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THE AMERICANS WITH DISABILITIES ACT, MENTAL ILLNESS, AND MEDICATION: A HISTORICAL PERSPECTIVE AND HOPE FOR THE FUTURE

Jennifer M. Jackson*

INTRODUCTION

When the Americans with Disabilities Act (ADA or the "Act") was passed in 1990, legislators, disability advocates, and scholars had high expectations for the law's impact on the status of the disabled in this country.[1] The purpose of the Act has always been to eliminate "discrimination against individuals with disabilities . . . [and] to provide clear, strong, consistent, enforceable standards addressing discrimination . . . ."[2] Instead, a decade later, the statute's inadequacies were all too apparent, with one critic noting that "[i]f the ADA was meant to be a revolutionary remaking of America, then the judicial interpretation and implementation of the ADA's employment title has been nothing less than a betrayal of the ADA's promise."[3] Specifically, in terms of Title I protection of

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1. Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 217 (2008).

2. Americans with Disabilities Act, 42 U.S.C. § 12101(b)(1)-(2) (2006).

3. Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 36 (2000).

individuals from employment discrimination based on psychiatric disability, critics argue that this protection is nothing more than a "delusion of rights."[4]

Throughout the ADA's history, mental illness has been the fastest growing category of charges filed with the Equal Employment Opportunity Agency (EEOC) each year.[5] However, in attempting to define what a disability is, courts appear to have been employing the very stereotypes and prejudices against people with psychiatric disabilities that the ADA was created to eradicate.[6] This continuing bias has created a long and difficult road for claimants with mental illness seeking the protection of the ADA.

Further complicating the matter for courts and claimants dealing with the issue of mental illness is how to treat the medications used (or not used) to ameliorate the illness. Mitigating measures have been a point of contention in ADA litigation since the passage of the Act.[7] Lower courts were divided for years on how to address the issue until the Supreme Court issued its opinion in *Sutton v. United Air Lines, Inc.*[8] The *Sutton* decision changed the way courts addressed mitigating measures until another seismic shift occurred when Congress overturned that decision in the Americans with Disabilities Act Amendments Act of 2008 (ADAAA).[9]

This article will trace the history of how medications for mental illness have been treated throughout the ADA's history:

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4. Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 271 (2000).

5. Kevin S. Wiley, Jr., Comment, *Scaling Back the ADA: How the* Sutton v. United Air Lines *Decision Affects Employees with Bipolar Disorder*, 2 SCHOLAR 355, 372 (2000).

6. Stephanie Procter Miller, Comment, *Keeping the Promise: The ADA and Employment Discrimination on the Basis of Psychiatric Disability*, 85 CALIF. L. REV. 701, 702 (1997).

7. Sarah Shaw, Comment, *Why Courts Cannot Deny ADA Protection to Plaintiffs Who Do Not Use Available Mitigating Measures for Their Impairments*, 90 CALIF. L. REV. 1981, 1984 (2002).

8. *See generally* Sutton v. United Airlines, Inc., 527 U.S. 471 (1999).

9. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(2)-(3), 122 Stat. 3553, 3553-3554 (codified at 42 U.S.C. 12101).

after the Act's passage; after the Supreme Court's decision in *Sutton*; and following the passage of the ADAAA in 2008. Through this lens, the article will contain a specific discussion of how medications themselves can and have been viewed as disabling under the Act and whether a plaintiff who chooses not to medicate her mental illness can recover under the ADA.

THE AMERICANS WITH DISABILITIES ACT

The ADA has its origins in the Rehabilitation Act (Rehab Act) of 1973, which provided protection from discrimination to people with disabilities in federal employment, federal contracting, and federally funded programs.[10] ADA terminology such as "qualified individual with a disability," "reasonable accommodation," and "undue hardship" was drawn from the Rehabilitation Act.[11] The ADA expanded protection for people with disabilities in most private and public employment settings. Title I of the ADA generally covers any employer with fifteen or more employees,[12] Title II prohibits discrimination by a state or local government,[13] and Title III prohibits discrimination in places of public accommodation and specific services operated by private entities.[14] This article will primarily focus on employment discrimination under Title I.

As the ADA stands now, "disability" is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[15] Actual mental impairment includes mental illness, mental retardation, dementia, cognitive limitations, or any of a variety of other conditions recognized as mental disorders and found in the Diagnostic and Statistical Manual of

10. Rehabilitation Act, 29 U.S.C. §§ 793-794 (2006).
11. Miller, *supra* note 6, at 708.
12. Americans with Disabilities Act, 42 U.S.C. § 12111(5)(A) (2006).
13. *Id.* § 12131(1).
14. *Id.* § 12181.
15. *Id.* § 12102(1).

Mental Disorders (DSM-IV).[16] However, the definition of mental impairment is not limited to the disorders described by the DSM-IV.[17] The EEOC regulations define a mental impairment as "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."[18] Title I states that an employer shall not "discriminate against a qualified individual with a disability . . . in regard to . . . the hiring, advancement, or discharge of employees, . . . and other terms, conditions, and privileges of employment."[19]

Title I requires that an employer make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual" unless the employer can demonstrate an undue hardship.[20] The statute defines a "qualified individual" as one "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[21] "Reasonable accommodation" is defined in the statute by way of an illustrative – rather than exhaustive – list. Generally, the examples include making existing facilities accessible to individuals with disabilities, and other logistical suggestions, such as job restructuring, to accommodate employees with disabilities.[22] The EEOC regulations further delineate the concept by defining reasonable accommodation as "[m]odifications or adjustments to the work environment . . . that enable a qualified individual with a disability to perform the essential functions of that position; or . . . enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated

16. MATTHEW BENDER & CO., TREATISE ON HEALTH CARE LAW § 20.14(3)(a) (2009); *see also*, AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000).

17. MATTHEW BENDER & CO., *supra* note 16, § 20.14(3)(a).

18. 29 C.F.R. § 1630.2(h)(2) (2009).

19. 42 U.S.C. § 12112(a).

20. *Id.* § 12112(b)(5)(A).

21. *Id.* § 12111(8).

22. *Id.* § 12111(9).

employees without disabilities."[23]

An employer does not have to make reasonable accommodations if it can prove that doing so would be an undue hardship, which the statute defines as "an action requiring significant difficulty or expense."[24] Similarly, if the employer can demonstrate that the employee is a "direct threat," that is, that he or she poses "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation,"[25] then the employer may not be liable for an adverse employment action or failure to accommodate.

The goal of the ADA is to move people with disabilities into the workforce by lowering discriminatory barriers to their entry.[26] As of July 2010, the unemployment rate for people with disabilities was 16.4%, compared to 9.5% for people without disabilities.[27] However, the U.S. Department of Health and Human Services' statistics show that among adults with serious mental illness, the unemployment rate has been as high as 90%, the highest level of any group of people with disabilities.[28] Work is viewed as vital to an increased enjoyment of life and better prognosis for many disabling conditions, especially for those with psychiatric disabilities.[29] As such, the spirit of the ADA recognizes that people with psychiatric disabilities "need protection from job discrimination to the same degree as those

23. 29 C.F.R. § 1630.2(o)(1)(ii),(iii).

24. 42 U.S.C. § 12111(10)(A).

25. *Id.* § 12111(3).

26. Lauren J. McGarity, Note, *Disabling Corrections and Correctable Disabilities: Why Side Effects Might Be the Saving Grace of* Sutton, 109 YALE L.J. 1161, 1164-65 (2000).

27. *Economic News Release: Table A-6. Employment Status of the Civilian Population by Sex, Age, and Disability Status, Not Seasonally Adjusted*, U.S. BUREAU OF LABOR STATISTICS, http://www.bls.gov/news.release/empsit.t06.htm (last modified Nov. 5, 2010).

28. *High Unemployment and Disability for People with Serious Mental Illness* SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH AND HUMAN SERVS (2002), http://mentalhealth.samhsa.gov/publications/allpubs/nmh020144/unemployment.asp (last visited Aug. 28, 2010).

29. Miller, *supra* note 6, at 705 (citing Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes be Undone?*, 8 J.L. & HEALTH 15, 35 (1993)).

with physical disabilities,"[30] but to date, the protection has fallen short and the inquiry has become muddled when the disability involved is mental illness.[31] Further, as will be discussed, persons with mental illness face heightened barriers to employment and to recovery under the ADA, not only because of social stigma related to their conditions, but also due to the inquiry as to whether their conditions are mitigated.

HISTORY OF THE ADA AND MENTAL ILLNESS

Not long after the passage of the ADA, even as it was being called "the most innovative and far-reaching federal civil rights legislation–ever–on behalf of disabled persons," commentators had concerns about how the statute would be applied to those with mental disabilities.[32] One commentator's concerns were three-fold: (1) the legislative history, early commentaries, and practice manuals relating to the ADA scarcely acknowledged the application of the Act to persons with mental disabilities; (2) when commentators have considered the Act's application to persons with mental disabilities, the analysis has generally been limited to persons with mental retardation, rather than those with mental illness; and (3) no matter how strongly such an Act is worded, the law's aims cannot be met unless there is a corresponding change in public attitudes (especially among the legal system interpreting and enforcing the Act).[33] The concern at the beginning was that unless attitudes toward the disabled, specifically persons with mental disabilities, changed, the ADA would "turn out to be little more than the last in a long (and depressing) series of 'paper victories' for mentally ill individuals."[34] The history of the statute has shown this fear to

30. *Id.* at 710.

31. *Id.* at 702.

32. Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes be Undone?*, 8 J.L. & HEALTH 15, 15 (1993).

33. *Id.* at 19-20.

34. *Id.* at 23 (citing Michael Lottman, *Paper Victories and Hard Realities, in* PAPER VICTORIES AND HARD REALITIES: THE IMPLEMENTATION OF THE LEGAL AND CONSTITUTIONAL RIGHTS OF THE MENTALLY DISABLED 93 (Valerie J. Bradley & Gary

have been realized in a number of ways.

Claimants with mental illness have faced a difficult road under the ADA. First, fear and misunderstanding of mental illness abounds both in the general public and in the courts. In perpetuating the very stereotypes about mental illness that the ADA sought to eliminate, American courts have failed to protect persons with psychiatric disabilities from employment discrimination.[35] This fear and misunderstanding has made those suffering with mental illness less likely to disclose their illness to their employer, which in turn makes coverage under the ADA impossible, as the disability must be known by the employer for reasonable accommodation to occur.[36]

Another historically troubling development for ADA claimants with mental illness, especially those that have been able to hide their conditions while working or functioning on some level in their occupational roles, is that courts, as a result of this level of functionality, are unwilling to find that the claimant has a disability at all; that is, the court finds that the claimant is not substantially impaired in the major life activity of working. For example, in *Cadelli v. Fort Smith School District*, a high school teacher with a panic disorder was found not to be disabled under the Rehab Act because his condition had not affected his ability to complete earlier assignments or fill alternate positions, so the condition was thus not a substantial impairment and not a disability.[37] This trend is particularly true for the psychiatrically disabled claimant who manages to control her condition to some degree with medication.[38]

In the frustrating alternative, courts have denied ADA

J. Clarke eds., 1976).

35. Stefan, *supra* note 4, at 273.

36. Miller, *supra* note 6, at 710-11; *see also*, Stefan, *supra* note 4, at 290 (explaining that applicants and employees with mental illness are "extraordinarily reluctant to disclose their disabilities" because of the "stigma and shame associated with mental illness" and because they predominantly believe that "hiding their disabilities provides far more protection from discrimination than the ADA ever would.").

37. *See generally*, Cadelli v. Fort Smith Sch. Dist., 852 F. Supp. 789 (W.D. Ark. 1993), *aff'd* 23 F.3d 1295 (8th Cir. 1994).

38. Wiley, *supra* note 5, at 363.

coverage to claimants with mental illness who refuse to take medication or seek treatment on the grounds that they are either creating their disability or not otherwise qualified for their position. In *Franklin v. U.S. Postal Service*, a claimant with paranoid schizophrenia was found not to be an "otherwise qualified handicapped individual" under the Rehab Act because, by refusing to treat her condition with medication, she was, in the court's view, creating her handicap.[39] In *Roberts v. Fairfax*, the plaintiff had failed to seek the recommended and available treatment for his depression, and was thus determined not to be a "qualified individual with a disability" under the ADA.[40] Further, Roberts' failure to accept the available treatment from his employer prevented him from demanding that the employer offer any other accommodation.[41]

Lower courts around the country came to be divided as to whether a plaintiff who treats her disability (be it physical or psychological) must be considered in reference to her untreated medical state or in reference to her condition after the effects of ameliorating medications. Before the ADAAA, the text of the ADA defined a "disability" as an "impairment that . . . limits . . . [a] major life activit[y]."[42] Some courts found the statutory language to be ambiguous and subsequently looked to the EEOC guidelines for an answer as to how to treat a mitigating plaintiff. For example, in *Arnold v. UPS*, the First Circuit held that the diabetic plaintiff should be considered in his unmitigated state, even though his medications controlled the disease to the point where he was not substantially limited in a major life activity.[43] The court noted that the statute did not define the terms "impairment," "substantially limits," or "major life activity" and felt that each term could have more than one meaning, and that the statute was silent as to whether

39. Franklin v. U.S. Postal Serv., 687 F. Supp. 1214, 1218 (S.D. Ohio 1988).

40. Roberts v. Fairfax, 937 F. Supp. 541, 548 (E.D. Va. 1996) (citing 29 C.F.R. § 1630.9(d)).

41. *Id.* at 549.

42. Americans with Disabilities Act, 42 U.S.C. § 12102(2)(A) (2006).

43. Arnold v. UPS, 136 F.3d 854, 863 (1st Cir. 1998).

medications should be part of the consideration.[44] The court ultimately evaluated the statutory language in light of the legislative intent and "broad remedial purposes" of the statute and held that the plaintiff's disability should be evaluated based on his underlying medical condition without considering mitigating medications.[45]

Alternatively, in *Hodgens v. General Dynamics Corp.*, a district court decided that the EEOC guidelines were at odds with the plain language of the statute.[46] In that case, the plaintiff identified his disabilities as hypertension and atrial fibrillation, both of which were controlled by medication.[47] The court noted that it was "difficult to see how a condition that has been ameliorated so that it does not affect an individual's ability to function normally can be construed as an 'impairment'. . . [and] even more difficult to see how . . . [it] 'substantially limits' a major life activity."[48] The court went on to affirmatively state that "an individual who takes medication that prevents a physical or mental condition from substantially limiting any major life activities is not disabled within the meaning of the ADA."[49]

Ultimately, eight circuits adopted the EEOC's interpretation that disabilities should be evaluated in their unmitigated state when determining the applicability of the ADA.[50] Conversely, the Sixth and Tenth Circuits adopted the position that an individual's disability should be evaluated in its mitigated state, and the Fourth Circuit, while not directly adopting the Sixth and Tenth Circuits' rationale, expressed concern that the EEOC

44. *Id.* at 859.

45. *Id.* at 863.

46. Hodgens v. Gen. Dynamics Corp., 963 F. Supp. 102, 107 (D.R.I. 1997), *aff'd on other grounds*, 144 F.3d 151, 173 (1st Cir. 1998) (like *Arnold*, the appeal went to the First Circuit, which affirmed the lower court's holding, but noted that it was affirming on different grounds and that the court "need not decide whether the district court was correct in . . . deciding that issue should proceed with or without consideration of Hodgens's ameliorative medications.").

47. *Id.*

48. *Id.*

49. *Id.* at 108.

50. McGarity, *supra* note 26, at 1168.

interpretation would make ADA coverage available to those with relatively minor conditions.[51] Thus, courts around the country were interpreting the ADA with reference to ameliorative medications in drastically different ways, which eventually led to the *Sutton* decision by the Supreme Court.

SUTTON V. UNITED AIR LINES, INC. AND MEDICATIONS

On the same day in 1999, the Supreme Court released three rulings related to the use of mitigating measures in ADA cases that would significantly change who was considered disabled under the ADA. The leading case in the trilogy, *Sutton,* involved severely myopic twin sisters who had applied for positions as pilots with United Air Lines.[52] With corrective lenses, the sisters' vision was equal to or better than 20/20, but they were denied positions with the airline regardless and sued under the ADA claiming discrimination based on their disability.[53] The sisters claimed that their disability substantially limited them in the major life activity of working and argued that the Court should comply with the EEOC guidelines and consider their disabilities in the unmitigated state.[54]

The Supreme Court upheld the Tenth Circuit's ruling that the effects of mitigating measures must be taken into account when determining whether a person is "disabled" under the ADA.[55] In determining that the EEOC guidelines were an "impermissible interpretation of the ADA," the Court questioned the EEOC's authority to interpret the definition of "disabled."[56] The Court noted that while the EEOC had authority to issue regulations to carry out the employment provisions of Title I, the definition of disability was located in the generally applicable provisions of the ADA, and no agency

51. *Id.* at 1168-69.
52. Sutton v. United Airlines, Inc., 527 U.S. 471, 475 (1999).
53. *Id.* at 475-76.
54. *Id.* at 481.
55. *Id.* at 482.
56. *Id.* at 471, 482.

had been given the authority to issue regulations interpreting the provisions falling outside of Titles I-V.[57]

The Court then went on to provide three justifications for its interpretation of the statute. First, the Court stated that "the Act define[d] a 'disability' as 'a physical or mental impairment that substantially limits one or more of the major life activities' of an individual"; in noting that the phrase "substantially limits" was in the present indicative verb tense, the Court felt it was important that the claimant be "presently–not potentially or hypothetically–substantially limited in order to demonstrate a disability."[58] Thus, if the person's physical or mental impairment is corrected by a mitigating measure, such as medication or lenses, then that person is not presently substantially limited and, therefore, not disabled under the Act.[59]

Second, the Court remarked that the determination of whether a person is disabled under the ADA had to be an individualized inquiry.[60] The Court reasoned that an individualized inquiry would be impossible if courts were forced to consider claimants in their unmitigated states, as it would require speculation and the drawing of conclusions based on "general information about how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition"; a process that the majority felt would be "contrary to both the letter and the spirit of the ADA."[61] At this point, the Court also noted that in failing to consider a claimant in his unmitigated state, it would be impossible to consider any negative side effects resulting from the use of mitigating measures, and gave examples of medications with potentially disabling side effects, such as antipsychotic drugs.[62]

Finally, the Court felt that Congress did not intend to protect all those whose uncorrected conditions would amount to

57. *Id.* at 478-79.
58. *Id.* at 482.
59. *Id.* at 482-83.
60. *Id.* at 483.
61. *Id.* at 483-84.
62. *Id.* at 484.

disabilities. In the statute's findings, Congress stated that "43,000,000 Americans have one or more physical or mental disabilities"; but the majority felt that this number would have been much higher had Congress intended to include all those with "corrected physical limitations."[63]

The Court further expanded its mitigating measures rationale in the two companion cases to *Sutton*. In *Murphy v. United Parcel Service*, the plaintiff suffered from hypertension; his blood pressure reaching 250/160 when unmedicated.[64] However, with medication, the plaintiff's blood pressure measured between 160/102 and 160/104; while still high, the plaintiff was able to "function[] normally," with the exception of the prohibition of lifting heavy objects.[65] The Court evaluated the Plaintiff in light of the corrective measure of his medication and determined that his impairment did not substantially limit a major life activity and he was, thus, not disabled for the purposes of the ADA.[66]

In the final case of the trilogy, *Albertson's, Inc. v. Kirkingburg*, the Supreme Court again rejected the ADA claim of an individual whose corrected impairment did not substantially limit a major life activity.[67] The plaintiff in *Kirkingburg* had a visual impairment that effectively rendered him with monocular vision; however, the plaintiff's brain had subconsciously developed coping mechanisms to compensate for his visual problems in sensing depth and peripheral objects.[68] The Ninth Circuit had held that the plaintiff's visual condition constituted a per se disability.[69] The Supreme Court, however, reversed that ruling and held that the plaintiff's ability to subconsciously compensate for his condition must be taken into account before

63. *Id.* at 484-87.
64. Murphy v. UPS, 527 U.S. 516, 519 (1999).
65. *Id.* at 520.
66. *Id.* at 521.
67. *See generally*, Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999).
68. *Id.* at 565-66.
69. *Id.* at 561.

determining whether he was disabled.[70] Thus, the Court had in one day extended the range of mitigating measures that must be considered from medications to corrective devices to an individual's ability to compensate for their impairment.

The fallout from the *Sutton* trilogy decisions was immediate. The fear was that those plaintiffs who use medications or medical devices to correct their disabilities would not be covered by the ADA's protections.[71] Indeed, the media interpretations of the decisions revealed a perception that the Supreme Court had "rendered the ADA powerless in the workplace."[72] Undeniably, the *Sutton* decision moved ADA litigation into a new phase in its history. Plaintiffs with mental illness were forced to consider not only how the courts would perceive their illness, but also how their chosen course of treatment would be viewed. A mentally ill plaintiff whose condition was controlled by medication would no longer be considered "disabled" after *Sutton*. Should the plaintiff argue that the medications she is forced to take for her condition are disabling in themselves? Would it be better for the purposes of the ADA, not to mitigate a condition at all?

MEDICATIONS AS DISABILITY

Though the *Sutton* decision seemed to close the door on ADA coverage for plaintiffs who mitigated their conditions with medication, there remained some hope for medicated plaintiffs. One interpretation of the decision was that one of the rationales underlying the majority's holding was the belief that viewing plaintiffs in their mitigated state was the only way a court would be able to "consider any negative side effects suffered by an individual resulting from the use of mitigating measures."[73] The hypothesis was that this language would open the door to a new class of ADA plaintiffs: "[i]ndividuals who take medications that

70. *Id.* at 565-67.
71. McGarity, *supra* note 26, at 1162.
72. *Id.*
73. *Id.* at 1162-63 (citing Sutton v. United Air Lines, 527 U.S. 471, 484 (1999)).

cause extreme drowsiness, nausea, or other severe side effects would be appropriately considered 'individuals with disabilities' under this language, as would individuals who have had corrective surgeries, such as colostomies or hysterectomies, that give rise to permanently disabling conditions."[74] It seemed that the Supreme Court was recognizing that medication side effects could be considered disabilities under the ADA.

In the *Sutton* opinion, the Court specifically cited three potentially disabling corrections: antipsychotic drugs, drugs used to treat Parkinson's disease, and antiepileptic drugs.[75] Thus, theoretically, though the Court was looking to limit the pool of potential ADA plaintiffs, it also took pains to ensure that its decision did not encourage potential plaintiffs to stop mitigating their disabilities in an effort to meet the statutory definition of disability, thereby promoting the self-sufficiency of the disabled that the ADA sought to protect.[76] However, even before *Sutton*, courts had considered the disabling side effects of medication in determining ADA coverage.

Courts that have considered the side effects of medications as a disability have generally held the side effects to the same definition of disability as delineated in the statute. For example, in *Hodgens*, the plaintiff offered the alternative theory of disability that he should be deemed disabled because of the various side effects of his medications.[77] The court in that case found no evidence that the side effects of the plaintiff's medications had substantially limited one of his major life activities.[78] Thus, though the plaintiff's argument of disability arose from an origin other than his medical condition, the court was able to apply the statutory language to the situation in a similar manner to determine the existence of a disability. Though the court in *Hodgens* did not find a disability based on

74. *Id.* at 1163.
75. *Sutton*, 527 U.S. at 484.
76. McGarity, *supra* note 26, at 1174.
77. Hodgens v. Gen. Dynamics Corp., 963 F. Supp. 102, 108 (D.R.I. 1997).
78. *Id.*

side effects, its consideration of whether the side effects caused a disability was evidence that courts were at least willing to acknowledge the often-debilitating consequences of treatment faced by ADA plaintiffs. However, the inquiry as to whether side effects constitute a disability does not always begin and end with the statutory language.

The EEOC guidelines list three factors to be considered in determining what constitutes a substantial limitation of a major life activity: (1) "the nature and severity of the impairment;" (2) "the duration or expected duration of the impairment;" and (3) "the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment."[79] Thus, even if a plaintiff's side effects were severe enough to satisfy the first factor, another hurdle would be whether the duration or permanency of the side effects constituted a disability. The difficulty with medication side effects after *Sutton* was the courts' general unwillingness to grant ADA coverage to disabilities that may not be permanent (such as chemotherapy) or may lessen with time (often the case with many medication side effects).[80] Accordingly, though some hoped that mitigating plaintiffs, such as mentally ill plaintiffs forced to take medications with often devastating side effects, would still have some recourse after *Sutton*, it still seemed as though a mitigating plaintiff would be effectively barred from coverage by the ADA.

NONMITIGATING PLAINTIFFS

NONMITIGATING PLAINTIFFS BEFORE SUTTON

Before the ADAAA, there was no language in the ADA that addressed the consideration of mitigating measures, either plaintiffs that used them or plaintiffs that did not.[81] As such, before *Sutton*, lower courts created a "failure to control a

79. 29 C.F.R. 1630.2(j)(2) (2009).
80. McGarity, *supra* note 26, at 1178.
81. Shaw, *supra* note 7, at 1997.

controllable disability doctrine," which was used to deny ADA coverage to nonmitigating plaintiffs.[82] The doctrine developed inconsistently through the years and was ultimately impacted by the *Sutton* decision and again by the ADAAA.

As mentioned earlier in this article, *Franklin* was a Rehab Act case that involved a plaintiff with paranoid schizophrenia who did not medicate her condition.[83] This was the first case to hold that a plaintiff who did not use available mitigating measures was therefore not protected against disability discrimination.[84] The court dismissed the plaintiff's claims under the Rehab Act on two grounds: first, that a person with a condition such as paranoid schizophrenia that was not controllable by medication was a danger to the public and coworkers and was therefore not an "otherwise qualified handicapped individual;" second, the court held that a person suffering from a condition that was controllable by medication who chose not to take that medication was not an "otherwise qualified handicapped person."[85] In this way, the court barred the plaintiff's action on two grounds: either she was a direct threat or she disqualified herself from coverage under the Rehab Act by failing to medicate her treatable condition.

The foreclosure of an ADA plaintiff for failure to use mitigating measures was first indicated in *Siefken v. Village of Arlington Heights*.[86] In *Siefken*, a police officer experienced a diabetic episode while on duty that resulted in the erratic driving of his car at high speeds through a residential area.[87] The plaintiff's episode was the result of a hypoglycemic reaction, and the police department ultimately terminated him as a result of his failure to monitor his diabetes.[88] The plaintiff had never

82. *Id.*

83. Franklin v. U.S. Postal Service, 687 F. Supp. 1214, 1216 (S.D. Ohio 1988).

84. Shaw, *supra* note 7, at 1998.

85. *Franklin*, 687 F. Supp. at 1219.

86. *See generally* Siefken v. Village of Arlington Heights, 65 F.3d 664 (7th Cir. 1995).

87. *Id.* at 665.

88. *Id.* at 666.

requested accommodation from his employer, and the Seventh Circuit held that "when an employee knows that he is afflicted with a disability, needs no accommodation from his employer, and fails to meet 'the employer's legitimate job expectations,' due to his failure to control a controllable disability, he cannot state a cause of action under the ADA."[89]

The holding in *Siefken* was really quite narrow, emphasizing that the proximate cause of Siefken's dismissal was his failure to control his disease, not the fact that he had the disease.[90] In addition, the court also suggested that Siefken was not qualified to perform the essential functions of his job because of his failure to control his disease.[91] *Siefken* established that the failure of a plaintiff to control her disability in situations where she will pose a direct threat to others "renders the employee unqualified for her position and severs the requisite causal connection between disability and discrimination."[92] This narrow holding, however, was expanded by the courts that adopted it to go beyond situations that involve direct threats and simply deny ADA coverage to nonmitigating plaintiffs.

For example, the plaintiff in *Van Stan v. Fancy Colours & Co.* was moving on appeal for a new trial on his ADA claim based on a defense question during the jury trial as to whether his marijuana use would affect his bipolar medication.[93] The Seventh Circuit cited *Siefken* in flatly stating that "[a] plaintiff cannot recover under the ADA if through his own fault he fails to control an otherwise controllable illness."[94] The court further noted that proof that the plaintiff's medication would have controlled his disorder, but for his drug use, would therefore be relevant.[95] Thus, the "*Siefken* Rule" came to be applied in

89. *Id.* at 667 (citing DeLuca v. Winer Indus., Inc., 53 F.3d 793, 797 (7th Cir. 1995)).

90. Shaw, *supra* note 7, at 2000.

91. *Id.*

92. *Id.* at 2001.

93. Van Stan v. Fancy Colours & Co., 125 F.3d 563, 570 (7th Cir. 1997).

94. *Id.*

95. *Id.*

nonmitigating plaintiff cases. With the *Sutton* decision, however, it appeared as though nonmitigating plaintiffs would be protected by the ADA, as the decision seemed to foreclose court speculation about whether available mitigating measures would be effective for a given plaintiff and instead put the focus on the plaintiff's actual current state.

NONMITIGATING PLAINTIFFS AFTER SUTTON

As previously mentioned, the *Sutton* decision directly addressed the interpretation of the ADA as it applies to mitigating plaintiffs. There is no requirement in *Sutton* that plaintiffs use available mitigating measures, nor is there any suggestion that plaintiffs who do not mitigate their conditions must be denied coverage or be evaluated based on a would-be mitigated state.[96] Rather, the Court stressed that whether an individual is disabled should be considered in light of his present state, not a hypothetical state where an impairment "might, could, or would" be substantially limiting.[97] In fact, the Court applied its reasoning to the situation in which a plaintiff did not use mitigating measures: "[t]he use or nonuse of a corrective device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual with an impairment *actually* faces are in fact substantially limiting."[98] Indeed, for a court to deny a nonmitigating plaintiff coverage based on its belief that she would not be disabled in a mitigated state, the court would have to speculate about, for example, whether the treatment would be effective for that plaintiff, whether the treatment side effects would substantially limit that plaintiff, and whether the symptoms of that plaintiff's particular disability would not prevent her from complying with the appropriate treatment.[99] This is precisely the kind of speculation that the Court

96. Shaw, *supra* note 7, at 2006.
97. *Id.* at 2007 (citing Sutton v. United Air Lines, 527 U.S. 471, 482 (1999)).
98. *Id.* (citing *Sutton*, 527 U.S. at 488 (emphasis in original)).
99. *Id.* at 2008.

"condemned as incompatible with an individualized inquiry."[100]

A district court in the Ninth Circuit applied the *Sutton* reasoning in regards to nonmitigating plaintiffs in *Finical v. Collections Unlimited, Inc.*[101] In *Finical,* the plaintiff worked as a telephone collector for a collections company and had requested accommodation for her hearing impairment in the form of a headset that amplified telephone conversations.[102] In defense to her suit claiming discrimination under the ADA, the employer claimed that the plaintiff was not disabled under the statute because her condition would have benefitted from the use of hearing aids (which the plaintiff chose not to wear because they amplified too much background noise).[103] The court rejected this argument and cited *Sutton* for the proposition that it must conduct an individualized inquiry of the plaintiff in her current state.[104] The court thus refused to engage in speculation as to whether the plaintiff would benefit from the use of a hearing aid.

Despite *Sutton* and subsequent decisions such as *Finical,* courts were still able to find ways to deny ADA coverage to nonmitigating plaintiffs. In *Tangires v. Johns Hopkins Hospital,* the plaintiff's failure to control her asthma with medication led to the granting of summary judgment in favor of the defendant.[105] The court paid lip service to *Sutton* by noting the importance of an individualized inquiry, but it then went on to make generalized statements about the ease of treatment for most asthmatics, and failed to consider the plaintiff in her current, unmitigated state.[106]

Further, even after *Sutton,* courts continue to apply the *Siefken* Rule to deny ADA coverage to nonmitigating plaintiffs.

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100. *Id.*

101. *See generally* Finical v. Collections Unlimited, Inc., 65 F. Supp. 2d 1032 (D. Ariz. 1999).

102. *Id.* at 1035, 1038.

103. *Id.* at 1037.

104. *Id.* at 1038.

105. Tangires v. Johns Hopkins Hospital, 79 F. Supp. 2d 587, 596 (D. Md. 2000).

106. Shaw, *supra* note 7, at 2014 (citing *Tangires,* 79 F. Supp. 2d at 595).

In *Brookins v. Indianapolis Power & Light Co.*, the plaintiff had struggled with issues of depression and anxiety and had not fully availed himself of treatment provided by his employer.[107] Upon discharge, the plaintiff sued under the ADA. The court applied the *Siefken* Rule and held that because the plaintiff knew he was afflicted with the disabilities of depression and anxiety, requested no accommodation from his employer, did not meet his employer's legitimate job expectation of regular attendance, and admitted that his conditions would be controllable by medication, he could not state a cause of action under the ADA.[108]

Similarly, in *Nunn v. Illinois State Board of Education*, the court held that the plaintiff did nothing to control her bipolar disorder, so her recovery under the ADA was therefore barred.[109] The court cast aside the individualized inquiry requirement of *Sutton* and found that bipolar disorder is a treatable condition, that the defendant gave the plaintiff an opportunity to get treatment but she refused, and that the plaintiff's decision barred her recovery.[110] Thus, courts again expanded the *Siefken* holding to encompass situations where failure to control disabilities precluded ADA protection, even when that failure did not pose a threat to the safety of others.[111]

The *Sutton* decision was unpopular among disability rights advocates and, as demonstrated, it did little to alleviate much confusion amongst ADA litigation. As such, nine years after the *Sutton* trilogy, Congress passed the ADAAA to further clarify its intention for the application of the ADA.

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107. Brookins v. Indianapolis Power & Light Co., 90 F. Supp. 2d 993, 996-99 (S.D. Ind. 2000).

108. *Id.* at 1006.

109. Nunn v. Ill. State Bd. of Educ., 448 F. Supp. 2d 997, 1001 (C.D. Ill. 2006).

110. *Id.* at 1001-02.

111. Shaw, *supra* note 7, at 2017.

AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT OF 2008

GENERAL CHANGES

As previously mentioned, expectations for the ADA were high, which likely explains why the Act was viewed by disability rights advocates "as such a huge disappointment, especially in the employment context."[112] It is undisputed that ADA plaintiffs experience extremely low success rates in Title I cases.[113] To this point, the greatest constraint on the application of the ADA has been the definition of "disability."[114] The original statutory definition was vague and courts interpreted it narrowly, providing ADA protection to few plaintiffs.[115] In response to these developments, Congress passed the ADAAA in September 2008.[116] Congressional intent for the ADAAA is to expand the definition of disability that had been narrowed by the Supreme Court in *Sutton* and clarify its intentions as to the application of the Act to persons with disabilities in the United States.[117]

The greatest change affected by the ADAAA relates to the definition of "disability" under the Act. The Amendments specifically reject the holdings in *Sutton* and other Supreme Court cases that narrowed the definition of disability and required a high burden for the plaintiff and reiterated Congress's desire for a broad application of the statute.[118] The Amendments broaden the definition of disability in several important ways. First, Congress removed the findings that

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112. Long, *supra* note 1, at 217.

113. Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 308 (2008).

114. Long, *supra* note 1, at 218.

115. *Id.*

116. *Id.* at 217.

117. *Id.*; Reagan S. Bissonnette, Note, *Reasonably Accommodating Nonmitigating Plaintiffs After the ADA Amendments Act of 2008*, 50 B.C. L. REV. 859, 859 (2009).

118. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(2)-(5), 122 Stat. 3553, 3553-54 (codified at 42 U.S.C. § 12101).

"some 43,000,000 Americans have one or more physical or mental disabilities" and that "individuals with disabilities are a discrete and insular minority"—language that the Supreme Court had used in *Sutton* as justification for narrowing the definition of disability.[119]

Second, Congress expressed the purpose of "a broad scope of protection to be available under the ADA."[120] It expressed its displeasure at the "inappropriately high level of limitation necessary to obtain coverage under the ADA," and reiterated that the focus of an ADA case should be on whether covered entities have complied with their statutory obligations, rather than conducting an "extensive analysis" of the plaintiff's impairment.[121] The traditional approach to interpreting remedial statutes is to afford broad interpretation, but the Supreme Court had seemed to work in direct contravention to that philosophy in its ADA cases; Congress was attempting to reverse that trend with the ADAAA.[122]

Third, while the ADAAA left the actual definition of "disabled" virtually unchanged, the Amendments made changes to the definitions of surrounding terms. For example, Congress changed the way the term "substantially limits" is defined by expressly rejecting the *Sutton* holding that required that courts take into account any mitigating measures used by the plaintiff. Instead, the ADAAA now explicitly states that "determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures," with the exception of "ordinary eyeglasses or contact lenses."[123] This will clearly have a positive effect for mentally ill claimants attempting to control their conditions with medications, but still suffering discrimination

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119. *Id.* § 3; *See also* Sutton v. United Air Lines, 527 U.S. 471, 484, 494 (1999).

120. ADA Amendments Act of 2008 § 2(b)(1).

121. *Id.* § 2(b)(5) (expressly rejecting standard enunciated in Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184 (2002)).

122. Long, *supra* note 1, at 219 (citing *Sutton*, 527 U.S. at 504 (Stevens, J., dissenting)).

123. ADA Amendments Act of 2008 § 3(4)(E).

because of their disability. Interestingly, this rejection of *Sutton's* holding will allow courts to engage in speculation about the extent of a plaintiff's condition, even if the plaintiff is using medication to treat that condition, thus allowing the judicial speculation that the Supreme Court had prohibited in the *Sutton* trilogy.[124] Further, Congress has determined that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[125] For many mental illnesses that are episodic in nature, such as bipolar disorder or depression, this language provides new hope for ADA protection. The amendment directs courts to consider whether an episodic impairment would substantially limit a major life activity if it were active, again allowing judicial speculation.[126]

Fourth, Congress clarified that the EEOC does in fact have the authority to interpret the definition of "disability" and its elements, a proposition questioned by the *Sutton* Court.[127] Additionally, the ADAAA includes a nonexhaustive list of major life activities as an illustration; before the ADAAA, a similar, though shorter, list was included in the EEOC regulations.[128] The ADAAA also made changes to the "regarded as" prong of the disability definition: instead of having to show that an employer mistakenly believed that the plaintiff had an impairment that substantially limited a major life activity, the plaintiff now only need show either that the plaintiff's impairment (regardless of how limiting it actually is) motivated the employer's adverse action or that the employer perceived the plaintiff as having an impairment, and that perception (accurate or not) motivated the adverse action.[129]

124. Bissonnette, *supra* note 117, at 872.
125. ADA Amendments Act of 2008 § 4(4)(D).
126. Long, *supra* note 1, at 221.
127. ADA Amendments Act of 2008 § 6(a)(2).
128. *Id.* § 4(a)(2)(A).
129. Long, *supra* note 1, at 224.

ADAAA, MEDICATIONS, AND NONMITIGATING PLAINTIFFS

As previously mentioned, the ADAAA offers new hope for potential ADA plaintiffs who use medications to mitigate their conditions. A medicated mentally ill plaintiff will theoretically have one less hurdle to face when bringing an ADA claim. Moreover, plaintiffs claiming disability due to side effects of medication will likely face a lower burden under Congress's broadened scope of protection and lowered plaintiff burden. Additionally, though the statute does not directly address nonmitigating plaintiffs, it seems they will conceivably be able to satisfy the definition of "disabled," since courts would not be taking mitigating measures into account. However, the true effect of the ADAAA is a shift in focus from whether an individual is disabled to whether she is a "qualified individual" under the statute.[130]

The determination of a "qualified individual," especially as it relates to nonmitigating plaintiffs, is not well defined in the statute.[131] Implicit in the determination of a qualified individual is the "reasonable" accommodation provided by the employer; however, the statute does not provide a clear standard as to what constitutes "reasonable" accommodation.[132] Accommodation issues are inherently fact-specific, and the majority of ADA precedent to this point has focused on qualifying the plaintiff as disabled, rather than on accommodation, leaving a lack of clear guidance on the subject.[133] In regards to a nonmitigating plaintiff, some argue that courts will now have to determine whether the plaintiff's decision not to mitigate was more reasonable than the employer's proffered accommodation.[134]

As courts and scholars have grappled with the issue of

130. Bissonnette, *supra* note 117, at 885.
131. *Id.*
132. Long, *supra* note 1, at 228.
133. *Id.* at 228-29.
134. Bissonnette, *supra* note 117, at 885.

nonmitigating plaintiffs over the years, and with the passage of the ADAAA, theories have emerged that suggest that nonmitigating plaintiffs should bear some burden to reasonably mitigate their conditions before requiring an employer to provide reasonable accommodation.[135] The question is whether an employer must always accommodate a plaintiff who chooses not to mitigate a condition that may legitimately be alleviated by treatment. One theory called for a balancing of the burdens of accommodation versus mitigation between the employer and the plaintiff;[136] another theory would allow the employer, after the plaintiff has made his prima facie case, to show that mitigating measures are more reasonable than an accommodation by the employer;[137] and yet another theory would compare the plaintiff's decision not to mitigate to what a "reasonable person" would do in the same situation.[138] These proposals claim to be consistent with public policy in requiring that the plaintiffs help themselves to some degree before turning to their employers or the courts for accommodation.[139]

All of these proposals, however, run counter to the spirit of the ADA, especially in light of the passage of the ADAAA. In the ADAAA, Congress specifically stated its intent that a "broad scope of protection . . . be available under the ADA" and further stated that the "primary object of attention" in ADA cases is whether covered entities "complied with their obligations."[140] Thus, it is logical to assume that Congress intended for courts to consider the employer's actions in offering reasonable accommodations, rather than whether the plaintiff's decision to

135. *Id.* at 885.

136. *Id.*

137. *Id.* at 890 (citing Debra Burke & Malcolm Abel, *Ameliorating Medication and ADA Protection: Use It and Lose It or Refuse It and Lose It?*, 38 AM. BUS. L.J. 785, 817 (2001)).

138. *Id.* at 890 (citing Jill Elaine Hasday, *Mitigation and the Americans with Disabilities Act*, 103 MICH. L. REV. 217, 219 (2004) and Lisa E. Key, *Voluntary Disabilities and the ADA: A Reasonable Interpretation of "Reasonable Accommodations,"* 48 HASTINGS L.J. 75, 96-97 (1996)).

139. *Id.* at 889.

140. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b), 122 Stat. 3553, 3553 (codified at 42 U.S.C. § 12101).

mitigate was reasonable. Additionally, some argue that the term "reasonable" modifies the term "accommodation" and has nothing to do with an evaluation of the employee's actions.[141]

In tandem with this expanded coverage, however, is employer protection in the form of the definition of "reasonable accommodation," both in the statute and the EEOC regulations. The statute provides a short, illustrative list of reasonable accommodations, while the regulations provide for a more specific definition, referring to a "qualified [individual or] applicant."[142] Consequently, a nonmitigating plaintiff would not be able to make outlandish accommodation demands of her employer, as a statutory interpretation would likely deem them to be unreasonable. Employers have further protection, as they do not need to provide reasonable accommodation in cases of undue hardship, direct threat, or cases of misconduct stemming from drug or alcohol use.[143]

Further, any test balancing the reasonableness of a plaintiff's decision not to mitigate would raise very real concerns about judicial or employer "second guessing" of employee medical decisions.[144] This situation would allow potential bias to creep into the decision making process of an individual; in the case of a person dealing with mental illness, the prevailing employer and judicial stereotypes about mental illness could prove fatal to any claim.[145] Additionally, employer or judicial involvement in medical decision making would run counter to the ADA's "goal of enhancing the independence and autonomy of individuals with disabilities."[146] Thus, even in the absence of statutory guidance of what constitutes "reasonable accommodation," nonmitigating plaintiffs should still be able to argue that employers accommodate their disabilities, as long as

141. Shaw, *supra* note 7, at 2034.

142. Americans with Disabilities Act, 42 U.S.C. § 12111(9) (2009); 29 C.F.R. § 1630.2(o) (2009).

143. Shaw, *supra* note 7, at 2025.

144. McGarity, *supra* note 26, at 1186.

145. *Id.*; *see also* Stefan, *supra* note 4, at 272.

146. McGarity, *supra* note 26, at 1187.

they are "qualified individual[s]."

CONCLUSION

The interpretation of the ADA prior to 2008 left many feeling that the statute was a failure in terms of rights for individuals with disabilities, and those with mental illness in particular. After the ADAAA, Congress has opened the door for ADA protection of both mitigated and nonmitigated plaintiffs with mental illness. These plaintiffs still face two significant remaining issues: (1) the continuing stigma related to mental illness that permeates both employment and judicial decisions; and (2) in terms of nonmitigating plaintiffs, with the judicial focus shifted from the definition of "disabled" to "reasonable accommodation," plaintiffs may now have to justify whether their decision not to mitigate is reasonable.

The stigma faced by individuals and plaintiffs with mental illness is one of the very issues that the ADA seeks to address. As one commentator has pointed out, "[t]he simple official repudiation of discriminatory practices is not enough to significantly alter the distorted cognitive processes that still frequently dominate our thinking and decision-making."[147] The ADA was the beginning of equal treatment for people with disabilities, but attitudes and beliefs (especially as they relate to people with mental illness) must be adjusted so that statutory interpretation will lead to the realization of the ADA's goals.[148] At this point, it seems that courts have forgotten this notion when making coverage decisions. The hope is that the ADAAA will remove the barriers of mitigating measures and episodic conditions that courts have used in the past to deny ADA coverage to plaintiffs with mental illness.

For plaintiffs with mental illness that choose not to mitigate their conditions, it may be easier to be classified as a person with a "disability," but more difficult to prove what would be a

147. Perlin, *supra* note 32, at 22.

148. *See generally id.* at 22-23.

reasonable accommodation in that situation. Courts can use the individualized inquiry demanded by the statute to determine what is reasonable in each situation without implementing any kind of new balancing test that places an onus on the plaintiff that Congress never intended. Only time will tell if the ADAAA will improve plaintiff coverage in ADA cases. Most of the cases on appeal at this point are still being decided under the ADA before the amendments, so little has been seen of the new effect. While the ADAAA left some questions open, hopefully the interpretation of the amended ADA going forward will provide greater coverage to people with disabilities of all kinds, as Congress intended, and especially to those with mental illness.