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Lisa Maria Tanzi

THE AMERICANS WITH DISABILITIES ACT:* BLIND JUSTICE IN "CORRECTIVE MEASURES" LITIGATION

Lisa Maria Tanzi[**]

INTRODUCTION

The Americans with Disabilities Act ("ADA")[1] has been the subject of intense and complicated litigation since its enactment in 1990.[2] In passing the ADA, ten years ago, Congress found that "some 43,000,000 Americans have one or more physical or mental disabilities."[3] With this number increasing, Congress sought to protect the millions of "people with disabilities [who] want to work but cannot find a job" from employment discrimination.[4] To accomplish this goal, Congress enabled those with certain disabilities to sue when faced with discrimination in their place of

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* 42 U.S.C. §§ 12101-12213 (1994).

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[1] 42 U.S.C. §§ 12101-12213.

[2] Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 107 (1998). Between 1992 and July 1998, there were 615 ADA trial court cases. *Id.* Of those 615 cases, the defendant employer prevailed in 570 cases, or 92.7%. *Id.* at 109. On appeal, the defendant employers prevailed in 448 of the 475 appealed cases, or at a rate of 94%. *Id.* Thus litigation has produced frustrating results for plaintiffs, as they have had little success under the ADA. Erwin Chemerinsky, *Unfulfilled Promise: The Americans with Disabilities Act*, TRIAL, Sept. 1999, at 88, 90. The Supreme Court's decisions in June of 1999 will "significantly curtail the reach of the ADA and that will make successful litigation under the [A]ct even more difficult." *Id.* at 88.

[3] 42 U.S.C. § 12101(a)(1) (1994).

[4] AMERICANS WITH DISABILITIES ACT OF 1989, S. REP. NO. 101-116, at 9 (citing to the staggering levels of unemployment among the disabled).

employment or when seeking a job. The ADA requires the judge to consider individually the impairment of each plaintiff to determine whether that person is afflicted with a disability that warrants ADA protection.[5] Because the statute requires an individualized analysis of a plaintiff's disability, it has been difficult for the courts to decide which disabilities fall under the umbrella of protection of the ADA.[6] This problem has been exacerbated by technological advances in medicine and the resulting ability to provide the means to "control" impairments.[7]

In *Sutton v. United Airlines, Inc.*, the Supreme Court recently concluded that an individual's impairment should be evaluated in the medicated or "controlled" state rather than in the natural state because "those whose impairments are largely corrected by medication or other devices are not 'disabled' within the meaning of the ADA."[8] This holding will have ramifications that will

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[5] 42 U.S.C. § 12102 (1994). Disabilities must be evaluated "with respect to an individual" and be determined by whether an impairment substantially limits the "major life activities of such individual." *Id.* § 12102(2). The Equal Employment Opportunity Commission ("EEOC") has defined "major life activities" to include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i) (1999). The Supreme Court also found reproduction to be a major life activity. Bragdon v. Abbott, 524 U.S. 624, 638-39 (1998). "The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual." 29 C.F.R. app. § 1630 (1999) (interpreting "substantially limits" in 29 C.F.R. § 1630.2(j)).

[6] *Compare* Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 866 n.10 (1st Cir. 1998) (holding that the unmitigated state is determinative for deciding whether an individual with diabetes mellitus is disabled) *with* Sutton v. United Air Lines, Inc., 130 F.3d 893 (10th Cir. 1998), *aff'd*, 119 S. Ct. 2139 (1999) (holding that disabilities, namely myopia, should be considered in their mitigated states) *and* Washington v. HCA Health Servs. of Texas, Inc., 152 F.3d 464 (1998) (holding that only serious impairments, such as diabetes, epilepsy and Adult Stills Disease, will be considered in their unmitigated state).

[7] *Sutton*, 119 S. Ct. at 2148. A main issue before the courts is whether a person is still disabled if they use a modern medication to control their impairment. For instance, *Sutton* dealt with a person who could see perfectly with glasses but without glasses was legally blind. *Id.*

[8] *Id.*

reverberate throughout the federal courts across the country.[9] The courts now must determine whether medication or devices that individuals are using are corrective measures and thus, disqualify them from protection under the ADA.[10] As a result of the *Sutton* ruling, the lower courts will have a difficult time considering claims under the ADA by individuals with impairments that are not corrected but, instead, merely maintained, such as cancer, epilepsy and diabetes.[11] Moreover, the Court's narrow interpretation has limited the success that plaintiffs may achieve under the ADA.

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[9] David Sinclair, *Local Attorneys React to High Court's ADA Decisions*, 9 LAW. J., July 30, 1999, at 3 ("the [C]ourt's decision to keep the number of disabled close to the 43 million mark . . . will absolutely generate further litigation"). *See, e.g.*, Spades v. City of Walnut Ridge, 186 F.3d 897 (8th Cir. 1999) (finding that a police officer who received medicine and counseling for his depression is not substantially limited). *See also* EEOC v. R.J. Gallagher Co., 181 F.3d 645 (5th Cir. 1999) (finding individuals are not disabled because they are not substantially limited when treating impairments with mitigating measures); Whitney v. Apfel, No. C-98-1119, 1999 WL 786369, at *1 (N.D. Cal. Sept. 28, 1999) (finding that medication used to treat depression is a mitigating measure).

[10] *Sutton*, 119 S. Ct. at 2139. The Court failed to define corrective measure. Instead, the Court merely stated that "use of a corrective device does not, by itself, relieve one's disability." *Id.* at 2149. "Rather one has a disability under subsection A if, notwithstanding the use of a corrective device, that individual is substantially limited in a major life activity." *Id.* The ADA lists three separate definitions of disability upon which an individual can bring an ADA claim. 42 U.S.C. § 12102(2)(A)-(C) (1994). Subsection A states that the term disability means "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." Id. § 12102(2)(A) [hereinafter Subsection A]. Subsection B states that the term disability means that there is "a record of such an impairment" by an employer, employment agency, labor organization, or joint labor management committee. *Id.* § 12102(2)(B) [hereinafter Subsection B]. Subsection C states that the term disability means that the individual has been "regarded as having such an impairment." *Id.* § 12102(2)(C) [hereinafter Subsection C]. *See also* Sinclair, *supra* note 9, at 15 ("there will be more litigation as to the disabilities and mitigating conditions that might or might not be covered").

[11] *Workers with 'Correctable' Handicaps Not Protected Under ADA, Says Supreme Court*, ANDREWS AIDS LITIG. REP., July 12, 1999, at 3, 4 [hereinafter *Workers*] (arguing that employers may be able to discriminate against individuals that have epilepsy or diabetes as a result of the Supreme Court's opinions defining disability).

The ruling in *Sutton* has limited greatly the classes of persons protected from discrimination under the ADA. Individuals now must demonstrate that they remain substantially limited in a major life activity even while utilizing measures to mitigate their disability.[12] It is virtually impossible for most disabled people to meet such a high threshold because, as a result of medicine and technology, most are not substantially limited in a major life activity. Nonetheless, under the Court's ruling, such individuals still may be discriminated against in the workplace on the basis of this disability.

This Note examines the extent to which mitigating measures should affect a disabled person's right to sue under the ADA. The Supreme Court failed to provide any substantive guidance in *Sutton* to aid the federal courts in identifying which medications or

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[12] *Workers*, *supra* note 11, at 4 (criticizing the Supreme Court's decision in the corrective measures litigation). The Supreme Court's requirement, that in order for a person to be considered disabled when utilizing corrective measures that person be substantially limited in a major life activity with the corrective measure, is too high of a threshold for most disabled people to meet. John M. Husband, *Corrective Measures in the Determination of Disability Under the ADA*, 28 COLO. LAW. 5 (1999). This is evident in a number of lower court decisions that were issued following the Supreme Court's analysis of disability under the ADA in *Sutton*. *See, e.g.*, Spades v. Walnut Ridge, 186 F.3d 897 (8th Cir. 1999) (finding that because the officer's depression was corrected by medication he was not substantially limited in a major life activity); EEOC v. R.J. Gallagher Co., 181 F.3d 645 (5th Cir. 1999) (finding that treatment of his cancer with chemotherapy treatments did not substantially limit the plaintiff in a major life activity); Matlock v. City of Dallas, No. Civ. A. 3:97-CV-2735, 1999 WL 1032601 at *1 (N.D. Tex. Nov. 12, 1999) (holding that with the assistance of a hearing aid, plaintiff suffered little or no hearing loss in each ear and thus could not be considered substantially limited in the major life activity of hearing); Whitney v. Apfel, No. C-98-1119, 1999 WL 786369, at *1 (N.D. Cal. Sept. 28, 1999) (finding that because the plaintiff used medication to treat his depression he was not substantially limited in a major life activity); Haiman v. Village of Fox Lake, 55 F. Supp. 2d 886 (N.D. Ill. 1999) (holding that because the plaintiff's medication alleviated the symptoms of her impairment she was not disabled under the ADA); Taylor v. Blue Cross & Blue Shield, 55 F. Supp. 2d 604 (N.D. Tex. 1999) (deciding that because the plaintiff's impairment of sleep apnea had been corrected with the use of an air pressure machine he was not substantially limited in any major life activity).

treatments disqualify plaintiffs as disabled under the ADA.[13] The question, thus, remains whether all medications prescribed to plaintiffs to alleviate impairments are now considered mitigating measures. Part I of this Note presents the applicable portions of the ADA and the Supreme Court cases analyzing corrective measures, and demonstrates that the Court's decisions conflict with the intent of the ADA. Part II of this Note discusses the manner in which the Court's decisions have been applied as a "blanket exclusion" to ADA protection in the lower courts. Part III proposes a balancing approach to determine how severely an individual is affected by a disability that remains faithful to both the Supreme Court's definition of disability and the intent of the ADA. Part III then applies the balancing approach to the recent Supreme Court cases, demonstrating that balancing the interests of the parties involved, rather than applying a bright-line test, most fairly will serve people with disabilities and at the same time protect the interests of employers. This Note concludes that if the Court had adopted a balancing approach to determine whether mitigating measures no longer leave a claimant disabled under the ADA, it would have reached different results in its recent trilogy of cases and provided clearer guidance for the lower courts. This guidance would have provided needed protections for individuals who are disabled rather than forcing them to go through the more difficult task of demonstrating that their employers regarded them as disabled.[14]

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[13] *Sutton*, 119 S. Ct. at 2147. "A person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not 'substantially limi[t]' a major life activity." *Id.*

[14] U.S. COMM'N ON CIVIL RIGHTS, HELPING EMPLOYERS COMPLY WITH THE ADA 254 (1998). When disability cases are brought before the courts, many courts find no disability of substantial limitation under Subsection A and have then applied that finding to the analysis under Subsection C, whether the employer regards the individual as substantially limited. *Id.*

I. AMERICANS WITH DISABILITIES ACT

Congress enacted the Americans with Disabilities Act in 1990[15] to provide broad based anti-discrimination protection for individuals with disabilities.[16] The Act 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."[17] Disability is defined as "(a) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment."[18] Substantially limiting is defined by the Equal Employment Opportunity Commission ("EEOC"), the agency charged by Congress with the Act's enforcement and interpretation, as a disability that causes an individual to be "unable to perform a major life activity that the average person in the general population can perform" or that "significantly restrict[s]" the performance of that major life activity.[19] Major life activities

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[15] 42 U.S.C. §§ 12101-12213 (1994).

[16] *See* 42 U.S.C. § 12101 (1994). Congress found that "unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination." *Id.* § 12101(a)(4)."The Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." *Id.* § 12101(a)(8). Thus, this Act ensures that "the Federal Government plays a central role in enforcing the standards established . . . on behalf of individuals with disabilities." *Id.* § 12101(b)(3).

[17] 42 U.S.C. § 12112(a) (1994).

[18] 42 U.S.C. § 12102(2)(A-C) (1994).

[19] 29 C.F.R. § 1630.2(j)(1)(i-ii) (1999) (defining the term "substantially limits"). 42 U.S.C. § 12116 (1994). The EEOC has the authority to issue regulations to carry out the employment provisions. "Not later than one year after [the date of enactment of this Act], the Commission shall issue regulations in an accessible format to carry out this subchapter." *See also* 29 C.F.R. § 1630.1 (1999) (citing the purpose of this regulation is to implement Title I of the ADA).

include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."[20] Additionally, such activities may include reading, thinking, concentrating, interacting with others,[21] sitting, standing, lifting, reaching and reproduction.[22] The Supreme Court defined "major life activity" in regard to the ADA as an activity that "denotes comparative importance" and the Court suggested "that the touchstone for determining an activity's inclusion under the statutory rubric is its significance."[23]

In order to be substantially limited in the major life activity of "working," the EEOC requires that the individual be precluded from "either a class of jobs or a broad range of jobs in various classes."[24] An individual is excluded from a broad range of jobs if the individual cannot meet the requirements of a number and type of jobs in a geographical area that do *not* utilize "similar training, knowledge, skills or abilities."[25] Thus, an individual is substantially limited in the major life activity of working, and excluded from a class of jobs, if the individual is afflicted with a back condition that prevents the individual from performing any heavy labor.[26] An individual is also excluded from a broad class of jobs and substantially limited if the individual has an allergy to a substance present in high rise office buildings, which excludes

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[20] 29 C.F.R. § 1630.2(i) (1999).

[21] *EEOC Enforcement Guidance on Americans with Disabilities Act and Psychiatric Disabilities* at 8 (Mar. 25, 1997), *in* UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION TECHNICAL ASSISTANCE PROGRAM (1998) [hereinafter *EEOC Enforcement Guidance*].

[22] 29 C.F.R. app. § 1630 (1999). The appendix provides an interpretation of the enforcement guidelines listing examples of what may be considered a major life activity. *See also* Bragdon v. Abbot, 524 U.S. 624 (1998). In *Bragdon*, the Supreme Court accepted the EEOC's reference to reproduction as a major life activity. *Id.* at 639.

[23] *Bragdon*, 524 U.S. at 638. The EEOC stated that a reproductive disorder is a physical impairment that is considered a disability. *See* 29 C.F.R. § 1630.2(h)(1) (1999) (defining a "physical impairment" as "any physiological disorder . . . affecting . . . [the] reproductive [system]").

[24] 29 C.F.R. § 1630.2(j)(3)(i) (1999).

[25] 29 C.F.R. app. § 1630 (1999) (interpreting "substantially limits" in 29 C.F.R. § 1630.2(j)).

[26] *Id.*

the individual from a broad range of various jobs carried out in these buildings.[27]

"[T]he major categories of job discrimination faced by people with disabilities include [the] use of standards that have the effect of denying opportunities."[28] With that in mind, the drafters of the ADA intended to eradicate standards that were not essential to job performance but that prevented disabled individuals from acquiring employment.[29] The ADA clearly states the purpose of the statute was:

> (1) to provide a *clear* and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
> (2) to provide *clear, strong, consistent enforceable standards* addressing discrimination against individuals with disabilities;
> (3) to ensure that the Federal government plays a central role in enforcing these standards on behalf of individuals with disabilities.[30]

A qualified individual within the meaning of the ADA is an employee-plaintiff who, "with or without reasonable accommodation, . . . [can] perform the essential functions of the employment position that such individual holds or desires."[31] The individual

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[27] *Id.*

[28] AMERICANS WITH DISABILITIES ACT OF 1989, S. REP. NO. 101-116, at 9.

[29] 42 U.S.C. § 12111(8) (1994). "The term '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.* "Essential functions" is defined as "the fundamental job duties of the employment position the individual with a disability holds or desires." 29 C.F.R. § 1630.2(n)(1) (1999). "The term 'essential functions' does not include marginal functions of the position." *Id.*

[30] 42 U.S.C. § 12101(b)(1-3) (1994) (enumerating the purpose of the Act) (emphasis added). *See also* S. Rep. No. 101-116, at 1 (stating purposes of the Act).

[31] 42 U.S.C. § 12111(8) (1994). The EEOC gives deference to the employer's judgment of what constitutes an essential function of the job. *Id.* If the employer has some type of written job description, for example, an advertisement, that description would be considered evidence of the essential functions of the job. *Id.* Reasonable accommodations may include "making

must be one "who satisfies the requisite skill, experience, education, and other job-related requirements of the . . . position."[32] Although the individual may have to satisfy certain employer created criteria that is not essential to the job, this criteria cannot be used to deny a disabled individual from job eligibility.[33] For instance:

> [I]f a person with a disability applies for a job and meets all the selection criteria except one that he or she cannot meet because of a disability, the criteria must concern an essential, non-marginal aspect of the job and be carefully tailored to measure the persons's actual ability to do an essential function of the job.[34]

Factors used to evaluate whether a function is essential include: whether the position exists to perform a particular function; the number of other employees available to perform that job function, or among whom the performance of that job function can be distributed; the degree of expertise or skill required to perform the function; and the time spent performing the function.[35] If a disabled person cannot meet an essential function of the job, an employer may lawfully decline to hire the person.[36] If, however,

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existing facilities used by employees readily accessible to and usable by individuals with disabilities," and may also include "job restructuring, part-time modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters and other similar accommodations for individuals with disabilities." *Id.* § 12111(9)(A-B).

[32] 29 C.F.R. § 1630.2(m) (1999).

[33] S. Rep. No. 101-116, at 37-38 (1989).

[34] *Id.* Litigation has demonstrated that a marginal function does not necessarily mean a function that is rarely performed. Instead, activities that are rarely performed but the "consequences of their nonperformance could be so catastrophic" are essential functions and not marginal functions. Barber v. Nabors Drilling U.S.A., Inc., 130 F.3d 702, 709 (5th Cir. 1997). If a minimum level qualification for a position is listed, this would effectively demonstrate that the qualification is an essential function of a job. Stinson v. West Suburban Hosp. Med. Ctr., No. 97C 3701, 1998 WL 188938, *1 (N.D. Ill. Jan. 21, 1998). The minimum qualification suggests that it is a prerequisite for hiring. *Id.*

[35] 29 C.F.R. app. § 1630 (1999).

[36] *Id.*

a disabled individual can perform the essential function of the job with reasonable accommodation, the employer may not deny employment to that individual.[37] Consequently, the statute enables employers to decline to hire individuals who are not qualified for the position[38] and balances the needs of employers against the abilities of disabled individuals.

The ADA not only seeks to protect individuals with disabilities from employment discrimination but also seeks to assure employers that the quality of work performed by their disabled employees will not be sacrificed.[39] Once employers are convinced that the quality of work will not suffer if they hire disabled individuals, less discrimination will occur at the hiring level.[40] Further, once the 43 million people with disabilities who are seeking employment have overcome workplace discrimination, the ADA will fulfil its vision "of an America where persons are judged by their abilities and not on the basis of their disabilities."[41]

The ADA's optimistic vision, however, has been blinded by the Supreme Court's trilogy of decisions regarding "controlled impairments."[42] In fact, these decisions represent a victory for the

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[37] *Id.* The EEOC's interpretive guidance defines accommodation as "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." *Id.* Examples of reasonable accommodations include: job restructuring; modified work schedules; reassignment to a vacant position; and modifications of equipment. 29 C.F.R. § 1630.2(o)(2)(ii) (1999).

[38] S. Rep. No. 101-116, at 37-38.

[39] *Id.*

[40] *Id.* at 17. Since its enactment in 1992, the ADA has been effective in reducing unemployment among the disabled by almost three percent. *See* U.S. COMM'N ON CIVIL RIGHTS, HELPING EMPLOYERS COMPLY WITH THE ADA (1998).

[41] S. Rep. No. 101-116, at 19 (testimony of Sandy Parrino).

[42] *See, e.g.*, Albertsons, Inc. v. Kirkingburg, 119 S. Ct. 2162 (1999) (holding that a plaintiff's vision impairment that can be mitigated by the use of subconscious adjustments is not considered substantially limited under the ADA); Sutton v. United Air Lines, Inc. 119 S. Ct. 2139 (1999) (holding that a plaintiff's vision impairment that can be corrected with the use of corrective lenses is not a "substantially limiting" disability within the meaning of the ADA); Murphy v. United Parcel Serv., Inc., 119 S. Ct. 2133 (1999) (finding that a plaintiff's hypertension that can be treated with the use of medication is not a "substantially

employers at the expense of people who most need protection of the ADA.[43] When defining "disability," the drafters used epilepsy, cancer, diabetes, hearing impairments, visual impairments and HIV[44] as illustrative of eligible physical impairments covered by the ADA.[45] Further, the drafters found that epilepsy, diabetes, emotional illness, and cancer were hidden disabilities in which "information was often used to exclude applicants . . . before their ability to perform the job was even evaluated."[46] Thus, Congress intended that these disabilities especially be protected by the Act.

II. THE SUPREME COURT AND THE "CONTROLLED IMPAIRMENTS" LITIGATION

The vague language of the ADA and its requirement of individualized consideration of a claimant's impairment[47] resulted in a deluge of cases in the courts requiring judges to determine

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limiting" disability within the meaning of the ADA). *See also* Elizabeth Worth Harris, *Controlled Impairments Under the Americans with Disabilities Act: A Search for the Meaning of "Disability,"* 73 WASH. L. REV. 575 (1998) (exploring the definition of disability and the concept of a controlled impairment). A "controlled impairment" is defined as "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." *Id.* at 580.

[43] *Workers, supra* note 11, at 4 (arguing that "[e]mployers may now be able to discriminate with impunity against individuals with epilepsy or diabetes"). *See also* David Savage, *Umbrella Starting to Close*, A.B.A. J., Aug. 1999, at 43, 46 (concluding that "[d]isappointed disability rights advocates say the law has been radically restricted").

[44] HIV is the acronym for Human Immunodeficiency Virus. STEDMAN'S MEDICAL DICTIONARY 39 (26th ed. 1995). HIV is a retrovirus that causes AIDS. *Id.* AIDS is a syndrome that attacks the human immune system. *Id.* HIV is transmitted by exchange of body fluids, notably blood and semen, through sexual contact, sharing needles, contact with contaminated blood, or transfusion of contaminated blood products. *Id.* Moreover, people with HIV can still develop health problems, including: pneumonia; cancer; and damage to the nervous system. *Id.*

[45] S. Rep. No. 101-116, at 22.

[46] *Id.*

[47] 42 U.S.C. § 12102 (1994). Disabilities must be evaluated "with respect to an individual" and be determined by whether an impairment substantially limits the "major life activities of such individual." *Id.* § 12102(2).

whether each individual is afflicted with a disability within the meaning of the ADA. One pertinent issue that has arisen is whether a person afflicted with a medical condition that is controlled by medications or another means, thus limiting the disability's interference with one or more major life activities, is disabled under the ADA.[48] While an employee may argue that she qualifies for protection under the ADA because her impairment, if left uncorrected, substantially limits her in a major life activity,[49] an employer may argue that the employee does not qualify for ADA protection because the impairment can be or has been corrected by mitigating measures and thus, does not substantially limit her in major life activities, specifically working.[50]

EEOC regulations provide that a disability should be considered without regard to mitigating measures.[51] In an unusual departure and in contrast to its decision in *Bragdon v. Abbott*,[52] the Supreme Court ignored the EEOC's guidelines, concluding that the EEOC lacked the authority to interpret the term disability.[53] The Court typically has afforded great deference to EEOC regulations concerning the ADA, and in *Bragdon v. Abbott* accepted the EEOC's extended interpretation that HIV is a disability covered

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[48] Chemerinsky, *supra* note 2, at 88 (identifying this same issue in all three disability cases the Supreme Court decided in June 1999).

[49] *See, e.g.*, Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2144-45 (arguing that if plaintiffs' vision is left uncorrected they cannot effectively "see to conduct numerous activities").

[50] *See, e.g.*, *Sutton*, 119 S. Ct. at 2146 (arguing "an impairment does not substantially limit a major life activity if it is corrected").

[51] 29 C.F.R. app. § 1630 (1999) (interpreting 29 C.F.R. § 1630.2(h)). The EEOC's regulations provide that mitigating measures should not be considered when evaluating a "physical or mental impairment" in two separate sections. *Id.* In the first reference, the regulations state, "(t)he existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistant or prosthetic devices." *Id.* In the second reference, the regulations state that the "substantially limits" determination must be made "on a case-by-case basis, without regard to mitigating measures such as medicines, or assistant or prosthetic devices." *Id.* (interpreting 29 C.F.R. § 1630.2(j) (1999)).

[52] 524 U.S. 624 (1998).

[53] *Sutton*, 119 S. Ct. at 2145.

under the Act.[54] The Supreme Court has held that regulation decisions are to be given controlling weight unless they seem "arbitrary, capricious or manifestly contrary to the statute."[55] Yet in *Sutton*, the Supreme Court expressly declined to decide whether the EEOC's interpretive guidance regarding the determination of disability warrants deference without even stating that the regulations were contrary to the Act.[56] The Court explained, "[a]lthough the parties dispute the persuasive force of these interpretive guidelines, we have no need in this case to decide what deference is due."[57] The Court did conclude, however, that the EEOC has not been given authority to interpret the term disability.[58] Moreover, the Court failed to recognize Congress' intent that disabilities that require self-help with mitigating measures, such as epilepsy, diabetes and cancer be covered by the Act and instead only afforded protection to one such "hidden disability," asymptomatic

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[54] *Bragdon*, 524 U.S. at 642. "The uniform body of administrative and judicial precedent confirms the conclusion [that asymptomatic HIV is covered under the ADA] as the most faithful way to effect the congressional design." *Id.* at 645.

[55] *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

Id. at 843-44.

[56] 29 C.F.R. § 1630.2(h) (1999). The EEOC's regulations provide in two sections that mitigating measures should not be considered when evaluating a "physical or mental impairment." *Id.* In the first reference, the regulations state, "(t)he existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices." *Id.* In the second reference, the regulations state that the "substantially limits" determination must be made "on a case-by-case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. § 1630.2(j) (1999).

[57] *Sutton*, 119 S. Ct. at 2146.

[58] *Id.*

HIV, and not other "hidden disabilities," which were also recognized by Congress to be disabilities covered by the ADA.[59]

In *Sutton v. United Air Lines, Inc.*,[60] *Murphy v. United Parcel Service, Inc.*[61] and *Albertsons, Inc. v. Kirkingburg*,[62] the Supreme Court held that individuals who use mitigating measures to correct disabling impairments are not considered disabled if, as a result of the corrective measure, the individuals are not substantially limited in a major life activity.[63] The Court identified high blood pressure and deficient vision as correctable impairments because individuals inflicted with these impairments can utilize measures to correct them.[64] Yet, the Court failed to give any guidance to identify what impairments substantially limit an individual in a major life activity.[65] Its failure to do so resulted in a raised burden on the plaintiff to achieve success under the ADA. This higher burden

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[59] AMERICANS WITH DISABILITIES ACT OF 1989, S. REP. NO. 101-116, at 22 (1989).

[60] 119 S. Ct. 2139 (1999).

[61] 119 S. Ct. 2133 (1999).

[62] 119 S. Ct. 2162 (1999).

[63] *See Sutton*, 119 S. Ct. at 2139. The Supreme Court found that the EEOC guidelines requiring, "that persons be evaluated in their hypothetical uncorrected state is an impermissible interpretation of the ADA." *Id.* at 2146.

> Further, the Court stated that by [l]ooking at the Act [as] a whole, it is apparent that if a person is taking measures to correct, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act.

Id.

[64] *Id.* at 2149 (holding that the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment). *See also Albertsons*, 119 S. Ct. at 2169 (holding that impaired vision that is compensated by subconscious mechanisms of the body is not a disability that is substantially limiting when corrected); *Murphy*, 119 S. Ct. at 2139 (holding that because hypertension is corrected with mitigating measures, such as medication, the plaintiff is not substantially limited in the job market but only disqualified for this particular job).

[65] *Sutton*, 119 S. Ct. at 2149. The Court stated that there are "individuals who take medicine to lessen the symptoms of an impairment so that they can function but nevertheless remain substantially limited." *Id.*

prevents plaintiffs from successfully being deemed as "substantially limited" in a major life activity while utilizing mitigating measures.

The Supreme Court did not provide substantive reasons for finding impairments controlled by medication or other devices as not warranting protection under the ADA. Rather, the Court buttressed its decisions with the verbiage of the Act, stating that "substantially limits appears in the Act in the present indicative verb form . . . [and] the language is properly read as requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability."[66] Thus, the disability only exists 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."[67] The Court ultimately concluded that "a person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently 'substantially limits' a major life activity."[68] Consequently, the Court created categories of impairments no longer protected under the ADA.

A. *Sutton v. United Air Lines, Inc.*[69]

In *Sutton v. United Air Lines, Inc.*, the petitioners were twin sisters who had severe myopia.[70] The sisters, Karen Sutton and Kimberly Hinton, brought a disability discrimination action against United Air Lines under the ADA.[71] The petitioners challenged the airline's minimum vision requirement for global pilots because they were denied interviews and pilot positions.[72] The petitioners met all of the job requirements except the vision requirement.[73] The

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[66] *Id.*

[67] *Id.*

[68] *Id.* at 2146-47.

[69] 119 S. Ct. 2139 (1999).

[70] *Id.* at 2143. Myopia is an optical condition in which only rays from a finite distance from the eye focus on the retina. STEDMAN'S MEDICAL DICTIONARY 1170 (26th ed. 1995). Myopia is commonly referred to as nearsightedness. *Id.*

[71] *Sutton*, 119 S. Ct. at 2139.

[72] *Id.*

[73] *Id.*

airline required that the petitioners have 20/100 minimum uncorrected vision.[74] The petitioners had 20/200 vision in their right eye and 20/400 vision in their left eye.[75] With the use of corrective lenses, however, their vision was 20/20 in both eyes.[76] The Sutton sisters claimed that they were disabled, because without corrective lenses, they could not "effectively . . . see to conduct numerous activities such as driving a vehicle, watching television or shopping in public stores."[77] Their claim was premised upon two arguments. First, that the defendant discriminated against them "because [the defendant] regarded the petitioners as having a disability."[78] The petitioners claimed the airline's vision requirement was based on stereotype, and the requirement prevented them from obtaining a job as a global airline pilot, a class of employment.[79] Thus, the petitioners contended that the airline "mistakenly believe[d] their physical impairments substantially limited them in the major life activity of working."[80] The second argument rested on the first prong of the definition of disability.[81] The petitioners argued that they "possess[ed] a physical impairment that substantially limited them in one or more major life activities." In order for the Court to decide whether the applicants had a substantially limiting disability, it had to first determine whether the impairment should be evaluated with or without reference to corrective measures.[82]

In addressing the "regarded as" argument, the Court concluded that the petitioners did not demonstrate that the airline regarded them as disabled, because the minimum vision requirement alone failed to establish a claim that the airline regarded the petitioners

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[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.* at 2143.

[78] *Id. See* 42 U.S.C. § 12102(2)(C) (1994) (defining "disability" with respect to an individual as "being regarded as having such an impairment").

[79] *Sutton*, 119 S. Ct. at 2150.

[80] *Id.*

[81] *Id.* at 2146. *See* 42 U.S.C. § 12102(2)(A) (1994) (defining "disability" as "a physical or mental impairment that substantially limits one or more major life activities").

[82] *Sutton*, 119 S. Ct. at 2150.

as substantially limited in a major life activity. In fact, the Court stated "that an employer is free to decide that physical characteristics or medical conditions . . . that are limiting . . . make individuals less . . . suited for a job."[83] The Court held that the airline did not regard the individuals as substantially limited in a major life activity but rather regarded their poor vision as precluding them from holding positions as global airline pilots.[84] The Court decided that, "when the major life activity . . . is working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs."[85] Thus, if the applicants were employable in a broad class of jobs, they cannot be substantially limited.[86] Because the position of a global airline pilot is a single type of job, the Court decided that the petitioners were not excluded from a broad class of jobs.[87]

Petitioners maintained that whether an impairment is substantially limiting should be determined without regard to corrective measures in consonance with EEOC regulations that direct that the determination of whether an individual is substantially limited be made without regard to mitigating measures.[88] The respondent, in turn, maintained that an impairment does not substantially limit a major life activity if it is corrected. It argued that the Court should not defer to the agency guidelines because they are in conflict with the plain meaning of the ADA[89] and are an impermissible interpretation of the ADA.[90]

Considering these arguments, the Court held that "a person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently

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[83] *Id.*

[84] *Id.* at 2150.

[85] *Id.* at 2151.

[86] *See* 29 C.F.R. § 1630.2(j)(3)(i) (1999). "The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *Id.*

[87] *Sutton*, 119 S. Ct. at 2151.

[88] *See* 29 C.F.R. § 1630.2(j).

[89] *Sutton*, 119 S. Ct. at 2146.

[90] *Id.*

substantially limits a major life activity."[91] The Court agreed with the respondent and found that the EEOC's guidelines, requiring that persons be evaluated in their unmitigated state, were contrary to the ADA's individualized inquiry requirement. This mandate forces employers "to make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than an individual's actual condition."[92] Thus, when the Court evaluated the visual impairment suffered by the petitioners, it concluded that because they "function identically to individuals without a similar impairment" they were not substantially limited in a major life activity.[93]

Focusing on Congress' findings that "some 43 million Americans have one or more physical or mental disabilities,"[94] the Court excluded some of those originally considered as disabled and concluded that the 43 million people Congress desired to protect under the Act included only those with "activity limitations."[95] Persons with activity limitations include those who, relative to their age and sex group, could not conduct usual activities.[96] Thus, the Court found that, "[h]ad Congress intended to include all [the] persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings."[97] As Justice Stevens stated in his dissent, the Court excluded "from the Act's protected class individuals with controllable conditions such as diabetes and severe

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[91] *Id.* at 2146-47.

[92] *Id.* at 2147.

[93] *Id.* at 2149.

[94] *See* 42 U.S.C. § 12101(a)(1) (1994). *See also Sutton*, 119 S. Ct. at 2147.

[95] *Sutton*, 119 S. Ct. at 2148-49 (finding that a functional approach, which defines disability as limitations on performing certain basic activities when using special aids, led to a number of disabled consistent with the congressional findings listed in the Act, rather than a nonfunctional approach, which defined disability by looking at all of the health conditions that impair health or normal abilities of an individual, that yielded much higher amounts of disabled people when omitting mitigating measures).

[96] *Id.* at 2148.

[97] *Id.* at 2149.

hypertension that were expressly understood as substantially limiting impairments."[98]

Since the Supreme Court in *Sutton* focused on Congress' numbers and did not look beyond the facts of the case, they failed to consider the issues at the heart of the ADA.[99] While the Court's rule may fit the facts of the *Sutton* case, the rule will be difficult to apply to future ADA cases. The *Sutton* case is different from most other types of disability cases for several reasons. First, vision cases deal with impairments and corrective measures that affect a large majority of the United States' population.[100] Second, the case dealt with employment in a highly regulated field.[101] Lastly, the airline's reasons for heightened hiring qualifications were for the protection of the public.[102] Cases involving other disabilities are not as easy to evaluate because they involve a more complicated analysis of the corrective measures.

B. Murphy v. United Parcel Service, Inc.[103]

Vaughn L. Murphy, a mechanic, sued his employer, United Parcel Service ("UPS"), under the ADA when he was terminated upon discovery that his blood pressure exceeded Department of Transportation ("DOT") requirements for drivers of commercial

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[98] *Id.* at 2160-61 (Stevens, J. dissenting).

[99] "Bad cases make bad law." Sinclair, *supra* note 9, at 3. The problem with *Sutton* is that nearsightedness is not a major disability and that the case deals with the Federal Aviation Administration regulations, which are given deference. Sinclair, *supra* note 9, at 3.

[100] The number of people in the United States with vision impairments is 100 million. *Sutton*, 119 S. Ct. at 2149 (citing National Advisory Eye Council, Vision Research—A National Plan: Hearing and Hearing Impairment (Department of Health and Human Services 1996)).

[101] *See* 14 C.F.R. § 67.203(a) (1999). The Federal Aviation Administration ("FAA") has instituted vision requirements for pilots. *Id.*

[102] The FAA wanted to insure that pilots would not have a visual condition that would interfere with flying the airplane. *Id.* § 67.203(e) (pilots cannot have an "acute or chronic pathological condition of either eye . . . that interferes with the proper function of an eye . . . or that may reasonably be expected to be aggravated by flying").

[103] 119 S. Ct. 2133 (1999).

vehicles.[104] In an unmedicated state his blood pressure was very high at 250/160.[105] The DOT regulations prescribed that a driver of a commercial vehicle in interstate commerce cannot have a "current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial vehicle safely."[106] When Murphy was tested to satisfy the clinical requirements, his blood pressure was 160/102.[107] UPS fired Murphy because his blood pressure exceeded the DOT's requirements for drivers of commercial motor vehicles.[108]

To determine whether Murphy was disabled within the meaning of the ADA, the Court considered two questions. Again, the threshold issue for the Court was whether mitigating measures should be considered when determining "whether under the ADA, an individual's impairment 'substantially limits' one or more major life activities."[109] Relying on *Sutton*, the Court concluded that when medicated, Murphy's blood pressure did not limit him in any major life activity.[110] Thus, considering the petitioner's disability in light of the mitigating measures, he was found not to be disabled within the meaning of the ADA.[111]

The Court then questioned whether the respondent fired the petitioner because it regarded him as disabled[112] as a result of its

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[104] *Id.* at 2136.

[105] *Id.* Borderline blood pressure is characterized as a systolic pressure no higher than 160 and a diastolic pressure no higher than 95. STEDMAN'S MEDICAL DICTIONARY 831 (26th ed. 1995). Systolic blood pressure is the top number of the ratio which represents the pressure generated when the heart contracts. Mi Young Hwang, *Why Should You Be Concerned about High Blood Pressure?*, 281 J. AM. MED. ASS'N 484 (1999). The diastolic blood pressure is the bottom number of the ratio which represents the pressure in the vessels when the heart is between contractions. *Id.* One in four Americans has high blood pressure. *Id.*

[106] 49 C.F.R. § 391.41(b)(6) (1999).

[107] *Murphy*, 119 S. Ct. at 2136. This diagnosis is considered high blood pressure. *See* STEDMAN'S MEDICAL DICTIONARY 831 (26th ed. 1995) (defining "high blood pressure").

[108] *Murphy*, 119 S. Ct. at 2136.

[109] *Id.* at 2137.

[110] *Id.*

[111] *Id.* at 2139.

[112] *Id.* at 2137. *See also* 42 U.S.C § 12102(2)(C) (1994) (defining "disability" as "being regarded as having such an impairment").

mistaken belief that he was substantially limited in the major life activity of working.[113] The Court relying on *Sutton*[114] held that the petitioner demonstrated that he was only unable to meet the job requirements of a mechanic position when the job required him to drive a commercial vehicle.[115] The district court concluded that driving a commercial vehicle was an essential function of this position.[116] The petitioner did not challenge this finding. Thus, relying on the district court's conclusion that driving a commercial vehicle was an essential function of the position, the Supreme Court concluded that Murphy did not satisfy this function because he could not meet the DOT certification.[117] Moreover, although the petitioner did not fulfill the requirements for this particular mechanic position, he was able to secure another job as a mechanic shortly after leaving UPS.[118] Because Murphy was employable as a mechanic in another position, the Court concluded that, "at most, the petitioner was regarded as unable to perform only a particular job."[119] This was insufficient, as a matter of law, to prove that the petitioner was regarded as disabled by UPS, because the inability to perform only a particular job is not grounds for a disability claim under the statute.[120] In fact, the EEOC regulations concede that an individual must be unemployable in a broad class of employment in a field.[121] As Murphy was qualified for several other mechanic positions, the array of positions available to him was considered a class of jobs for which he was employable. Thus,

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[113] *Murphy*, 119 S. Ct. at 2137.

[114] Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2150-51 (1999).

[115] *Murphy*, 119 S. Ct. at 2138.

[116] *Id.* at 2136 (citing Murphy v. United Parcel Serv., Inc., 946 F. Supp. 872, 882-83 (D. Kan. 1996)).

[117] *Id.* at 2138.

[118] *Id.* at 2139.

[119] *Id.* at 2139.

[120] *Id. See also* 29 C.F.R. § 1630.2 (j)(3)(i) (1999). "The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *Id.*

[121] *See id.* § 1630.2(j)(3). "The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes." *Id.*

the Court found he did not meet the requirements necessary for protection under the ADA.

C. *Albertsons, Inc. v. Kirkingburg*[122]

In *Albertsons*, an employee truck driver, Hallie Kirkingburg, was fired by his employer, the supermarket chain Albertsons, Inc., because he did not meet the DOT's vision standards.[123] Kirkingburg suffered from amblyopia,[124] an uncorrectable condition that left him with monocular vision.[125] Even after obtaining a waiver of the DOT's standards, his employer did not rehire him.[126] Kirkingburg then brought an ADA action against his former employer.[127]

It was undisputed that Kirkingburg's amblyopia was a physical impairment and that seeing is a major life activity.[128] The question was whether monocular vision alone "substantially limited" Kirkingburg in the major life activity of seeing.[129] Kirkingburg

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[122] 119 S. Ct. 2162 (1999).

[123] *Id.* at 2165. The DOT's vision requirements required corrected distant visual acuity of at least 20/40 in each eye and distant binocular acuity of at least 20/40. 49 C.F.R. § 391.41(b)(10) (1999).

[124] *Albertsons*, 119 S. Ct. at 2166-65. Amblyopia is a suppression of the central vision in one eye when the images from the two eyes are so different that they cannot be fused into one. STEDMAN'S MEDICAL DICTIONARY 56 (26th ed. 1995).There are several possible causes of this condition: 1) a suppression of central vision in one eye due to faulty image formation; 2) a suppression of central vision in two eyes pointing in different directions; or 3) a suppression of central vision due to two images of different sizes, unable to be fused so that the blurrier image is suppressed. *Id.*

[125] Monocular vision is visibility in one eye only. STEDMAN'S MEDICAL DICTIONARY 1126 (26th ed. 1995).

[126] *Albertsons*, 119 S. Ct. at 2166. The DOT had a system since 1992 that allowed commercial drivers with three years commercial driving experience but inflicted with deficient vision to waive the requirements and retain DOT certification. *Id.* at 2167. The driver could not have had a license suspension or revocation, a moving violation, conviction for driving related offenses, or any serious traffic violations. *Id.*

[127] *Id.* at 2166.

[128] *Id.* at 2167.

[129] *Id.* at 2168.

provided evidence that his brain developed subconscious mechanisms for compensating his disability.[130] Kirkingburg had "learned to compensate for the disability by making subconscious adjustments to the manner in which he sensed depth and perceived peripheral objects."[131]

As it had in *Sutton*, the Court determined that mitigating measures should be considered when evaluating a disability, and therefore, evaluated Kirkingburg's subconscious compensation for his disability.[132] The Court stated that there was "no principled basis for distinguishing between measures undertaken with artificial aids, like medications or devices, and measures undertaken, whether consciously or not, with the body's own system."[133] Thus, the Court decided that because a mitigating measure was available, Kirkingburg had to prove that even with this mitigating measure, he was substantially limited in a major life activity.[134] To complete this determination, the Court required that he prove his disability by "offering evidence that the extent of the limitation in terms of [his] own experience, as in loss of depth perception and visual field, [was] substantial."[135]

In addition, the Court considered the DOT's decision to waive the vision requirements and provide Kirkingburg with DOT certification.[136] Despite the fact that the federal agency waived the minimum vision requirement,[137] the Court stated that this

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[130] *Id.*

[131] *Id.*

[132] *Id.* at 2169.

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.* at 2166. DOT certification is granted to:

> [A]pplicants with deficient vision who had three years of recent experience driving a commercial vehicle without a license suspension or revocation, involvement in a reportable accident in which the applicant was cited for a moving violation, conviction for certain driving related offenses, citation for certain serious traffic violations or more than two convictions for any other moving violations.

Id.

[137] *Id.* at 2166. "In early 1993, after he had left Albertsons, Kirkingburg received a DOT waiver, but Albertsons refused to rehire him." *Id.*

waiver did not imply that the employer had to rehire Kirkingburg.[138] The Court essentially disregarded the waiver and never reached the decision of whether Kirkingburg was or was not disabled under the ADA because it disposed of the case on the grounds that Kirkingburg was unable to meet federal vision standards with or without reasonable accommodation.[139]

In *Albertsons*, the federal agency made it clear that the vision qualification was not essential to the job because the agency waived it.[140] The Court, however, found that even if the federal agency waived the qualifications, the employer could still deny employment to the individual.[141] The agency waived the qualification in an experimental program to eradicate standards, such as these, that were not essential to such transportation positions as the one at hand. The agency found Kirkingburg eligible for the program because he met the excellent driving standards required under the program.[142] The Court, however, decided that because the waiver program was not based on any factual conclusion conducive to public safety and was merely experimental in nature, an employer did not have to jeopardize its employee's safety by

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[138] *Id.* at 2174. The Court stated that the waiver regulation did not require an employer to participate in the experiment. *Id.* The waiver program was an experiment of the Federal Highway Administration to conduct a study comparing the group of experienced, visually deficient drivers with a control group of experienced drivers who meet the vision standards. *Id.* This experiment was to allow the Federal Highway Administration to reevaluate their vision standards in the context of actual driver performance in relation to the latest medical technology. *Id.* The Court did not want to burden employers who attempted to comply with the DOT certification requirements with an experimental waiver. *Id.*

[139] *Id.* at 2170 (finding that Kirkingburg was unable to meet the vision standards). "The federal vision standards were an essential function of the job required by a regulation wholly out of the control of the employer." *Id.* at 2171.

[140] *Id.* at 2166.

[141] *Id.* at 2174.

[142] *Id.* at 2166. People with deficient vision were given DOT certification if they met the following requirements: three years of recent commercial vehicle driving experience; no revocation or suspension of a license; and no involvement in a reportable accident in which the individual was cited for a traffic violation. *Id.* In order to be a part of the program, a waiver applicant had to agree to have his vision checked annually for deterioration. *Id.*

submitting to this well intended experiment.[143] Thus, the Court failed to recognize that the intent of the ADA's drafters was to eradicate exactly this type of obstacle.

In denying the force of the experimental waiver, the Supreme Court also ignored the Act's definition of the term discriminate. The ADA provides:

> [Q]ualification standards, employment tests or other selection criteria that screen out . . . an individual with a disability or a class of individuals with disabilities [cannot be used] unless the standard test or other selection criteria . . . is shown to be job related for the position in question and is consistent with business necessity.[144]

The federal agency waived the vision standard for the same reasons the ADA was enacted. "The impetus of developing the waiver program was a concern that the existing substantive standard might be more demanding than safety required."[145] Thus, the Supreme Court did not heed the purpose of the Act—"to eradicate the use of standards that have the effect of denying opportunities."[146]

The Court's analysis of the first prong of the definition of disability under the Act, which states that the term disability means "a physical or mental impairment that substantially limits one or more of the major life activities of such individual,"[147] also failed to recognize much of the force behind the ADA, because it was interpreted in isolation. The Court limited its analysis and did not consider the other parts of the definition of disability as well as the collateral issues involved in the type of jobs the applicants were pursuing. First, the interpretation of the ADA's definition of disability should be interpreted with reference to the entire statute and not just one isolated sentence.[148] Thus, taken as a whole, a

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[143] *Id.* at 2174.

[144] 42 U.S.C. § 12112(b)(6) (1994) (defining the term "discriminate").

[145] *Albertsons*, 119 S. Ct. at 2172.

[146] AMERICANS WITH DISABILITIES ACT OF 1989, S. REP. NO. 101-116, at 37-38 (1989).

[147] 42 U.S.C. § 12102(2)(A) (1994).

[148] *See* Beecham v. United States, 511 U.S. 368, 372 (1994). The Supreme Court has emphasized that statutory determination of definitions should not be made with reference to a single word or phrase but instead the Court should

disability should be considered without reference to mitigating measures because the statute defining disability would then be superfluous.[149] This section of the statute allows a plaintiff to define a disability by a record of the impairment. Thus, those who were once considered disabled but who are now fully recovered are also protected under Subsection B of the Act.[150]

The Court, however, has failed to recognize that consideration of mitigating measures makes it virtually impossible for any plaintiff who is addressing a disability with self-help to redress an unjust act by an employer. Thus, it has inadvertently forced the disabled to argue, pursuant to Subsection C of the Act,[151] that the employer has regarded the individual as disabled. The Court also used *Murphy* to limit the causes of action under this third prong.[152] The Court held that "a person is regarded as disabled within the meaning of the ADA if a covered entity mistakenly believes that the person's actual, non-limiting impairment substantially limits one or more major life activities."[153] Thus, the Court has subsumed the "substantial limitation" analysis, once reserved for the first prong of the statute, into the third prong of the statute, attempting to foreclose this alternative pleading as an option for the disabled.[154]

Proponents of the narrow interpretation of the trilogy of cases believe the limited interpretation of the ADA was necessary to curb unnecessary and frivolous lawsuits. This underlying belief, however, will be inapplicable to a number of discrimination cases brought before the courts. Instead, the trilogy will likely generate

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focus on "the plain meaning of the whole statute, not of isolated sentences." *Id.*

[149] 42 U.S.C. § 12102(2)(B) (1994) (defining disability by record of the impairment).

[150] Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2154 (1999) (Stevens, J. dissenting).

[151] 42 U.S.C. § 12102(2)(C) (1994).

[152] Murphy v. United Parcel Serv., Inc., 119 S. Ct. 2133, 2137 (1999).

[153] *Id.*

[154] This analysis assumes that if an impairment is not considered substantially limiting under Subsection A of the Act, the plaintiff cannot be perceived as substantially limited under Subsection C of the Act. REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS, HELPING EMPLOYERS COMPLY WITH THE ADA 254 (Sept. 1998). Thus, the plaintiff cannot be considered disabled. *Id.*

further litigation. First, those who are dismissed because they cannot prove that they are substantially limited at the district court level will seek more appeals.[155] Second, there will be an increase in litigation as to the types of disabilities that have mitigating measures but that are still covered by the ADA.[156] Thus, the Court was mistaken in its belief that its decision would make the federal courts more efficient.

Supporters of the trilogy also argue that the narrow interpretation was necessary to control employers' insurance rates.[157] Employers need to protect themselves from suits by disabled employees who are injured on the job. By erring on the side of employers, however, the Supreme Court mistakenly took the "heart" out of the ADA.[158] Now, employers can refuse to hire a fully qualified individual because of the misperceptions of an individual's disability and there will be no legal protection for the individual if a mitigating measure is utilized.[159]

III. A BLANKET EXCLUSION AND ITS RAMIFICATIONS FOR THE DISABLED

The Supreme Court's analysis of the meaning of disability in this trilogy of cases prevents individuals from falling under the umbrella protection of the ADA who are diagnosed with diseases

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[155] Sinclair, *supra* note 9, at 15.

[156] Sinclair, *supra* note 9, at 15.

[157] Sinclair, *supra* note 9, at 3 ("this decision is a form of insurance discrimination"). Corporate managers argue that [*Murphy*] slows down the growing deluge of ADA lawsuits. Lynette Clemetson, *A Sharper Image of Bias*, NEWSWEEK, July 5, 1999, at 27.

[158] Clemetson, *supra* note 157, at 27.

[159] *Workers*, *supra* note 11, at 4. Bennet Klein, an employment discrimination attorney who argued the landmark HIV/ADA case, *Bragdon v. Abbott*, 524 U.S. 624 (1998), stated that "an employer may now refuse to hire a fully qualified job candidate simply because the individual has diabetes, and there will be no legal review of that job decision." *Workers*, *supra* note 11, at 4.

such as, diabetes,[160] epilepsy,[161] or cancer.[162] A case-by-case analysis of these impairments demonstrates that individuals inflicted with either epilepsy, diabetes or cancer will almost never be considered disabled under the Supreme Court's analysis because treatment may be available for each of these hidden disabilities that, when utilized, will maintain the disorder. The maintained disabilities which are more complicated than corrected disabilities, are distinguishable from corrected disabilities because a maintained disability has the chance of recurring as a result of extraneous factors that are beyond the control of the afflicted individual. Therefore, while an individual living with a maintainable disability can pursue activities without substantial limitation, their disability could recur and affect a major life activity at any time.

In the post-*Sutton* era, however, impairments that can be maintained with mitigating measures, but that are not necessarily corrected, will be denied ADA protection unjustly. Justice Stevens, in his dissent in *Sutton*, illustrated this point arguing that, the majority's decision holds that "one who continues to wear a hearing aid that she has worn all her life might not be covered . . . [because] fully cured impairments are covered but merely treatable

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[160] Diabetes mellitus is a condition in which carbohydrate utilization is reduced while utilization of lipid and protein production is increased. STEDMAN'S MEDICAL DICTIONARY 878 (26th ed. 1995). It is caused by a deficiency of insulin. *Id.*

[161] Epilepsy is a chronic disorder due to excessive release of neurons associated with various alterations of a patient's consciousness. *Id.* at 584. Such alterations of consciousness include: 1) attacks by which a person is unaware of the loss of consciousness; 2) momentary spells of impaired consciousness; or 3) focal convulsions. *Id.* Epileptics are afflicted with a seizure that affects the motor, sensory, reflex, psychic or vegetative conditions. *Id.* Patients are afflicted with a seizure that affects either the motor, sensory, reflex, psychic or vegetative conditions. *Id.* The epileptic condition can be life threatening because a series of seizures or a seizure that lasts longer than 30 minutes can deprive the brain of oxygen or cause heart or kidney failure. Margie Patlack, *Controlling Epilepsy*, FDA CONSUMER, May 1992, at 28, 29.

[162] Cancer is a general term frequently used to indicate any of various types of malignant tumors, which invade surrounding tissues, and are likely to recur after attempted removal and to cause death of the patient. *Id.* at 268.

ones are not."[163] Because the Supreme Court based its opinion on a visual acuity impairment, a disability easily corrected with glasses, the lower courts will have a difficult time balancing the interests involved in maintainable impairments litigation, where a disability cannot be remedied but the individual is able to perform many life activities without impairment by the disability.

As a result of the *Sutton* decision and its progeny, individuals using hypertension medication, corrective vision lenses, or some sort of self-accommodation are excluded from ADA protection.[164] This categorical exclusion conflicts with the intent of the Act's framers to have the courts conduct individualized analyses of claimants' disabilities. Because the Act was to be applied on a case-by-case basis, no per se categories of disability were created. Prior to *Sutton*, however, some lower courts demonstrated a willingness to accept, epilepsy, diabetes, cancer and even some emotional illnesses as disabilities. Nonetheless, the post-*Sutton* cases now reveal that the lower courts are being forced to apply the Supreme Court's mitigating measures analysis as a "blanket exclusion," which in effect, nullifies the ADA requirement of case-by-case analysis of each individual's disorder.[165] As a result, the disabled are left with the more difficult task of proving that their employers regard them as disabled. Consequently, the future of protection for the disabled under the ADA is uncertain.[166]

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[163] Sutton v. United Air Lines, 119 S. Ct. 2139, 2154 (1999) (Stevens, J. dissenting).

[164] Sinclair, *supra* note 9, at 15. "[W]e know for sure that if you wear corrective lenses and take medication to control high blood pressure you are not going to get the ADA's help." *Id.*

[165] 42 U.S.C. § 12102(2) (1994) (stating the determination of disability must be made "with respect to an individual").

[166] Sinclair, *supra* note 9, at 15 (conceding that "all parties agree that the ADA now covers fewer people, and the scope of the law has been narrowed considerably").

A. *Cancer and Treatment*

Cancer is a group of over one hundred different diseases that currently affect more than 8.4 million Americans.[167] All forms of cancer involve the growth of abnormal cells that multiply without control and destroy healthy body tissue.[168] Normally, cells divide and grow to keep a person healthy.[169] However, when cells continue to divide even though new cells are unnecessary, these new cells accumulate and form a mass of extra tissue called a tumor.[170] The dividing and growing cells may even spread to other parts of the body, attacking healthy tissue.[171]

Despite modern medical advances, cancer is not a correctable disability.[172] People who suffer from cancer are treated with a variety of medical treatments including: surgery;[173] radiation

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[167] CANCER FACTS & FIGURES 2000, AMERICAN CANCER SOCIETY, INC. 1 (2000) [hereinafter CANCER].

[168] *Id.* at 2.

[169] NATIONAL CANCER INST., CHEMOTHERAPY AND YOU 2 (1999) [hereinafter CHEMOTHERAPY].

[170] NATIONAL CANCER INST., WHAT YOU NEED TO KNOW ABOUT CANCER 2 (1993) [hereinafter NEED TO KNOW].

[171] CHEMOTHERAPY, *supra* note 169, at 2.

[172] A cancer recurrence is the reappearance of the disease that was thought to be cured or inactive. NATIONAL CANCER INST., WHEN CANCER RECURS 3 (1997) [hereinafter RECURS]. "Cancer is more like a lifelong, chronic disease that needs[s] to be manage[d] rather than something the doctors can cure once and for all." NATIONAL CANCER INST., FACING FORWARD: A GUIDE FOR CANCER SURVIVORS 6 (1996) [hereinafter FACING FORWARD].

[173] Surgery removes the tumor causing the cancer. CANCER, *supra* note 167, at 1. Because surgery may result in removing organs it has several physical and psychological consequences on the patient. Barrie Anderson and Susan Lutgendorf, *Quality of Life in Gynecologic Cancer Survivors*, CA. CANCER J. CLINICIANS, July/Aug. 1997, at 218, 220. For example, some gynecological cancer survivors must undergo a hysterectomy, which is a complete removal of the uterus, resulting in infertility, sexual dysfunction, and gender identity issues. *Id. See also* STEDMAN'S MEDICAL DICTIONARY 842 (26th ed. 1995). Some courts have even found that a mastectomy to treat breast cancer substantially limits a major life activity, such as working. Berk v. Bates Advert. USA, Inc., No. 94 CIV. 9140, 1997 WL 749386, at *5 (S.D.N.Y. Dec. 3, 1997). The court in *Berk* relied upon a Supreme Court case stating that "hospitalization is a fact more than

therapy;[174] chemotherapy;[175] and hormone therapy.[176] In some

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sufficient to establish that one or more . . . major life activities were substantially limited." School Bd. of Nassau County v. Arline, 480 U.S. 273, 281 (1987). *See also* Anderson v. Gus Mayer Boston Store, 924 F. Supp. 763, 777 n.39 (E.D. Tex. 1996) (finding that "the record was developed well enough for the court to declare as a matter of law that the testicular cancer was . . . a disability" because Anderson was subject to surgery and irradiation of the testicles).

[174] Radiation therapy aims to kill the cancerous cells to keep them from growing and multiplying. NATIONAL CANCER INST., RADIATION THERAPY AND YOU 5 (1999) [hereinafter RADIATION THERAPY]. Radiation has varying effects on the individuals who undergo this treatment. *Id.* at 27. The effects can be acute or chronic. *Id.* Acute side effects occur immediately after treatment begins and remain only for a few weeks. *Id.* Chronic side effects may take months or years to appear and are usually permanent. *Id.* Chronic side effects can consist of fibrosis or atrophy of permanent tissue that affect tissue tolerance of ultraviolet radiation. Anderson and Lutgendorf, *supra* note 173, at 221. A persons's freedom of movement may also be limited because of bowel movement problems. Anderson and Lutgendorf, *supra* note 173, at 221.

[175] Chemotherapy is the treatment of disease by means of chemical substances or drugs. STEDMAN'S MEDICAL DICTIONARY 321 (26th ed. 1995). Anticancer drugs destroy cancer cells by preventing them from dividing. CHEMOTHERAPY, *supra* note 169, at 2. Chemotherapy is administered in cycles that alternate with rest periods in one of several ways: intravenously; orally; topically; or injected intramuscularly. CHEMOTHERAPY, *supra* note 169, at 9. Chemotherapy has serious side effects with possible long term impact on energy levels and functions of several organs. CHEMOTHERAPY, *supra* note 169, at 15. Other side effects while receiving chemotherapy treatment include: fatigue, which appears suddenly and is not subsided by rest; severe nausea and vomiting; damage to nerves causing shooting pain; numbness; burning or tingling in the extremities; hair loss in all parts of the body; low red blood cell count causing fatigue, dizziness and shortness of breath; interfered functioning of the central nervous system; susceptibility to infections; inability to create platelets necessary for blood-clotting; bowel problems, such as diarrhea or constipation; permanent renal damage; and effect on sexual organs, such as lowering sperm count in men, resulting in infertility, erectile dysfunction, infertility in women, declined interest in intercourse. CHEMOTHERAPY, *supra* note 169, at 15-27.

[176] Hormone Therapy is used to treat cancers that rely on hormones, chemicals produced by glands and circulated in the bloodstream to control the actions of certain cells or organs, to grow. NEED TO KNOW, *supra* note 170, at 14. Hormone therapy can include removing the organ that makes the hormones on which the cancer is depending to grow. NEED TO KNOW, *supra* note 170, at 14. It can also include using drugs to prevent the organ from producing the hormone or changing the way the hormone functions. NEED TO KNOW, *supra*

cases, a patient may be in remission after treatment.[177] Remission is a complete or partial disappearance of the signs and symptoms of cancer.[178] However, remission may not be a cure because an individual may have a recurrence after a period in which the disease was considered under control.[179] Thus, the cancer may lie dormant, ready to re-strike its victim at any time.[180]

Individuals diagnosed with cancer are discriminated against in the workplace.[181] Discrimination is based on fear and the stigma associated with cancer.[182] Of the eight million people living in the United States with a history of cancer, at least half of them are struggling to become "gainfully employed" without discrimination.[183]

Under the Supreme Court's mitigating measures analysis, cancer patients undergoing medical treatment will not be considered disabled once the treatment is complete. Thus, it seems that courts will find cancer to be a "corrected" impairment. However, if the patient's cancer recurs, the courts again would have to

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note 170, at 14. Hormone therapy can have long term side effects, causing infertility in both men and women, severe nausea and vomiting, hot flashes, and weight gain. NEED TO KNOW, *supra* note 170, at 17.

[177] Remission is the abatement or lessening of the symptoms of a disease. STEDMAN'S MEDICAL DICTIONARY 1526 (26th ed. 1995).

[178] *Id.*

[179] RECURS, *supra* note 172, at 3. A recurrence is the reappearance of the disease that was thought to be cured or in remission. Cancer may recur after several weeks, months or years. RECURS, *supra* note 172, at 4. The recurrent cancer is usually caused by tissue from an earlier episode of cancer, which had been treated, but not eradicated. RECURS, *supra* note 172, at 4. Because some of the cancer survived the treatment, it is the same cancer even though it reappears in another portion of the body. RECURS, *supra* note 172, at 4. Beginning cancer treatment again places huge demands on the individual's spirit and body. RECURS, *supra* note 172, at 4.

[180] AMERICANS WITH DISABILITIES ACT OF 1989, S. REP. NO. 101-116, at 39 (1989). Cancer is considered one of the "hidden disabilities" to be protected by this Act. *Id.*

[181] Ian Ziegler, *When Cancer Comes to Work*, BUS. & HEALTH, July 1998, at 34, 36.

[182] *See id.* at 34."Employees with cancer were fired or laid off five times more frequently than their cancer-free colleagues." *Id.* at 36.

[183] *Id.* at 34.

undertake an analysis to decide whether the individual is substantially limited in a major life activity. This is not only inefficient but would effectively deny individuals with cancer ADA protection because such an analysis makes cancer a temporary disability.[184] A temporary disability is one that does not substantially limit a major life activity for more than several months.[185] Courts do not consider temporary disabilities, which are intermittent or episodic, such as arthritis,[186] worthy of ADA protection.[187] Analyzing cancer after every recurrence will convert cancer into an identifiable temporary disability not covered under the ADA's umbrella protection.[188] This is contrary to the purpose of the ADA, which was enacted to prevent disabled individuals who are disabled for more than several months but capable of working, from employment discrimination on the basis of their disability.[189]

The Supreme Court's definition of disability will have the effect of a "blanket exclusion" when analyzing a mitigating measures case involving cancer because the burden placed on the petitioners to prove that they are substantially limited even while receiving anti-cancer treatment will be difficult to overcome.[190]

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[184] *See* EEOC v. R.J. Gallagher Co., 959 F. Supp. 405 (S.D. Tex. 1997), *vacated in part*, 181 F.3d 645 (5th Cir. 1999) (finding cancer that is in remission not a substantially limiting disability). Temporary injuries are not viewed as substantially limiting a major life activity. Christopher Cramer and Ursula L. Haerter, *Does ADA Protect Temporary Disabilities?*, 10 CONN. EMPLOYMENT L. LETTER 3 (1999). "[S]urgery related absences from work and short-term working restrictions afterward do not constitute sufficient limitations to make this impairment a disability under the ADA." *Id.*

[185] *EEOC Enforcement Guidance*, *supra* note 21, at 8.

[186] Arthritis is an inflammation of a joint, particularly in the hands and feet. STEDMAN'S MEDICAL DICTIONARY 149 (26th ed. 1995).

[187] *See, e.g.*, Hamm v. Runyon, 51 F.3d 721, 725 (7th Cir. 1995). *See also* Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 544 (7th Cir. 1995).

[188] A temporary impairment is too short of duration to be considered "substantially limiting" for purposes of the ADA. Adams v. Citizens Advice Bureau, No. 99-7131, 1999 WL 635612, at *1 (2d Cir. Aug. 20, 1999).

[189] 42 U.S.C. § 12101(b)(4) (1994). "It is the purpose of this chapter to . . . address the major areas of discrimination faced day to day by people with disabilities." *Id.*

[190] Sinclair, *supra* note 9, at 3 (arguing that civil rights law should be "loosely construed," and that because it is not many disabled people are "carved

This threshold may be insurmountable, however, because an individual diagnosed with cancer can perform the essential functions of her job with or without reasonable accommodation. Because the individual can work, under the Court's bright-line test the individual may not be able to show that the condition is substantially limiting. The treatment, however, used by an individual diagnosed with cancer can have severe side effects such as those associated with chemotherapy and, thus, may substantially limit an individual in a major life activity.[191] Side effects during treatment may be so severe that patients may schedule their therapy on a Friday, allowing the weekend to recuperate, so that they may return to work on Monday.[192] Nonetheless, the ADA's safeguards, against employment discrimination, have been stripped when the individual utilizes a device that aids in overcoming the full effect of the disability.[193]

The difficulty for the plaintiff to meet the "substantial limitation" criteria was demonstrated recently in *EEOC v. R.J. Gallagher Co.*[194] In *Gallagher*, the petitioner, Michael Boyle, brought a law suit against his employer claiming disability discrimination due to his myeldoysplastic syndrome ("MDS"), a form of blood cancer.[195] Boyle had worked for the defendant for over twenty years, entering into one-year contracts with his employer with the option to renew each year.[196] In 1991, the employment contract was extended for three years and in 1993, Boyle was promoted to president.[197] In the same year, Boyle was diagnosed with MDS having to undergo aggressive chemotherapy treatments that caused

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out" of the definition of disability).

[191] *See* CHEMOTHERAPY, *supra* note 169, at 15-27.

[192] *See* Ziegler, *supra* note 181, at 34.

[193] *Workers*, *supra* note 11, at 4 (identifying the recent Supreme Court rulings as a Catch-22 for people with disabilities).

[194] 959 F. Supp. 405 (S.D. Tex. 1997), *vacated in part*, 181 F.3d 645 (5th Cir. 1999) (finding cancer that is in remission not a substantially limiting disability).

[195] *Gallagher*, 181 F.3d at 648.

[196] *Id.* The option read that their agreement would "automatically be renewed for consecutive one-year periods, unless either party gives notice to the other that said party does not intend to renew and extend this agreement." *Id.*

[197] *Id.*

him to miss over a month of work.[198] After the treatments, his doctor declared that he was in remission.[199] The doctor warned, however, that there was no guarantee that the cancer would not return.[200] Boyle had to continue to attend six monthly three to five day chemotherapy sessions.[201] Upon his return to work with this information, the Chief Executive Officer demoted Boyle to Vice President of Sales and Boyle refused to return to work.[202] He then filed a charge of discrimination with the EEOC, pursuing his claim in district court, which granted summary judgment in favor of Gallagher.[203]

On appeal, the Fifth Circuit acknowledged that MDS is a physical impairment, however, the court conceded that it must evaluate the condition in its treated state because of the Supreme Court's opinion in *Sutton*.[204] The appellate court concluded that the MDS did not substantially limit Boyle's major life activity of working because his cancer was in remission.[205] Therefore, his life activities were largely unaffected by MDS, even though he had to attend six months of chemotherapy treatments.[206] The court found his required chemotherapy sessions irrelevant because he could follow his treatment schedule and still maintain a full workload.[207] Consequently, the court treated cancer as a correctable disability not warranting ADA protection.[208]

The Fifth Circuit's treatment of cancer is in conflict with *Bragdon v. Abbot*.[209] In *Bragdon*, the Supreme Court found that an individual infected with HIV, but who is asymptomatic, is

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[198] *Id.* Boyle began chemotherapy treatments on December 15, 1993 and returned to work on January 26, 1994. *Id.* at 648-49.

[199] *Id.*

[200] *Id* at 649.

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] *Id.* at 653. *See also* Sutton v. United Air Lines, Inc., 119 S. Ct. 2133 (1999).

[205] *Gallagher*, 181 F.3d at 655.

[206] *Id.* at 649.

[207] *Id.*

[208] *Id.* at 655.

[209] 524 U.S. 624 (1998).

substantially limited in the major life activity of reproduction, and thus is considered disabled under the ADA.[210] Likewise, many people inflicted with cancer become infertile as a result of the disease or due to its treatment.[211] Additionally, cancer, like HIV, a debilitating disease that can be maintained by drug therapy, has no known cure, and also can result in death.[212] As opposed to the millions of Americans afflicted with cancer, less than 100,000 Americans were reported to the United States Department of Health and Humans Services to be living with HIV.[213] The Court found that these HIV-infected Americans should be subject to the umbrella protection of the ADA. It based its decision in *Bragdon* on an individual's limited ability to procreate.[214] Using this criteria, cancer and HIV should be afforded the same protection. Furthermore, because the Supreme Court found that HIV was such a debilitating disease due to the effect the disease has on a person's lymphatic system and the immediate abnormalities of the blood caused by the infection, the district court and court of appeals in *Gallagher* should have applied the same analysis to cancer because of the similar debilitating and deteriorating effects cancer has on an individual.[215]

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[210] *Id.* at 655.

[211] CHEMOTHERAPY, *supra* note 169, at 15-27.

[212] Joan Stephenson, *HIV Researchers Air New Findings*, 281 J. AM. MED. ASS'N 883 (1999). Although researchers have been progressive in restoring battered immune systems, doctors have not been able to restore the immune system completely. *Id.* at 883.

[213] By the end of 1998, the number of Americans that were reported to be HIV positive was 97,950. CENTER FOR DISEASE CONTROL AND PREVENTION, 10 HIV/AIDS SURVEILLANCE REPORT 7 (1998). This figure differs from the number of Americans who were reported to be living with AIDS. The number of Americans who were reported to be living with AIDS was 265,879. *Id.* Both the HIV and AIDS rates include only people who are still alive and those who were reported to confidential testing sites. *Id.* at 7 nn.1-3. AIDS is the symptomatic portion of the illness where AIDS patients T4 lymphocytes have seriously depleted and patients suffer from a one or more of the opportunistic infections including: candidiasis; Kaposi's sarcoma; non-Hodgkins lymphoma; and tuberculosis. STEDMAN'S MEDICAL DICTIONARY 39-40 (26th ed. 1995).

[214] *Bragdon*, 524 U.S. at 639.

[215] *Id.*

Moreover, an individual treated for cancer may suffer from many side effects that substantially limit the individual in many life activities, causing a debilitating effect on the individual. Both the district court and the court of appeals failed to recognize Boyle as substantially limited in a major life activity because they regarded chemotherapy as a mitigating measure, which they believed expressly foreclosed any analysis of the cancer as substantially limiting.[216] In comparison, an individual infected with asymptomatic HIV automatically will be considered substantially limited in a major life activity because of risks involved in reproduction.[217] People infected with HIV, however, now are able to procreate with the use of medicinal treatments with little risk to the fetus.[218] Moreover, a person who is asymptomatic can live a normal lifestyle and may not even suffer in any physical manner from the infection for many years.[219] It seems, then, that the courts have ignored the substantial limitation that cancer can place on an individual in major life activities, while recognizing that asymptomatic HIV substantially limits an infected individual in a debilitating manner. Thus, the courts have found HIV to be covered by the ADA because of its infectious nature as well as because of the harsh stigma HIV carries in society.[220] While the courts should be praised for their heightened protection of HIV, they also should be scorned for their insensitive and highly dogmatic view of cancer, from which many people suffer physical pain as well as discrimination in the workplace.

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[216] EEOC v. R.J. Gallagher Co., 181 F.3d 645 (5th Cir. 1999).

[217] HIV can be transmitted during sexual intercourse. STEDMAN'S MEDICAL DICTIONARY 39 (26th ed. 1995).

[218] Lynne Mofenson, *Can Perinatal HIV Infection Be Eliminated in the United States?*, 282 J. AM. MED. ASS'N 577 (1999). Due to the use of drug therapies, such as zidovudine, in early stages of HIV positive pregnant women, perinatal transmission has been reduced by two thirds. *Id.* at 577.

[219] *See generally* Harvey Makadon, *An Asymptomatic 41 Year Old Man with HIV Infection*, 281 J. AM. MED. ASS'N 739 (1999) (discussing a clinical study of an HIV patient who has been asymptomatic for nine years).

[220] Chai Feldblum, *Disability Discrimination in America*, 281 J. AM. MED. ASS'N 745 (1999).

B. *Epilepsy and Medication*

Epilepsy[221] is a condition that affects one percent of the United States population.[222] Epilepsy, like cancer, may lie dormant within an individual without any apparent sign or symptoms until it suddenly reappears.[223] Epilepsy is a condition that affects the nervous system, which governs how electrical energy behaves in the brain, making the epileptic susceptible to recurring seizures.[224] Although seizures are symptoms of epilepsy,[225] they may be treated with the use of surgery[226] or oral anti-epileptic medications.[227] Once an individual has suffered from seizures and is diagnosed with epilepsy, the individual is considered to have a chronic, lifelong disorder.[228] Although, over time, medications may be reduced, seizures may occur even when the individual

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[221] *See supra* note 161 (discussing epilepsy and its effects).

[222] *Hospitalization for Epilepsy*, 274 J. AM. MED. ASS'N 1670 (1995).

[223] *Id.*

[224] *See* Patlack, *supra* note 221, at 29. There are more than 20 different types of epileptic seizures ranging from a loss of consciousness to bodily convulsions lasting several minutes. Patlack, *supra* note 221, at 29.

[225] *See* STEDMAN'S MEDICAL DICTIONARY 584 (26th ed. 1995).

[226] Surgery is a treatment utilized by patients for whom anti-epileptic medications fail to control their seizures. William J. Marks, *Management of Seizures and Epilepsy*, 57 AM. FAM. PHYSICIAN 1589 (1999). Surgery attempts to completely control the seizure, however, patients may still need to administer oral anti-epileptic medication. *Id.* The most common procedure undergone by epileptics is a temporal lobe resection. *Id.* Although permanent damage is rare, patients may suffer from verbal skill deficiencies after surgery. *Id.*

[227] Anti-epileptic drugs prevent or arrest seizures. STEDMAN'S MEDICAL DICTIONARY 101-02 (26th ed. 1995). Anti-epileptic drugs, which are taken orally, increase the amount of neurotransmitters in the brain which inhibit the transfer of electrical impulses from neuron to neuron. Patlack, *supra* note 221, at 30.

[228] Josemir Sander, *Towards a Coherent Public-Health Analysis for Epilepsy,* 353 LANCET 1817 (1999) (stating that epilepsy is a chronic disorder of unknown cause and is difficult to prevent). Childhood epilepsy must be distinguished from the epilepsy that affects adults. Childhood epilepsy differs in both treatment and prognosis. Shlomo Shinnar, *Epilepsy Treatment in the 21st Century,* EXCEPTIONAL PARENT, Oct. 1999, at 64 (stating that choice of anti-epileptic drug treatment is based on several factors, including seizure type, gender and age). A majority of children with seizures outgrow their disorder. *Id.* at 34.

properly is following the regimented treatment schedule.[229] An individual suffering from epilepsy can have a seizure even when the disorder is well controlled with medication if the regular sleep cycle is disturbed,[230] or if a flickering light is present.[231] An epileptic's condition never can be considered cured because extraneous factors can cause the condition to recur.[232] Thus, epilepsy is never corrected but merely maintained or suppressed. Although most individuals with epilepsy generally function normally during a seizure they have little or no control over their movements or cognitive processes.[233] Moreover, although an individual can take daily medication, this medication only minimizes the occurrence of seizures; it does not prevent them.[234]

When evaluating an epileptic in a medicated state, she does not appear to be "substantially limited" because epilepsy will not interfere with the essential functions of most occupations.[235] An epileptic, however, is still subject to suffering an epileptic attack.[236] Thus, while an epileptic may suffer a seemingly substantially limiting disability in the form of a seizure under *Sutton*, the

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[229] *See* Marks, *supra* note 226, at 1589. "Management of patients with epilepsy is often challenging, as evidenced by a recent report that over one half of all patients with epilepsy continue to experience at least occasional seizures despite treatment with anti-epileptic medications." Marks, *supra* note 226, at 1589.

[230] Patlack, *supra* note 221, at 29 (stating that seizures can be brought on by a lack of sleep).

[231] Patlack, *supra* note 221, at 29 (stating that seizures can be induced by a flickering light). *See also* Thurber v. Browner, No. 93 C 2061, 1994 WL 395007, at *4 (N.D. Ill. July 26, 1994) (finding that the plaintiff was "handicapped" within the meaning of the Act and that she was a qualified employee whom the employer had to reasonably accommodate after a flickering light affected her epileptic condition).

[232] Current drugs only suppress epileptic seizures but do not affect the underlying disorder. Shinna, *supra* note 228, at 34.

[233] ABA COMM. ON MENTAL AND PHYSICAL DISABILITY LAW, MENTAL DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT 155 (1997).

[234] *Id.*

[235] 29 C.F.R. § 1630.2(n) (1999). The term "essential functions" means "the fundamental job duties of the employment position the individual with a disability holds or desires." *Id.*

[236] Patlack, *supra* note 221, at 29.

Supreme Court would fail to acknowledge this hypothetical, yet foreseeable, occurrence as a disability.[237] Consequently, if an employer requires a job applicant to state whether she suffers from a disability, and an applicant lists epilepsy, the fact that the applicant takes the prescribed medication will prevent a court finding that the employer violated the ADA if the employer refuses to hire the individual because of the applicant's disability.[238]

C. Diabetes and Insulin Medication

Similar to epilepsy, diabetes can result in complications even while the patient is maintaining the condition with medications and healthy living habits.[239] Diabetes is a chronic condition, affecting fourteen million Americans, which manifests itself when the pancreas is unable to produce sufficient amounts of insulin[240] necessary to carry blood sugar into the body's cells.[241] The result

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[237] Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2146 (1999) (stating that evaluating [p]ersons "in their hypothetical uncorrected state . . . is an impermissible interpretation of the ADA").

[238] Chemerinsky, *supra* note 2, at 89 (demonstrating that if a person has a medical condition that uses medication, such as epilepsy, there is no disability and the employer can refuse to hire the individual solely because of epilepsy without any legal repercussions).

[239] *See* NATIONAL INST. OF DIABETES AND DIGESTIVE AND KIDNEY DISEASES, DIABETES IN AMERICA 4-9 (2d ed.1995) [hereinafter DIABETES]. There are two types of diabetes mellitus: Type I diabetes, also known as insulin dependent diabetes and Type II diabetes, also known as non-insulin based diabetes, usually develops in obese adults over the age of 35. STEDMAN'S MEDICAL DICTIONARY 473 (26th ed. 1995). The American Diabetes Association recommends the control of diabetes with education, diet, medication and physical activity. *Id.* The Association also recognizes that there are no universal guidelines to be disseminated concerning the treatment of diabetes. Instead, the treatment should be tailored to each individual. *Id.* Diabetes mellitus is a condition in which carbohydrate utilization is reduced while utilization of lipid and protein production is increased. *Id.* Diabetes is caused by a deficiency of insulin. *Id.*

[240] Insulin is a polypeptide hormone that promotes glucose utilization, protein synthesis, and the formation and storage of neutral lipids. It is administered intramuscularly or intravenously in the treatment of diabetes mellitus. STEDMAN'S MEDICAL DICTIONARY 878 (26th ed. 1995).

[241] *Id.*

is an overflow of blood sugar in the blood, which is passed out through the body's urinary system.[242] Emergency conditions called hypoglycemia[243] or hyperglycemia[244] result from the imbalance of blood sugar. Diabetes is so serious that it can cause long term damage to a number of organs including the eyes, kidneys, nerves, heart, and blood vessels.[245]

Diabetes complications can develop even while the individual is maintaining the disorder.[246] As the Supreme Court requires the evaluation of a disorder in its present medicated state, a diabetic using insulin will not be considered disabled for the purposes of the ADA.[247] Moreover, the Court used insulin dependent diabetics as illustrative of a case in which a mitigating measure precludes an individual from being considered substantially limited. The Court provided, in dicta, that a diabetic whose insulin injections allow her to continue working was not covered by the statute because the diabetic was not "substantially limited" in a major life activity.[248] This reasoning will discourage and prevent an individual with diabetes from seeking the protection of the ADA.[249]

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[242] *Id.*

[243] *Id.* Hypoglycemia is defined an abnormally low level of sugar in the circulating blood. *Id.* at 836. This complication can result in a functional limitation on individuals with diabetes. *Id.* After being inflicted with low sugar levels, an individual may have slow reaction time and be unable to work until blood sugar levels are raised. DIABETES, *supra* note 239, at 261.

[244] Hyperglycemia is an abnormally high concentration of glucose in the circulating blood, seen especially in patients with diabetes mellitus. STEDMAN'S MEDICAL DICTIONARY 825 (26th ed. 1995).

[245] *Report of the Expert Committee on the Diagnosis and Classification of Diabetes Mellitus*, 23 DIABETES CARE S4 (Jan. 2000).

[246] There are several complications that arise as a result of diabetes. Some of these complications arise even with proper treatment and self care. DIABETES, *supra* note 239, at 88, 289, 429, 449. Such complications include: lactic acidosis, hypoglycemia, vision impairments, heart disease, and stroke. DIABETES, *supra* note 239, at 88, 289, 429, 449.

[247] Savage, *supra* note 43, at 46 ("A diabetic whose insulin injections allow her to continue working is not covered by the statute.").

[248] *See* Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2147 (1999).

[249] Shereen Arent, *Supreme Court Decisions Make it More Difficult for People with Diabetes to Fight Discrimination*, DIABETES FORECAST, Sept. 1999, at 33, 34.

Prior to *Sutton*, diabetics were able to bring successful claims under the ADA. For example, in *Canon v. Clark*, the Southern District of Florida found a diabetic to be "substantially limited" in a number of major life activities, because she was dependent on her insulin injections.[250] It seems, however, that this decision may no longer carry weight in light of the *Sutton* dicta.

Most critics argue that the *Sutton* decision is absurd because a person may be disabled enough to be fired from a job but not disabled enough to challenge the firing.[251] Now, under the Court's analysis, people with diabetes can be fired or refused a position because they have the disease. Since individuals can use insulin injections to mitigate their disorders, the lower courts will exclude completely diabetes from recovery under the Act.

D. Major Depressive Disorder

Major depression, a type of depressive disorder, is a form of mental illness recognized by the American Psychiatric Association.[252] Approximately six percent of adults in the United States suffer from major depression in their life time.[253] Depressive

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[250] *See, e.g.*, Canon v. Clark, 883 F. Supp. 718, 721 (S.D. Fl. 1995) (finding that a diabetic was substantially limited in a number of major life activities because she was dependent on her insulin injections).

[251] Arent, *supra* note 249, at 34.

[252] The American Psychiatric Association defines major depressive disorder as a mental disorder in the Diagnostic and Statistical Manual for Mental Disorders ("DSM-IV"). AMERICAN PSYCHIATRIC ASS'N., DIAGNOSTIC AND STATISTICAL MANUAL FOR MENTAL DISORDERS 339 (4th ed. 1994). The onset of major depressive disorder can occur at any age. *Id.* at 341. The following are the specifiers psychiatrists use to describe the major depressive disorder episode: mild; moderate; severe without psychotic features; severe with psychotic features; in partial remission; and in full remission. *Id.* at 339. Approximately 50% of individuals who have been diagnosed with this disorder can be expected to have a second episode. *Id.* at 34. Individuals who have had two episodes have a 70% chance of having a third, and individuals who have had three episodes have a 90% chance of having a fourth episode. Thus, this is a recurring disorder. *Id.* at 342. *See also* DEBORAH ZUCKERMAN ET AL., THE ADA AND PEOPLE WITH MENTAL ILLNESS, A RESOURCE MANUAL FOR EMPLOYERS 64 (1993).

[253] Zuckerman, *supra* note 252, at 9.

disorders usually involve changes in mood.[254] Major depression is characterized as an extreme or prolonged episode of sadness, in which an individual is no longer interested in activities that the individual previously enjoyed.[255] This psychiatric disorder does not subside on its own and requires treatment by medication.[256] If there is no treatment, the depression can last for long periods of time.[257] Individuals suffer from major depression throughout their lives.[258] Some of the symptoms of major depression include: an inability to concentrate, recollect and make decisions; pessimism; sentiments of worthlessness; loss of pleasure in usual activities; problems with sleep cycle; social withdrawal; and irritability.[259] These sentiments must be distinguished from occasional sadness or bad moods. The length of time these symptoms last, and the severity of the symptoms, is what distinguishes major depression from general mood changes. Major depression can be treated with medication, psychotherapy, or a combination of both.[260]

Although the ADA does not protect people merely because they have been diagnosed with major depression, if the individual can demonstrate how depression affects a major life activity, the individual should be able to secure protection under the Act.[261] It seems, however, that individuals who are diagnosed with major depressive disorder and claim that they have been discriminated

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[254] Zuckerman, *supra* note 252, at 9.

[255] Zuckerman, *supra* note 252, at 64.

[256] Zuckerman, *supra* note 252, at 64.

[257] Zuckerman, *supra* note 252, at 64. Major depression is a severe mental illness because it affects a person's health, relationships and occupation. Zuckerman, *supra* note 252, at 64. Moreover, some symptoms can be so severe that individuals, who are not treated with this disorder, may commit suicide. Zuckerman, *supra* note 252, at 64. Suicide is more prevalent among people who are diagnosable as suffering from major depression at fifteen percent than the general population at one percent. Zuckerman, *supra* note 252, at 64.

[258] Zuckerman, *supra* note 252, at 64.

[259] John W. Parry, MENTAL DISABILITY LAW: A PRIMER 4 (1995).

[260] Zuckerman, *supra* note 252, at 68-69.

[261] Clark v. Virginia Bd. of Examiners, 880 F. Supp. 430, 440 (1995) (finding that the plaintiff, who suffered from major depressive disorder, was a person with a disability and is a qualified person with a disability to practice law).

against by their employer, have not been successful in the post-*Sutton* era.[262]

In a recent Eighth Circuit Court of Appeals case, *Spades v. City of Walnut Ridge*,[263] the petitioner, Sam Spades, appealed the district court's grant of summary judgment in favor of the employer.[264] The petitioner was employed as a police officer with the City of Walnut Ridge.[265] During his tenure, he attempted suicide by shooting himself in the head.[266] After this incident, Spades sought medical attention for his physical injuries as well as counseling for his depression.[267] Spades attempted to return to work after his counseling and recuperation period.[268] The City, however, terminated his employment because of his violent use of a firearm in his suicide attempt.[269] Spades alleged that the City violated the ADA, firing him due to his disability.[270] The City defended their decision reasoning that they sought to prevent increased exposure to legal liability.[271]

The Eighth Circuit did not perform an individualized analysis of the petitioner's condition. Instead, the court merely cited *Sutton*,[272] and found that because Spades received counseling and medication for his condition, his depression was thereby corrected.[273] Therefore, the court concluded that Spades was not "sub-

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[262] *See, e.g.*, Spades v. City of Walnut Ridge, No. 98-4119, 1999 WL 560627, at *1 (8th Cir. July 28, 1999) (finding that a police officer's major depressive disorder treated by medication is not a substantially limiting disability under the ADA); Whitney v. Apfel, No. C-98-1119 PJH, 1999 WL 786369, *1 (N.D. Cal. Sept. 28, 1999) (finding that a government employee's major depressive disorder treated with medication is not a substantially limiting disability under the ADA).

[263] *Spades*, 1999 WL 560627, at *1.

[264] *Id.*

[265] *Id.*

[266] *Id.*

[267] *Id.*

[268] *Id.*

[269] *Id.*

[270] *Id.*

[271] *Id.*

[272] Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999).

[273] Spades, 1999 WL 560627, at *2.

stantially limited" in a major life activity[274] and was not entitled to ADA protection.[275] To reach this conclusion, the court merely sought out the presence of medication or other mitigating measures.[276] Once it found mitigating measures, the court *assumed* that the petitioner was not substantially limited in working and found the petitioner not to be disabled under the ADA.[277] Consequently, the petitioner suffered from employment discrimination because of his disability. Because the Supreme Court failed to provide clearer guidance in evaluating a disability, the Eighth Circuit was unable to provide an individualized analysis of Spades' disorder as would have been appropriate for disability determinations under the statute. Instead, the court applied the mitigating measures analysis as a blanket exclusion.

Whitney v. Apfel,[278] is another illustration of a court's inability to redress emotional illness discrimination in the workplace. The petitioner brought a cause of action against his employer, the Social Security Administration ("SSA").[279] He alleged that the SSA demoted him because of his disability, depression.[280] His physician stated that his depression was caused by his work-related stress, and upon recommendation by his physician, he took a ten-week leave of absence.[281] During this period he was treated for his depression with medication.[282] When Whitney returned to work he was demoted.[283] Six years later, Whitney applied for a promotion, and while ranked among the best qualified for the position, he was not selected for the promotion.[284]

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[274] *Id.* at *1.

[275] *Id.* (holding that "a determination of whether Spades' depression is a disability must be made with reference to any mitigating measures") (citing *Sutton*, 119 S. Ct. at 2146-47).

[276] *Id.*

[277] *Id.* at *2.

[278] Whitney v. Apfel, No. C-98-1119 PJH, 1999 WL 786369, *1 (N.D. Cal. Sept. 28, 1999).

[279] *Id.* at *1.

[280] *Id.* The petitioner became depressed in 1989. *Id.*

[281] *Id.*

[282] *Id.*

[283] *Id.*

[284] *Id.*

The court found that Whitney did not qualify for ADA protection because he no longer suffered from a psychological impairment.[285] The court held that his medication alleviated his depression so that he was no longer substantially limited.[286] The court also decided that even if Whitney established that the SSA believed his depression substantially limited him in the major life activity of working, he must prove that he was limited in a broad class of jobs.[287] Since there was no proof that he was limited in a broad class of jobs, the court granted summary judgment in favor of the defendants.[288] Thus, the court found his depression not to be protected by the ADA because he utilized drugs to overcome his disability.[289]

Application of the Court's analysis to "hidden disabilities," such as cancer, epilepsy, diabetes or major depression, has not produced the results the Supreme Court suggested it desired.[290] Although the Court indicated that it intended "to restrict the ADA only to those that it believed were members of the historically disadvantaged class of disabled people and refused to extend it to people that are not victims of discrimination or who are not considered to be politically powerless,"[291] its actual effect will be to deny protection to individuals who deserve ADA coverage. Because the Supreme Court dealt with an easy case of corrective lenses, the Court was unable to consider the many issues faced by people suffering from complex disorders, like epilepsy, cancer and diabetes. Because the more complicated issues faced by individuals

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[285] *Id.* at *3.

[286] *Id.*

[287] *Id.*

[288] *Id.* at *4 ("Because the court finds that Whitney failed to demonstrate that there is a genuine issue of material fact with regard to whether the selection panel regarded him as disabled, defendant's motion for summary judgment is granted.").

[289] *Id.* at *3.

[290] Sutton v. United Air Lines, Inc. 119 S. Ct. 2139, 2152 (1999) (Ginsburg, J., concurring). "Congress' use of the phrase ["individuals with disabilities are a 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.*

[291] AMERICANS WITH DISABILITIES ACT OF 1989, S. REP. NO. 101-116, at 9 (1989).

living with maintainable disabilities was not addressed by the Court, the lower courts do not have any guidance when applying the bright-line test. Consequently, once the courts identify a mitigating measure in use, the judges instead apply the Court's bright-line test of "substantial limitation in regard to mitigating measures" as a blanket exclusion.

By failing to recognize the implications of the mitigating measures analysis, the lower courts will continue to apply this bright-line test without an individualized analysis as illustrated in *Spades*, *Gallagher* and *Whitney*. Thus far, the lower courts have not undertaken an analysis to identify how the person is substantially limited but, instead, superficially have addressed the subject.[292] Once the courts have found a mitigating measure in use, they automatically have excluded the petitioner from protection. This burden of proof, to demonstrate a substantial limitation while receiving treatment, is difficult to overcome. The burden will rarely be met by an individual utilizing mitigating measures because the individual will not have any symptoms until an unanticipated attack occurs. As a result of this "blanket exclusion," plaintiffs are forced to seek redress under the third prong of the definition of disability by attempting to prove that their employers regarded them as disabled, a truly difficult task.

IV. A CLEARER FRAMEWORK

The aforementioned lower court rulings illustrate that the Supreme Court's holding in *Sutton*, requiring the consideration of mitigating factors, did not provide sufficient and clear guidance to employers and lower courts to address employment discrimination oppressing the disabled. Moreover, the Supreme Court's holding, as applied, has and will continue to result in a "blanket exclusion" of some disabilities from ADA protection, undermining the purpose and intent of the ADA, which requires an analysis of the individual's condition. Following *Sutton* and its progeny, in order for

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[292] *See, e.g.*, Spades v. City of Walnut Ridge, No. 98-4110, WL 560627, at *1 (8th Cir. July 28, 1999); EEOC v. R.J. Gallagher Co., 959 F. Supp. 405 (S.D. Tex. 1997), *vacated in part*, 181 F.3d 645 (5th Cir. 1999); Whitney v. Apfel, No. C-98-1119 PJH, 1999 WL 786369, *1 (N.D. Cal. Sept. 28, 1999).

plaintiffs to vindicate discrimination under the ADA, they must show that their condition, even after correction, interferes with a major life activity but will not interfere with their job performance.[293] This leaves the courts with little room to balance the interests involved in the disability inquiry.

Instead of evaluating whether an individual is "substantially limited" at the time of the lawsuit, the courts should adopt an analysis that focuses on how the individual is affected by the disability and the treatment. This approach will reward deserving plaintiffs yet not be overbroad in application. Those who deserve the protection of the statute will receive it while those who bring frivolous law suits will be denied access to the courts because they will be unable to demonstrate the latent and long term impact of their disorder. If there is no long term impact resulting from the disorder, the individual cannot be viewed as substantially limited. If the individual is not substantially limited, the employer need not hire the individual. Thus, by balancing the interests of both the employee and employer, courts may apply the ADA fairly and reasonably.

The proposed framework that follows, incorporates in its analysis the questions the drafters of the ADA sought to answer, as well as the relevant statutory and regulatory concerns.[294] The analysis consists of four parts. First, the court should evaluate whether there is a possibility that an individual with an impairment will suffer from symptoms or suffer an attack even while receiving treatment.[295] Second, the courts should determine whether there is a permanent or long term impact of the impairment.[296] Third, the courts should consider whether the qualification the individual

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[293] Chemerinsky, *supra* note 2, at 90.

[294] *See, e.g.*, 42 U.S.C. § 12101-12111 (1999) (noting the legislative intent of the ADA); 29 C.F.R. § 1630 (1999) (providing for regulations to implement the ADA in accordance with the legislative intent).

[295] 29 C.F.R. § 1630.2(j)(2)(i) (1999) (calling for the evaluation of "the nature and severity of the impairment" when considering the factors that determine "substantially limited" in a major life activity).

[296] *Id.* § 1630.2(j)(2)(iii) (1999) (defining the term "substantially limits" through an evaluation of the "permanent long term impact . . . resulting from the impairment").

cannot meet is essential to the job sought.[297] Finally, the courts should consider whether the public interest is concerned.[298] The public interest concern is relevant to this balancing test where the job at issue, such as that of the global airline pilot, places the employee in a responsible position in relation to other people. The regulations require that a determination be made whether the individual causes a "direct threat" to others; that is, whether the individual creates a significant risk of substantial harm to the health or safety of others or to himself, that cannot be reduced by reasonable accommodation.[299]

The factors in the balancing formula are mutually dependent. Thus, if the answer to the first factor is in the negative, then the disability is not latent. If there is no possibility that the person will be affected by the disability, then the analysis is complete because the individual cannot be considered substantially limited within the meaning of "disability" under the ADA. Using this four part analysis, a court better would be able to balance the goals that the ADA sought to achieve with the employers' needs that the Supreme Court sought to protect.[300] By balancing the relevant

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[297] *Id.* § 1630.2(n)(1)-(2) (defining "essential functions").

[298] *Id.* § 1630.2(r). The public interest is concerned if there is a "direct threat" to its well being. *Id.*

> Direct threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a 'direct threat' shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. In determining whether an individual would pose a direct threat, the factors to be considered include: 1) the duration of the risk; 2) the nature and severity of the potential harm; 3) the likelihood that the potential harm will occur; and 4) the imminence of the potential harm.

Id.

[299] *Id.*

[300] Employers' needs include reduced litigation and prevention of fraudulent and frivolous disability claims. *See* Sinclair, *supra* note 9, at 3 ("this decision is a form of insurance discrimination")."Corporate managers argue that [*Murphy*] slows down the growing deluge of ADA lawsuits." Clemetson, *supra* note 157, at 27.

interests, the courts may protect employers, and remain faithful to the ADA's goals.

A. *Application of the Balancing Approach to the Recent Supreme Court Disability Cases*

The following section applies the balancing approach to the recent Supreme Court disability cases. By balancing the interests the Court espoused, more individuals will be covered than excluded by the Court's bright-line test. This test also avoids plaintiffs having to find redress pursuant to Subsection C of the ADA,[301] which requires employees to demonstrate that their employers perceived them as disabled, a feat difficult to achieve.

1. Sutton v. United Air Lines[302]

In *Sutton*, the petitioners stated that they had a vision impairment that was corrected with lenses to an acuity of 20/20.[303] Applying the proposed balancing formula, the Court first would look to see whether the petitioners would suffer from symptoms of the impairment even while utilizing the corrective measures. Because the individuals have a vision impairment, there are no extraneous factors that can change the status of the corrected state. For instance, the only way the petitioners would suffer from the effects of this impairment would be if they were to misplace their glasses. This would not be an effect of the disability, but only a result of their carelessness. Thus, the question becomes whether the individual, while taking the medication or utilizing the mitigating measures, could still suffer from the disability because of extraneous factors. There are, arguably, no extraneous factors that affect corrected vision. Because the first factor is in the negative, there is no latent, unidentified symptom that will affect the individual. Thus, the individual cannot be considered disabled within the meaning of the ADA.

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[301] 42 U.S.C. § 12102(2)(C) (1994).

[302] 119 S. Ct. 2139 (1999).

[303] Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2143 (1999).

The purpose of the ADA was to ensure equal opportunity of employment for disabled people.[304] The petitioners in *Sutton* could have found equal opportunity of employment in many other areas where perfect eyesight was not essential to the job.[305] Moreover, after balancing the employer's need to have qualified pilots fly its planes to ensure passenger safety with society's interest in not discriminating against disabled individuals, the public interest in flight control is so great that it outweighs the interest of equal opportunity of employment for those with impaired vision.

2. *Albertsons v. Kirkingburg*[306]

In *Albertsons*, the petitioner was afflicted with a disorder that left him with monocular vision.[307] Because he lived with this disorder for many years, his body subconsciously adjusted for the lack of depth perception that resulted from this disorder.[308] Amblyopia occurs when the individual's brain and eye nerve connections fail to develop normally.[309] In the case of amblyopia, the brain learns to ignore visual information from the affected eye.[310] As a result of the disorder, the patient lacks depth perception.[311] If this condition is diagnosed during childhood, permanent visual impairment can be avoided.[312] Kirkingburg, however, never corrected this problem and his brain subconsciously adjusted for

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[304] 42 U.S.C. § 12101(a)(8) (1994) (indicating that the Nation's proper goals regarding individuals with disabilities are to "assure equality of opportunity").

[305] *Sutton*, 119 S. Ct. at 2151. "Indeed, there are a number of other positions utilizing petitioners' skills, such as regional pilot and pilot instructor to name a few, that are available to them." *Id.*

[306] 119 S. Ct. 2162 (1999).

[307] *Albertsons*, 119 S. Ct. 2162 (1999). Kirkingburg suffers from amblyopia which left him with monocular vision in effect. *Id.* at 2165. *See* STEDMAN'S MEDICAL DICTIONARY 56 (26th ed. 1995) (discussing amblyopia).

[308] *Albertsons*, 119 S. Ct. at 2168.

[309] *See* STEDMAN'S MEDICAL DICTIONARY 56 (26th ed. 1995) (defining amblyopia).

[310] *Id.*

[311] *Id.*

[312] *Id.*

the poor vision.[313] This self-mechanism is not a correction of his eyesight, it is merely an accommodation. Kirkingburg developed this mechanism to compensate for the depth perception that he lacked because of his disability. Thus, under the first prong of the balancing test he must be considered substantially limited because there is no true correction of the disability. Instead, because a mechanism of the body has mitigated his vision impairment, he may continue to suffer.

The second prong of the balancing test evaluates whether the disorder has a long term impact on the individual. In the case of amblyopia, if the disorder is not corrected early then the patient will have permanent vision damage.[314] Kirkingburg did not correct the vision impairment in his early childhood, resulting in his poor vision as an adult. Thus, Kirkingburg is substantially limited under the ADA because the deterioration of his vision, as a result of amblyopia, has a permanent and long term impact on his major life activity of seeing.

The third prong considers whether the qualification the employee lacks is essential to the job. In this case, the federal agency that instituted the minimum vision requirement waived it as a result of Kirkingburg's excellent driving record.[315] The agency that instituted the regulation found that it was not essential for Kirkingburg's position.[316] Thus, the minimum vision requirement cannot be considered an essential function of the job. As a result, Kirkingburg cannot be excluded from the position because he is unable to fulfill the vision requirement.

If the Court were to continue the analysis, by considering the final prong, the public interest at stake is not so great as to outweigh Kirkingburg's right to employment. During his employment and while he was inflicted with this impairment, Kirkingburg

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[313] *Albertsons*, 119 S. Ct. at 2168.

[314] *See* STEDMAN'S MEDICAL DICTIONARY 56 (26th ed. 1995) (defining amblyopia).

[315] *Albertsons*, 119 S. Ct. at 2166 (citing the waiver of the minimum vision requirement).

[316] *Id.* One can infer that the minimum vision requirement was not essential to the job because the agency that instituted the requirements waived them.

was never involved in any moving violations or traffic offenses.[317] His excellent driving record was a strong indication that he was not a hazard on the road or a threat to the public's safety, even though he was unable to see like the general population.[318] Because the threat to the public was not overwhelming, society's interest in protecting Kirkingburg from employment discrimination outweighed his employer's interests. Thus, Kirkingburg should have received ADA protection.

3. *EEOC v. R.J. Gallagher Co.*[319]

The first prong of the balancing approach requires a determination that there is a possibility that the individual will suffer from the disorder even while receiving treatment. In the case of Boyles' cancer, he suffered from the effects of the treatments for the disorder and lacked a guaranteed cure for his cancer.[320] For example, although Boyle's doctor stated that he was in remission after the treatments, Boyle died merely one year after he returned to work, evidence that his condition was not corrected.[321] Moreover, it is uncontroverted that cancer patients suffer from the effects of treatment.[322] Boyle suffered from the chemotherapy treatments both cosmetically and physically.[323] Thus, Boyle's condition satisfies the first prong of the analysis because his condition was never fully corrected.

The second prong evaluates whether the disorder had a long term impact on the individual. In this case, the long term impact on

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[317] *Id.* at 2166.

[318] *Id.* at 2167. There is uncontroverted evidence that "the manner in which he sees differs significantly from the manner in which most people see." *Id.*

[319] EEOC v. R.J. Gallagher Co., 959 F. Supp. 405 (S.D. Tex.1997), *vacated in part*, 181 F.3d 645 (5th Cir. 1999).

[320] *Gallagher*, 181 F.3d at 648. "Boyle was released from the hospital . . . having lost all the hair on his head, his eyelashes and eyebrows, and twenty-five pounds." *Id.*

[321] *Id.* at 650 n.1.

[322] *See* CHEMOTHERAPY, *supra* note 169, at 15-27. *See also* RADIATION THERAPY, *supra* note 174, at 27.

[323] *Gallagher*, 181 F.3d at 648.

Boyle was that the cancer was terminal. As the condition was long term, the second prong of the balancing approach is satisfied.

The third prong evaluates whether the qualification that the individual allegedly could not meet was essential to the job. The employer, Gallagher, argued that Boyle was unable to "devote his full time and best efforts towards furthering the interest of the employer" because he was forced to take days off of work for his cancer treatments.[324] The fact that Boyle needed to take off days to attend to and recover from his cancer treatments does not indicate that he could not fulfill the essential function of his position as president of the company. Boyle demonstrated that he was able to fulfill his position by delegating work assignments during his absences.[325] Thus, he appeared able to meet the essential functions of the position of president.

Finally, there was no public interest at stake to consider against Boyle's employment as a disabled person. Boyle was president of the company and was not a hazard to anyone at the company. Thus, if the court would have employed this balancing analysis, it would have found Boyle disabled under the ADA.

B. The Light at the End of the Tunnel: Other Avenues of Redress under the ADA

The ADA allows plaintiffs to seek protection from discrimination under any of the three prongs of the Act's definition of disability.[326] Many litigants attempt to prove discrimination under the third prong of the definition.[327] The third prong of the definition defines disability as "being regarded as having such an impairment" by an employer.[328]

In *Murphy v. United Parcel Service, Inc.*,[329] although the petitioner was unable to prove that he was substantially limited in

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[324] *Id.* at 651.

[325] *Id.* at 648.

[326] 42 U.S.C. § 12102(2)(A-C) (1994).

[327] *Id.* § 12102(2)(C).

[328] *Id.*

[329] 119 S. Ct. 2133 (1999). "Petitioner was diagnosed with hypertension when he was 10 years old." *Id.* at 2136.

the major life activity of working under Subsection A of the Act, he also claimed that he was perceived as disabled by UPS under Subsection C.[330] The Court, however, refused to recognize this claim, as well. The Court disagreed that Murphy was perceived as disabled, even though his employer told him he was "fired because of his hypertension."[331]

In the aftermath of the *Murphy* decision, it seems that litigation will not be reduced, as the Supreme Court would have liked, but instead, will increase under the third prong of the definition of disability. Although the Supreme Court treated harshly the question of whether Murphy was regarded by his employer as disabled, the lower courts have been sympathetic to the claims of plaintiffs.[332] A recent litany of cases demonstrate that many courts will preclude summary judgment motions to dismiss the "perceived as disabled" prong of the definition of disability under the Act.

In the following district and appellate court cases, plaintiffs were successful in precluding summary judgment motions of their discrimination claim under the third prong of the ADA's definition of disability.[333] While decisions have not yet been reached as to

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[330] 42 U.S.C. § 12102(2)(C) (1994).

[331] Petitioner's Opening Brief at *104a-105a, Murphy v. United Parcel Serv., 119 S. Ct. 2133 (1999) (No. 97-1992). Murphy was impaired by high blood pressure and treated his condition with prescribed medication. *Murphy*, 119 S. Ct. at 2136.

[332] While courts have not permitted the claim of substantial limitation to survive summary judgment, they have permitted ADA cases to survive summary judgment on the claim that the employers regarded the plaintiffs as disabled. *See* EEOC v. R.J. Gallagher Co., 181 F.3d 645 (5th Cir. 1999); Morris v. Dempsey Ing Inc., 1999 WL 1045032 (N.D. Ill. Nov. 12, 1999); Matlock v. Dallas, 1999 WL 1032601 (N.D. Tex. Nov. 12, 1999); Cinelli v. U.S. Energy Partners, 77 F. Supp. 2d 566 (1999).

[333] 42 U.S.C. § 12102(2)(C). *See also Gallagher*, 181 F.3d 645) (finding that there is a genuine issue of material fact as to whether the plaintiff, an individual suffering from cancer, was regarded as disabled by his employer when the employer demoted him, after learning of his cancer); Morris v. Dempsey, 1999 WL 1045032 (N.D. Ill. Nov. 12, 1999) (finding that there was a genuine issue of material fact when an employer terminated the plaintiff, a diabetic, by telling him that "the company considered him a liability because of his diabetic condition"); Matlock v. Dallas, 1999 WL 1032601 (N.D. Tex. Nov. 12, 1999) (denying a summary judgment motion as to the "regarded as" claim because the

whether these individuals will be considered to be disabled under this prong, these successful motions demonstrate that the disabled may be able to carve out a niche where they can continue to embrace the protection of the ADA.

In *EEOC v. R.J. Gallagher Co.*,[334] the court of appeals quickly dismissed the plaintiff's challenge of the lower court's finding that Boyle was not substantially limited in a major life activity due to his cancer under Subsection A of the ADA.[335] The court found that under *Sutton*,[336] since Boyle was able to utilize a mitigating anti-cancer treatment, he could not be considered substantially limited in a major life activity.[337] The court of appeals, however, was more sympathetic than the lower court when it evaluated the district court's summary judgment decision, which found that the employer did not regard the plaintiff as disabled due to his cancer under Subsection C of the Act.[338] The court of appeals found that there was a genuine issue of material fact as to whether the employer regarded Boyle as disabled.[339] The court relied on the fact that Boyle was demoted to a position that provided for half the annual income that he received as president.[340] The court found that the demotion was enough to preclude a summary judgment motion because a jury could reasonably

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plaintiff's employer fired him due to his hearing impairment); Cinelli v. U.S. Energy Partners, 77 F. Supp. 2d 566 (1999) (finding that there is a genuine issue of material fact as to whether the plaintiff, an individual suffering from non-Hodgkins lymphoma, a form of cancer, was perceived by his employer to be disabled when his employer expressed doubts that he could continue to do his job adequately due to his health problems).

[334] 181 F.3d 645 (5th Cir. 1999).

[335] *Id.* at 655.

[336] Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999).

[337] *Gallagher*, 181 F.3d at 655.

[338] EEOC v. R.J. Gallagher Co., 959 F. Supp. 405, 409 (S.D. Tex. 1997). The district court stated that the "regarded as" prong of the definition is to protect people who have some obvious specific handicap that employers might generalize into a disability, such as wearing an eye patch or missing a limb. *Id.*

[339] *Gallagher*, 181 F.3d at 657.

[340] *Id.*

conclude that the offer for a lower position, with a lower salary, was constructive discharge based on discrimination.[341]

In *Morris v. Dempsey ING, Inc.*,[342] the plaintiff, Cary Morris, was a diabetic.[343] Unlike the previous cases discussed, the plaintiff did not claim that he was substantially limited in a major life activity.[344] Instead, Morris strictly claimed that his employer regarded him as disabled pursuant to Subsection C of the Act.[345] The company told him that he was considered a liability because of his diabetic condition when it discharged him.[346] In the court's short opinion, it found that this was evidence enough to state a claim for relief.[347] Thus, the court denied the defendant's motion for summary judgment.[348]

In *Cinelli v. U.S. Energy Partners*,[349] the plaintiff, James Cinelli, also did not file a claim arguing that he was substantially limited under Subsection A of the Act but instead pursued a claim under Subsection C, arguing that his employer regarded him as disabled.[350] The plaintiff was diagnosed with non-Hodgkins lymphoma, an incurable form of cancer.[351] Three days after learning of Cinelli's condition, his supervisors fired him.[352] The employer argued that it fired Cinelli because he was unable to meet

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[341] *Id.* at 656-57.

[342] Morris v. Dempsey ING, Inc., 1999 WL 1045032, at *1 (N.D. Ill. Nov. 12, 1999).

[343] *Id.*

[344] *Id.* The court pointed out that this would have been a fruitless claim because the *Sutton* opinion included language that stated that diabetics using corrective medication may not be disabled under the ADA. *Id.*

[345] 42 U.S.C. § 12102(2)(C) (1994).

[346] *Morris*, 1999 WL 1045032, at *1.

[347] *Id.* at *3.

[348] *Id.*

[349] 77 F. Supp. 2d 566 (D. N.J. 1999).

[350] *Id.* at 569.

[351] *Id.*

[352] *Id.* Initially, Cinelli told his employer that he found a lump in his neck and was going to a specialist to have a biopsy. *Id.* at 570. Shortly after this discussion, Cinelli learned that the lump was a malignant tumor. *Id.* Cinelli informed his employer that the lump was cancerous and that he planned to undergo surgery to have it removed. *Id.* at 571. Once the tumor was tested, the plaintiff's doctor informed him that he had terminal incurable cancer. *Id.*

the quota required for the position and because he had not generated any new sales.[353] In response, Cinelli provided evidence that his new accounts were of considerable size and would be profitable to the company.[354] Moreover, the company sent Cinelli a letter advising him that he was discharged because of his inability to perform his job functions.[355] The court found that a reasonable inference could be made that Cinelli's employer fired him because he was disabled based on the employer's use of the word "inability."[356] Thus, the court denied the defendant's motion for summary judgment.[357]

It remains to be seen whether the third prong of the ADA will provide a successful alternative to the substantial limitation claim for plaintiffs utilizing mitigating measures. If, however, the courts follow the *Murphy* interpretation of Subsection C regarding whether the employer perceived the individual to be "substantially limited" in a major life activity, the disabled may not have any other redress under the Act. Thus, their livelihoods may be threatened due to the failure of the Supreme Court to recognize the complete ramifications of its decisions.

CONCLUSION

The Supreme Court's recent decision in *Sutton* concerning the definition of disability has had a serious impact on the judicial system. The intent of the ADA has been defeated by the sweeping ruling that considers individuals using "mitigating measures" to be disabled only upon a showing of substantial limitation. This has had the effect of denying disabled individuals that have maintained their disorders, but who have not corrected them, the protection of the ADA in employment discrimination cases.

Although the Court was concerned with employer discrimination liability and frivolous lawsuits, its narrow definition of disability will not reduce the amount of frivolous lawsuits brought

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[353] *Id.* at 571.
[354] *Id.*
[355] *Id.*
[356] *Id.*
[357] *Id.* at 579.

before the court. Instead of protecting the disabled, the Court's rule excludes from protection all plaintiffs utilizing mitigating measures. Furthermore, the Supreme Court's ruling also failed to provide the lower courts with guidance to conduct a fair and individualized analysis of disorders that can be maintained with medical treatment. As a result, the lower courts have applied a "blanket exclusion" to mitigating measures cases denying worthy petitioners ADA protection.

To avoid this "blanket exclusion" and the application of blind justice, the courts should apply the balancing formula proposed in this Note. Application of the balancing formula to the Supreme Court's recent disability decisions demonstrates that balancing the interests of the individual against the employer and society will protect the employer's interests in avoiding frivolous claims and at the same time fulfill the ADA's promises to the disabled. Frivolous claims will be dismissed early if plaintiffs cannot demonstrate the long term impact of the impairment. Those that are able to demonstrate the long term impact of the impairment will secure the rightful protection of the ADA.

Finally, although protection under the ADA has now been narrowed by the Court, the disabled may be able to take advantage of the third prong of the statute, allowing them to demonstrate that their employers regarded them as disabled. This third prong, however, requires a much higher threshold of proof because the plaintiff must allege the intent of the employer, which requires evidence that may be difficult to obtain. In the post-*Sutton* era, the lower courts have taken advantage of this "last resort" and have prevented employers from totally denying the disabled any protection of the statute. However, this "last resort" still falls short of the purpose of the ADA's optimistic goal to prevent discrimination and to successfully employ the disabled.