴

Courts which enforce the EEOC's guidance on mitigating measures, however, find that both the law and common sense justify including people with corrected impairments within the scope of the ADA.¹⁴⁵ These courts find it inherently unfair to refuse to protect individuals with impairments just because their prosthetic devices, medications or treatments are effec-

Colo. 1996).

¹³⁹ See *Sutton v. United Air Line, Inc.*, 130 F.3d 893 (10th Cir. 1997).

¹⁴⁰ See 29 C.F.R. § 1630.2(i) (1998).

¹⁴¹ See *Sutton*, 130 F.3d at 902-03; *Schluter v. Industrial Coils, Inc.*, 928 F. Supp. 1437, 1445 (W.D. Wis. 1996).

¹⁴² *Sutton*, Civ.A.No. 96-S-121, 1996 WL 588917, *1.

¹⁴³ *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986).

¹⁴⁴ See *id.*; *Murphy v. United Parcel Serv., Inc.*, 946 F. Supp. 872, 880-81 (D. Kan. 1996); *Coghlan v. H.J. Heinz Co.*, 851 F. Supp. 808, 813 (N.D. Tex. 1994).

¹⁴⁵ See *Fallacaro v. Richardson*, 965 F. Supp. 87, 93 (D.D.C. 1997); *Krocka v. Reigler*, 958 F. Supp. 1333, 1340 (N.D. Ill. 1997).

tive.¹⁴⁶ Simply because an individual can take medication or don eyewear to reduce or temporarily eliminate the effect of an impairment "does not eliminate the underlying disability" and should not preclude that individual from ADA protection.¹⁴⁷ The courts which defer to the EEOC's guidance do not believe the ADA's shield will be hyperextended by protecting these individuals. On the contrary, these courts remain convinced that "[i]ndividuals who need . . . prosthetic devices [or other forms of mitigating measures] clearly have impairments that may substantially limit their major life activities"¹⁴⁸ and that they are precisely the individuals the ADA was intended to protect.

III. A SUGGESTED RESOLUTION TO THE CONFLICT OVER THE EEOC'S INTERPRETIVE GUIDANCE

Although most appellate courts have found in favor of strict adherence to the EEOC guidelines on the issue of mitigating measures,¹⁴⁹ the judiciary's discomfort with completely ignoring the ameliorative effects of medication and other devices remains.¹⁵⁰ Because, in the past, this topic has forced a choice between two extremes—fully accepting the EEOC's interpretive guidance or ignoring both the guidance and the individual's untreated disability—the most durable and reasonable position may be at the center of these two outer-reaches.¹⁵¹ Giving deference to the EEOC's guidance by con-

¹⁴⁶ See *Fallacaro*, 965 F. Supp. at 93.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See *supra* note 80.

¹⁵⁰ See, e.g., *Gilday v. Mecosta County*, 124 F.3d 760, 766-68 (6th Cir. 1997) (Kennedy, J. and Guy, J. delivering separate opinions regarding a mitigating measures evaluation); *Smith v. Horton Indus., Inc.*, 17 F. Supp. 2d 1094, 1099 (D.S.D. 1998); *Hendler v. Intelcom USA, Inc.*, 963 F. Supp. 200 (E.D.N.Y. 1997).

¹⁵¹ One very recent attempt to find "a happy medium" solution to this issue was advanced by the Fifth Circuit in *Washington v. HCA Health Serv. of Texas, Inc.*, 152 F.3d 464, 470-71 (5th Cir. 1998). The opinion held that only those impairments which are "serious in the common parlance and . . . require that the individual use mitigating measures on a frequent basis" will be evaluated "in their unmitigated state." *Id.* Those ameliorations that "amount to permanent corrections" will be factored into a "substantially limits" evaluation. *Id.* While this type of reasoning is a start, it doesn't seem to go far enough in preventing the overextension of ADA protection.

sidering an individual's untreated impairment should be balanced against the other factors which determine a person's substantial limitation.¹⁵² "In some cases a person with a 'controlled' medical problem or condition will be completely functional and should be evaluated as such. In other cases, a person with a controlled medical condition may still be under a disability"¹⁵³ Under this tempered approach, the evaluation of an individual's untreated impairment is part of a "substantially limits" test, but it is not the only factor taken into consideration.

This case-by-case analysis finds support in the EEOC's regulations. Section 1630.2(j) of the regulations provides that three factors are to be considered when deciding if an impairment is substantially limiting: "(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment."¹⁵⁴ This section later defines "substantially limits" as meaning "[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."¹⁵⁵

Since the mere presence of mitigating measures does not automatically prove an individual has a qualified disability,¹⁵⁶ combining an examination of an untreated impairment with an examination of the other factors listed under section 1630.2(j)'s "substantially limits" test ensures a full statutory analysis. The presence of a severe, untreated condition *alone* will not guarantee an individual will be found substantially limited, especially if that individual "is able to perform activities [on a daily basis] at the same level as a person in the

¹⁵² See *infra* text accompanying notes 154-55.

¹⁵³ *Gilday*, 124 F.3d at 768 (Guy, J., concurring); see also *Hendler*, 963 F. Supp. at 207.

¹⁵⁴ 29 C.F.R. § 1630.2(j)(2) (1998).

¹⁵⁵ *Id.* § 1630.2(j)(1)(ii).

¹⁵⁶ See EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL, VOL. 2, EEOC Order 915.002, § 902.6 at 902-37 (Mar. 14, 1995).

general population.”¹⁵⁷ Likewise, an individual who suffers from a severe untreated impairment and otherwise qualifies as substantially limited will not be denied protection just because treatment ameliorates her daily condition.¹⁵⁸

This comprehensive approach is further supported by the congressional record charting the development of the ADA. The exact language used by both the House and Senate to address the issue of mitigating measures varies slightly from the language used by the EEOC in their interpretive guidance.¹⁵⁹ The last sentence in the section of Congress’ report addressing actual disabilities reads: “Whether a person has a disability should be assessed without regard to the *availability* of mitigating measures, such as reasonable accommodations or auxiliary aids.”¹⁶⁰ In the sentences preceding this quote, Congress emphasized that, in order for an impairment to rise to the level of a disability, the impairment must be severe in fact.¹⁶¹ Mandating that the “*availability* of mitigating measures” should be ignored further emphasizes the importance of considering only the *actual effects* of an individual’s impairment. Using the phrase *availability of* is also evidence that Congress’ priority was an evaluation of a person’s genuine limitations, not how the condition might be improved nor how it may worsen.¹⁶²

The EEOC announcement containing its final rules on section 1630 also used the phrase “*availability of* mitigating measures,”¹⁶³ although the first two words were lost when these rules were codified in the actual appendix.¹⁶⁴ In their

¹⁵⁷ *Hendler*, 963 F. Supp. at 206.

¹⁵⁸ *See id.*

¹⁵⁹ Compare congressional language, *supra* note 136, with EEOC language, *infra* note 164.

¹⁶⁰ H.R. REP. NO. 101-485, pt. II, at 52 (1990); S. REP. NO. 101-116, at 23 (1990) (emphasis added).

¹⁶¹ *See* H.R. REP. NO. 101-485, pt. II, at 50-52; S. REP. NO. 101-116, at 21-23.

¹⁶² *See* H.R. REP. NO. 101-485, pt. II, at 50-52; S. REP. NO. 101-116, at 21-23.. Although the House Report does provide two examples of application of the mitigating measures rule which closely mirror the examples contained in the EEOC’s guidance, the clear emphasis of the section as a whole remains on the real condition of the individual with an impairment. *See* H.R. REP. NO. 101-485, pt. II, at 52.

¹⁶³ Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35726, 35727 (1991) (final rule to be codified in an appendix to 29 C.F.R. § 1630) (emphasis added).

¹⁶⁴ *See* 29 C.F.R. app. § 1630.2(h) (1998) (“The existence of an impairment is to

overview of the regulations, the EEOC summed up its central interpretive approach to the statute: "Of necessity, many of the determinations that may be required by this part must be made on a case-by-case basis."¹⁶⁵ Then, in the section devoted exclusively to a discussion of the phrase "substantially limits," the EEOC explained that it revised section 1630.2(j)'s interpretive guidance to "make it clear that the determination of whether an impairment substantially limits one or more major life activities is to be made without regard to the *availability* of mitigating measures."¹⁶⁶ The EEOC further explained that it amended the guidance to underscore the importance of "focus[ing] on the individual's capacity to perform major life activities rather than on the presence or absence of mitigating measures."¹⁶⁷ "Substantially limits," as defined here by the EEOC, mandates a "real life" evaluation of a person's impairment which certainly would include examining the effect mitigating measures actually have on the person's impairment.

The reasonableness of this case-specific approach is best exemplified by applying it to a hypothetical scenario involving mitigating measures. Consider, for example, two plaintiffs with asthma, both seeking accommodations in their work environment through Title I of the ADA.¹⁶⁸ Plaintiff A has been treated for asthma since the age of 5; he has episodes of severe wheezing, shortness of breath and coughing, which on four occasions necessitated emergency medical care; he must use a multi-drug regimen to treat his condition. Plaintiff B's asthma began as an adult, caused by an allergic reaction to her house cats. It triggers wheezing, coughing, headaches and tightness

be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices."); 29 C.F.R. app. § 1630.2(j) ("The determination of whether an individual is substantially limited . . . must be made . . . without regard to mitigating measures such as medicines, or assistive or prosthetic devices.").

¹⁶⁵ Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35726, 35726 (1991) (final rule to be codified in an appendix to 29 C.F.R. § 1630).

¹⁶⁶ *Id.* at 35727 (emphasis added).

¹⁶⁷ *Id.* at 35728.

¹⁶⁸ These hypothetical cases are based loosely on the facts of *Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718 (2d Cir. 1994) (granting defendant's motion for summary judgment against plaintiff with asthma), and *Hendler v. Intelcom USA, Inc.*, 963 F. Supp. 200 (E.D.N.Y. 1997) (denying defendant's motion for summary judgment against plaintiff with asthma).

in her chest, particularly when she is exposed to forced air systems in rooms without windows; her condition is treated with exercise and other lifestyle changes. Both plaintiffs state they are able to exercise regularly without significant restriction and otherwise lead "normal" lives.

A strict application of the EEOC's guidance on mitigating measures would likely qualify both plaintiffs under the ADA, since, on the facts above, their untreated asthmatic conditions seem to substantially limit the major life activity of breathing. On the other hand, evaluating the plaintiffs' treated impairments would probably preclude both of them from asserting the protection of the ADA, since medication and other forms of treatment control their asthma and allow them to live "normal" lives. To achieve a result more satisfactory than simply both or neither, a broader evaluation of whether asthma substantially limits the plaintiffs' lives is necessary.¹⁶⁹

A comprehensive "substantially limits" analysis would consider the severity, duration and long-term impact of each plaintiff's asthma,¹⁷⁰ as well as its treated and untreated state. Each plaintiff's overall ability to breathe would also be compared with an average person's ability to breathe.¹⁷¹ Under this case-specific analysis, Plaintiff A would likely be found to qualify under the ADA as an individual substantially limited by his asthma in the major life activity of breathing, while Plaintiff B would not. Even though both plaintiffs' treated conditions were similar, the duration, severity and long-term impact of Plaintiff B's asthma is significantly less than that of Plaintiff A. In addition, while it is common for people in the general population to experience allergic reactions to cats or experience physical discomfort when deprived of freshly circulated air, it is not common for members of the general population to be hospitalized for breathing problems or require medication to breathe normally. Although both plaintiffs suffer from the same impairment, which is improved to the same level by corrective measures, the severity of the impairments varies, causing one to be substantially limiting under the ADA and the other not. This evaluative process combines deference to

¹⁶⁹ See *supra* text accompanying notes 154-58.

¹⁷⁰ See 29 C.F.R. § 1630.2(j)(2) (1998).

¹⁷¹ See *id.* § 1630.2(j)(1)(ii).

the EEOC with adherence to congressional intent and the overarching purposes of the ADA to reach a more equitable outcome.¹⁷²

CONCLUSION

Although uncertainty is an inherent drawback in any case-specific analysis, the flexibility provided is a benefit well-worth the doubt. This approach combines the strongest legal arguments on both sides of the issue of mitigating measures, giving the EEOC's guidance deference, while preserving the ADA's requirement that an impairment substantially limit an individual's life activities. Weighing the importance of an individual's treated and untreated condition ensures that the protective covering of the ADA is not stretched so thin it begins to wear and develop gaps where protection should have been provided. Similarly, under this approach, the ADA does not become so narrow that the people it was intended to protect are left vulnerable to the discrimination the ADA was meant to destroy.

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¹⁷² But see Catherine J. Lanctot, *Ad Hoc Decision Making and Per Se Prejudice: How Individualizing the Determination of "Disability" Undermines the ADA*, 42 VILL. L. REV. 327, 338-40 (1997) (criticizing courts which make individual disability determinations).