SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 52 | Issue 4

2002

The Economically Disadvantaged and the ADA: Why Economic Need Should Factor into the Mitigating Measures Disability Analysis

Christine M. Tomko

THE ECONOMICALLY DISADVANTAGED AND THE ADA:

WHY ECONOMIC NEED SHOULD FACTOR INTO THE MITIGATING MEASURES DISABILITY ANALYSIS

"I did my job when I was called on by my country. Now it is your job and the job of everyone in Congress to make sure that when I lost the use of my legs I didn't lose my ability to achieve my dreams."[1]

INTRODUCTION

The Americans with Disabilities Act of 1990[2] ("ADA") was enacted to provide people with disabilities with the opportunity to achieve their dreams and integrate into the mainstream of American society and the workforce.[3] Historically, people with disabilities faced barriers to integration and also tended to be much poorer than the rest of Americans.[4] While the ADA was passed to assist with this integration, to eliminate economic dependency, and to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,"[5] people with disabilities still lag behind non-disabled persons both in obtaining employment and in earnings despite the past decade of economic prosperity.[6] Former President Clinton summed up this employment divide when he stated: "Not everyone has shared in the American economic renaissance. We all know there are people . . . who have been left behind, including millions of Americans with significant disabilities who want to go to work."[7]

---

[1] H.R. REP. No. 101-485, pt. 2, at 49 (1990) (quoting Perry Tillman, a Vietnam veteran).

[2] 42 U.S.C. §§ 12101-12213 (1994) (Supp. V 1999).

[3] *See id.* § 12101.

[4] *See id.*; H.R. REP. No. 101-485, pt. 2, at 43-47.

[5] 42 U.S.C. §12101(b)(1) (1994).

[6] *See* E. Scott Reckard, *Disabled are Behind in Economic Boom*, L.A. TIMES, Nov. 18, 2000, at A1.

[7] *Id.*

Unfortunately, the courts' interpretation of the ADA has not assisted people with disabilities in their fight to enter the workforce. In 1999, 95% of all litigated ADA claims in which a decision was issued ended in defeat for the disability plaintiff.[8] The Supreme Court's decision in the seminal case of *Sutton v. United Airlines, Inc.*,[9] which narrowed the scope of the ADA, is a new obstacle to the ADA plaintiff. The *Sutton* Court held that if a person was utilizing mitigating measures to correct a physical or mental impairment, that individual must be evaluated in his mitigated state[10] for purposes of determining the existence of a disability under Title I of the ADA.[11] A person with an impairment does not fall within ADA protection unless the impairment "substantially limits one or more of [one's] major life activities."[12] In other words, a person with a disability must have an impairment, but not all impaired persons have a disability as defined by the ADA. The severity of the impairment determines if one has a disability, and the use of corrective measures can determine the severity. For example, to determine if a hearing impaired person who uses a hearing aid has a disability, his impaired hearing must be evaluated with regard to the use of the hearing aid. Prior to the *Sutton* decision, most jurisdictions would have made this determination without regard to the use of a hearing aid, making it much easier to establish a disability.[13] Consequently, disability advocates were dismayed after *Sut-*

---

[8] *See* Claudia MacLachlan, *Employers Winning ADA Suits*, NAT'L L.J., July 31, 2000, at B1. It should be noted, however, that this figure only relates to litigated cases in which a decision was issued and does not include settled cases, for which there are no statistics. *See id.* It is likely that the number of ADA plaintiffs who receive favorable settlements is much higher.

[9] 527 U.S. 471 (1999).

[10] The court specifically held that "the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment." *Id.* at 475.

[11] The ADA defines a disability 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 impairment; or (C) being regarded as having such an impairment." 42 U.S.C. §12102(2) (1994). Major life activities include seeing, hearing, walking, speaking, learning, breathing, and performing manual tasks. 29 C.F.R. § 1630.2(i) (1994). While it is not entirely clear if working qualifies as a major life activity, the Supreme Court has suggested that if a plaintiff is alleging that work is the major life activity, the plaintiff must show that his disability precludes him from working in a broad class of jobs and not just one particular job. *Sutton*, 527 U.S. at 492. To state a prima facie claim of disability discrimination under the ADA, a plaintiff must prove by a preponderance of the evidence that: (1) he was disabled within the meaning of the Act; (2) he was a qualified individual, i.e., able to perform the essential functions of the position with or without reasonable accommodation; and (3) he was discharged because of his disability. *See* Criado v. IBM Corp., 145 F.3d 437, 441 (1st Cir. 1998); Jacques v. Clean-Up Group, Inc., 96 F.3d 506, 511 (1st Cir. 1996). This Note, however, focuses on the first prong of the disability determination in the employment context—that he was disabled under the meaning of the Act.

[12] 42 U.S.C. § 12102 (2)(A) (1994).

[13] Prior to the *Sutton* decision, eight circuits interpreted the ADA as requiring an evaluation of an impairment in its unmitigated state, in which case courts would not have had to deal with inability to afford mitigating measures. *See* Lauren J. McGarity, *Disabling Corrections and Correctable Disabilities: Why Side Effects Might Be the Saving Grace of Sutton*, 109 YALE L.J.

ton about the adverse effect of this narrowed scope on people with disabilities.[14]

The Court's decision in *Sutton*, however, did not address the situation in which the scientific technology exists to mitigate an impairment but the employee cannot afford to utilize the mitigating measures.[15] Consider, for example, that 20 million Americans have a hearing impairment.[16] An average hearing aid costs $971,[17] and many insurance plans do not cover hearing aids.[18] Additionally, many types of hearing loss require two hearing aids[19] or more expensive hearing aids that range from $2,000 to $5,000 each. Moreover, among hearing-impaired people ages 18-44, over 5% have annual incomes between $10,000 and $24,999,[20] while among those ages 45-64, 14.6%

1161, 1168 n.41 (2000) (citing eight circuits which considered an impairment in its unmitigated state prior to the *Sutton* decision).

[14] *See* Lisa Eichorn, *Applying the ADA to Mitigating Measures Cases: A Choice of Statutory Evils*, 31 ARIZ. ST. L.J. 1071, 1120 (1999) ("Congress's originally intended reach has been so narrowed by [*Sutton*] that it is now incumbent upon Congress to amend the ADA to reflect its originally intended scope."); Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91 (2000) ("[I]n *Sutton*, a seven-person majority of the Supreme Court ruled that mitigating measures should be taken into account in determining whether an individual has a disability—in direct contravention of both the legislative history to the ADA and the laws implementing regulatory guidance."); Scott E. Ferrin, *Seeing Through a Glass Darkly: The Supreme Court's Narrowed Definition of Disability*, 2000 BYU EDUC. & L.J. 221 (2000) (noting that *Sutton* determined that people who have correctable disabilities are no longer considered disabled); Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY J. EMP. & LAB. L. 53, 139-140 (2000) (arguing that the Supreme Court ignored the legislative history and plain meaning of the ADA in narrowing its scope).

[15] This Note does not address an employee who chooses not to utilize mitigating measures because of the negative side effects of the mitigating measures. For a discussion of this topic, see Joshua C. Dickinson, *Will the Supreme Court Allow Employers to Consider Reasonable Mitigating Measures Not Presently Utilized by Employers When Determining Whether a 'Disability' Exists Under Section A of the ADA?*, 68 MO.-K.C. L. REV. 389 (2000). *See also* Brian T. Rabineau, *Those With Disabilities Take Heed: Eighth Circuit Suggests That ADA May Not Protect Those Who Fail To Control a Controllable Disability*, 65 MO. L. REV. 319 (2000), (discussing an 8th Circuit case holding that one who fails to mitigate a controllable disability may not "warrant protection under the ADA.").

[16] NAT'L CTR FOR HEALTH STAT., SERIES 10, NO. 188, VITAL AND HEALTH STATISTICS: PREVALENCE AND CHARACTERISTICS OF PERSONS WITH HEARING TROUBLE: UNITED STATES, 1990-91, at 24-25 tbl. 1 (1994) [hereinafter persons with hearing trouble].

[17] *See* 145 CONG. REC. E1372 (daily ed. June 23, 1999) (statement of Rep. Morella). This figure is from 1997.

[18] *See generally Hearing Aid Insurance Poll*, *at* http://www.listen-up.org/poll.htm (last visited Feb. 13, 2002) (stating that results of an informal poll of 133 adults and children with hearing loss showed that although 98% of those polled had health insurance, 48% of the health insurance plans did not cover hearing aids); *Insurance and Hearing Aids: Trying to Get a Necessity Covered*, *at* http://www.deafness.about.com/library/weekly/ (last visited Feb. 25, 2002) (stating that health insurance companies have "largely refused" to cover hearing aids).

[19] *See* American Academy of Audiology, *Consumer Resources*, *at* http://www.audiology.org/consumer/wyskahl.php (last visited Feb. 25, 2002) (stating that "[t]he need for one hearing aid or two should be determined by you and your audiologist").

[20] *Id.*

have annual incomes ranging from $10,000 to $24,999.[21] Therefore, a person with a hearing impairment might not be able to afford a hearing aid.

This issue is not limited, however, to the hearing impaired community. It is estimated that 50 million Americans suffer from a disability.[22] Many of these people, such as epileptics and diabetics, depend on expensive prescription drugs to treat their impairment. Additionally, as of 1997, there were 43.4 million uninsured Americans.[23] Even among those with health insurance, premiums are rising, which may result in reduction in the scope of coverage or even loss of coverage.[24] Moreover, people with disabilities are twice as likely as non-disabled persons to delay getting needed health care because they cannot afford it.[25] Therefore, inability to pay for mitigating measures is a potential problem; the solution that this Note proposes is to evaluate an economically disadvantaged ADA plaintiff in his unmitigated state.

This raises three legal issues. First, because most courts have not directly addressed economic inability to utilize mitigating measures, they have no precedent or reasoning to guide them as to why economic hardship might justify evaluating the employee in his unmitigated state.[26] Second, even if courts are convinced that economic status should be considered, they need guidance in determining who is economically disadvantaged. Third, there are implications of considering economic status in the disability determination. For example, does this provide incentives not to utilize mitigating measures? Is it fair for an economically needy person with epilepsy, evaluated in his unmitigated state, to be found to have a disability, while a person with epilepsy, who can afford his medication, is evaluated in the mitigated state and found not to be disabled? As a society, do we want to force someone to sell his car and take public transportation so that he can afford a mitigating device? Conversely, should someone who leases a sport utility vehicle, has two televisions and cable television, but who

---

[21] *See id.*

[22] *See* Heidi M. Berven & Peter David Blanck, *Assistive Technology Patenting Trends and the Americans with Disabilities Act*, 17 BEHAV. SCI. & L. 47, 67 (1999) (stating that based on current Census Bureau estimates, over 50 million Americans have a disability). While the 50 million figure is larger than the 43 million people with disabilities that the ADA refers to, the 50 million figure is based upon Census estimates. *See id.* While the article does not explain the basis for the estimate, it is logical to assume that it is based on expected population growth.

[23] CENSUS BUREAU, U.S. DEP'T OF LABOR, STAT. ABSTRACT NO. 185 (119th ed. 1999).

[24] *See* discussion *infra* Part I.C.

[25] *Id.*

[26] Until the *Sutton* decision, many courts did not have to deal with the issue of whether a plaintiff could afford to pay for corrective devices because many courts followed the EEOC Guidelines and made the disability determination with regards to the employee's unmitigated state. *See* McGarity, *supra* note 13, at 1168 n.41.

claims he cannot afford to utilize a mitigating measure, be considered economically disadvantaged? Do we want someone to take a second mortgage out on his home so that he can afford a corrective device? Should someone have to apply for an assistive technology loan in order to utilize mitigating measures?[27]

In addressing all three issues, this Note has two goals. First, this Note argues that economic inability to utilize mitigating measures is a justifiable reason for considering one in his unmitigated state when making an ADA disability determination. The Supreme Court's *Sutton* decision, federal appellate decisions alluding to the existence of justifiable reasons for evaluating a plaintiff in his unmitigated state, the text and legislative history of the ADA, and the ADA's undue hardship defense for the employer all support this conclusion. Additionally, the one court, thus far, to confront a plaintiff's inability to pay for mitigating measures held that it would evaluate the plaintiff in his unmitigated state.[28]

Furthermore, consideration of economic need in the disability analysis will balance the ADA's goal of removing barriers to the labor market for people with disabilities with the goal of protecting employers and the courts from a flood of frivolous lawsuits. This is true because only people who are truly economically disadvantaged will be able to claim economic need, and they are the people most likely to face external barriers to employment beyond their disability.

Next, this Note proposes an analytical framework adopted from the in forma pauperis proceeding to determine if one is economically disadvantaged in the ADA disability determination. The factors in this analysis include the extent of the plaintiff's financial resources, the proportion of the plaintiff's resources that must be expended to utilize mitigating measures, the cost of the mitigating measure required, and any special circumstances which support a finding of economic need.

This Note addresses the legal issues in four sections. Part I discusses the potential problem of inability to afford mitigating measures in light of the historic economic challenges faced by people with disabilities, skyrocketing health insurance premiums, and the number of uninsured Americans. Part II presents legal support for considering economic status in the ADA disability determinations, including *Sutton*, federal appellate cases, and the text and intent of the ADA. Part III discusses the possible models that the court can use to determine

---

[27] These questions arose during an August 2000 conversation with Sharona Hoffman, Assistant Professor of Law at Case Western Reserve University School of Law.

[28] *See* Haworth v. Procter & Gamble Mfg. Co., No. Civ.A. 97-2149-EEO, 1998 WL 231062 (D. Kan. Apr. 30, 1998).

economic need, including the Food Stamp Program, Section 8 housing, and the ADA undue hardship and in forma pauperis analyses. Finally, Part IV proposes an analytical framework based on the in forma pauperis balancing approach for assessing economic disadvantage. It also addresses the implications of considering economic status in disability determinations, including an employer's duty to provide a reasonable accommodation and possible unfair results to ADA litigants.

I. BACKGROUND: THE ECONOMIC STATUS OF PEOPLE WITH DISABILITIES

Approximately one in five Americans has some kind of disability, and one in ten has a severe disability.[29] Historically, persons with disabilities have faced physical, attitudinal, educational, and economic challenges to integration into mainstream society.[30] Title I of the ADA reflects Congress's recognition of these economic and employment challenges.[31]

A. General Economic Challenges and Unmet Need for Assistive Technology

The general economic and employment challenges facing people with disabilities are illustrated in the results of a recent survey indicating that nationwide, of people with disabilities ages 18-64 who are able to work despite their disabilities, 56% work full or part-time as compared with 81% of the non-disabled population in the same age bracket.[32] Moreover, over two-thirds of these unemployed people with disabilities would like to be working.[33] Furthermore, 29% of people with disabilities live in households with annual incomes of $15,000 or less as compared to 10% of people without disabilities.[34] Additionally, only 16% of people with disabilities are likely to live in households with greater than $50,000 annual income as compared to

---

[29] CENSUS BUREAU, U.S. DEP'T OF COMMERCE, PUB. NO. CENBR/97-5, CENSUS BRIEF (1997) [hereinafter CEN BRIEF 97-5]. The U.S. Census defines a disability as difficulty seeing, hearing, talking, walking, climbing stairs, lifting, carrying, working at a job and around the house, or has difficulty performing activities of daily living. A severe disability is defined as an inability to perform one or more activities, using an assistive device to get around, or needing assistance from another person to perform basic activities. *Id.* It should be noted that this is different from the ADA definition of a disability, which defines a disability in terms of an "impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(A) (1994).

[30] *See* H.R. REP. No. 101-485, *supra* note 4, at 43-47.

[31] *See* 42 U.S.C. § 12101 (1994).

[32] *See Executive Summary of the 2000 N.O.D./Harris Survey of Americans With Disabilities, at* http://www.nod.org/hs2000.html (last visited Sept. 10, 2000) (on file with author).

[33] *Id.*

[34] *Id.*

39% of people without disabilities.[35] Moreover, the survey indicated that people with disabilities are twice as likely as people without disabilities to delay getting needed health care because they cannot afford it.[36] This is not surprising given their low incomes and the fact that a 1997 U.S. Census Brief survey indicates that 81.3% of people with a disability surveyed did not receive Supplementary Security Income ("SSI"), food stamps, or other cash assistance, while 81.4% did not receive Social Security benefits.[37]

While people with disabilities are equally as likely as non-disabled people to have health insurance of some kind, 28% of people with disabilities have a special need that is not covered by their health insurance compared with 7% of persons without a disability.[38]

Therefore, combined factors such as low income, lack of comprehensive health insurance, and the high costs of many medications or other corrective devices, may make corrective measures unaffordable for a person with a disability. This fact is borne out by the results of another survey that indicate that 1.2 million Americans of working ages 25-64 have an unmet need for assistive technology ("AT") devices such as motorized and customized wheelchairs, augmentative communication devices, vehicle modifications, computer equipment, assistive listening devices, home modifications, work-site modifications, and classroom modifications.[39] Moreover, 48% of Americans who use AT devices or who have a household member who uses AT devices paid for the AT without help from social service agencies or

---

[35] *Id.*

[36] *Id.*

[37] Berven & Blanck, *supra* note 22, at 66. *See also* CEN BRIEF 97-5, *supra* note 29, at 1 (reporting that 77.74% of Americans age 22 to 64 with disabilities do not receive public assistance). This person would not be able to collect Social Security or SSI disability benefits because, although disabled, he is still qualified to work. In order to receive disabled worker's benefits under Social Security, one must be unable to engage in any substantial gainful activity, where gainful activity is defined as "work performed for remuneration or profit; or work of a nature generally performed for remuneration or profit; or work intended for profit, whether or not a profit is realized." 1997 SOCIAL SECURITY HANDBOOK § 603 (13th ed. 1997). This definition of disability also applies to eligibility for the SSI benefits program. *Id* at § 507. The federal appellate courts have recently held that a person who is considered disabled for Social Security purposes and collects Social Security or SSI disability benefits may still bring a disability suit under Title I of ADA. *See* Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795 (1999). However, given that SSI income is only of "minimal decency or minimal subsistence," R. George Wright, *Persons With Disabilities and the Meaning of Constitutional Equal Protection,* 60 OHIO ST. L.J. 145, 154 (1999) (citations omitted), it is still possible that one would not be able to afford to utilize corrective measures.

[38] *Executive Summary of 2000 N.O.D./Harris Survey of Americans With Disabilities, at* http://www.nod.org/hs2000.html (last visited Oct. 24, 2000) (on file with author).

[39] Berven & Blanck, *supra* note 22, at 48. AT is defined as "any item, piece of equipment or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase or improve the functional capabilities of individuals with disabilities." *See id.* (citing Technology Related Assistance for Individuals with Disabilities Act, Pub. L. No. 103-218, 108 Stat. 50 (1994)).

third parties, and more than 75% of persons with home modifications or accessibility features paid for them out of pocket.[40]

B. Economic Problems in the Context of the Hearing Impaired Community

The hearing impaired community provides an example of the economic disadvantages that many people with disabilities face. Approximately 20 million persons, or 8.6% of the total U.S. population 3 years and older, have hearing impairments.[41] Of this number, 10,598,000 are of working ages 18-64.[42] More important, of persons with a hearing impairment ages 18-44, 5.6% have an annual family income of $10,000 or less, while 5.1% have a family income in the range of $10,000 to $24,999.[43] Of hearing impaired persons ages 45-64, 19.1%, have an annual family income of $10,000 while 14.6%, have an annual family income of $10,000 to $24,999.[44] The U.S. federal poverty threshold for a family of four is an annual income of $17,000. Therefore, many people with hearing impairments live in poverty.

In light of these statistics, consider that an average hearing aid costs $971[45] and lasts approximately 5 years.[46] Moreover, many hearing impaired people have hearing loss in both ears and need two hearing aids to correct their impairments.[47] Further exacerbating the problem is the fact that most private and employer-provided insurance plans do not cover the costs of hearing exams or hearing aids. Therefore, many working people with moderate incomes may not be able to afford hearing aids.

C. Uninsured Americans and Skyrocketing Health Insurance Premiums

The economic problems facing people with disabilities are also magnified in light of the fact that 43.4 million Americans are unin-

---

[40] *See id.* at 66. The authors also state that poor people are twice as likely to need AT devices and that non-whites are more likely than whites to have an unmet need for AT. *Id.*

[41] PERSONS WITH HEARING TROUBLE, *supra* note 16, *at* 24-25 tbl. 1.

[42] *Id.*

[43] *Id.* at 29-30, tbl. 4.

[44] *Id.*

[45] 145 CONG. REC. E1372 (daily ed. June 23, 1999) (statement of Rep. Morella). It should be noted, however, that not all persons with a hearing impairment will be helped by the use of a hearing aid and these people may require additional or different AT, such as cochlear implants.

[46] American Academy of Audiology, *Frequently Asked Questions About Hearing Aids, at* http://www.audiology.org/consumer/hafaq (last visited Oct. 24, 2000).

[47] *See* American Academy of Audiology, *Consumer Resources, at* http://www.audiology.org/consumer/wyskahl/ (last visited Oct. 24, 2000).

sured.[48] Of the 43.4 million, 32.4 million are of working age,[49] and as such may be subject to ADA protection.[50] Additionally, some assistive technologies such as hearing aids and cochlear implants are not covered by most insurance plans.[51] So, even if an employee does have insurance, the policy may not cover a needed AT device.

Rising health insurance premiums also have the potential to make previously affordable corrective measures unaffordable because of a loss in coverage or because of higher insurance premiums. A recent report indicated that employer-provided insurance policy premiums have either risen 10 to 30% in the past year or are predicted to rise 10 to 30% this year.[52] Furthermore, a September 2000 national survey of small businesses by the National Blue Cross and Blue Shield Association and the Employee Benefits Research Institute found that of companies with 100 employees or fewer, one in seven said they would drop health insurance if premiums increased by 10 percent, while 46% said they would reduce the scope of their coverage. For a person with a disability who is already struggling economically, rising insurance premiums and the corresponding reduction in the scope of coverage or loss of coverage[53] could have devastating consequences. For example, many people with disabilities such as epilepsy, diabetes, or high blood pressure are able to control their disabilities through medication. But if employers start limiting the scope of coverage or dropping coverage altogether, many people with

---

[48] CENSUS BUREAU, U.S. DEP'T OF LABOR, STAT. ABSTRACT NO.127 (119th ed. 1999).

[49] *Id.*

[50] Title I prohibits disability-based discrimination in the employment context. *See* 42 U.S.C. § 12101(b)(2) (1994) (stating that it is the purpose of the chapter to provide a mandate for the elimination of discrimination against individuals with disabilities).

[51] The cost of cochlear implant surgery is $40,000, but many insurance companies do not pay because of a lack of data on the benefits. *See, e.g., Cochlear Implants Worth the Money for Deaf Children*, PITTSBURGH POST-GAZETTE, Aug. 16, 2000, at A3; Elizabeth Foster, *Cochlear Implants: Thousands Unserved*, WASH. POST, Oct. 10, 2000, at Z4 (noting that "private insurance often fails to cover hospitals' costs for cochlear implant systems").

[52] Sam Howe Verhovek, *Frustration Grows With Cost of Health Insurance*, N.Y. TIMES, Sept. 18, 2000, at Abs. 1. *See also* Paul Duggan & Susan Levine, *Health Care Costs Will Pinch Employers; Insurance Squeeze Also to Hit Workers*, WASH. POST, Sept. 26, 2000, at A1 (reporting that various employers have recently raised or will raise the premiums on the health insurance coverage provided to employees by 10 to 40%); Katherine Swartz, Op-Ed, *Making Health Insurance Affordable*, BOSTON GLOBE, Oct. 23, 2000, at A19 (noting that "insurers have announced premium increases of 10-30 percent").

[53] An employer can elect to suspend all prescription drug coverage so long as he does so with regard to all prescription drugs, without violating the ADA. *See EEOC Interim Guidance on Application of ADA to Health Insurance*, 3 EEOC Compliance Manual (BNA) No. 176, at 2301-08 (June 8, 1993) (noting that "[u]niversal limits or exclusions from coverage of all experimental drugs and/or treatments . . . are . . . not . . . distinctions based on disability").

previously correctable disabilities may then be unable to utilize mitigating measures.[54]

II. WHY ECONOMIC NEED IS A JUSTIFIABLE REASON TO EVALUATE AN ADA PLAINTIFF IN HIS UNMITIGATED STATE

It is not enough to say that many people with disabilities may ask to be evaluated in the unmitigated state because they cannot afford to utilize mitigating measures. The courts also need solid legal support as to why economic need is a justifiable reason to evaluate an ADA plaintiff in his unmitigated state. While the Supreme Court and most federal courts have not directly addressed this issue, there are several reasons why economic status should be considered in the ADA disability evaluation.

A. Sutton *Decision*

The Supreme Court held in *Sutton v. United Airlines, Inc.*[55] that the determination of whether one is disabled under the ADA must be made with regard to corrective measures such as medication, eyeglasses, and hearing aids.[56] In *Sutton*, two sisters with visual myopia sued United Airlines after they were rejected as pilots because their uncorrected vision did not meet United's minimum vision standard.[57] The sisters alleged that United rejected them based on their disability, or in the alternative, rejected them because it regarded them as disabled.[58] In order to proceed on the disability claim, the sisters had to show that they met the ADA definition of disabled.[59] The sisters argued that although they used corrective eyewear, they should have been evaluated in their unmitigated state.[60] The Supreme Court affirmed the lower courts' rulings and held that the sisters had not met

---

[54] These employees may, however, be protected under the "record of" prong of the ADA. *See* 42 U.S.C. § 12102(2)(B) (1994) (stating that disability means a record of such impairment). But many employees do not notify their employees about impairments such as diabetes or high blood pressure because they have no need to as long as their insurance covers the medications needed to mitigate the impairments. Therefore, they would not satisfy the "record of" prong. *See* Ellison v. Software Spectrum, Inc., 85 F.3d 187 (5th Cir. 1996) (holding that a record of impairment was not shown where there was no evidence in the personnel file showing that the employer's breast cancer affected her position and where she never missed a day of work).

[55] 527 U.S. 471 (1999).

[56] *See id.* at 476 (stating that the district court found that "[b]ecause petitioners could fully correct their visual impairments, the court held that they . . . had not stated a claim that they were disabled within the meaning of the ADA").

[57] *Id.* at 475-76.

[58] *Id.* at 476.

[59] The ADA defines a disability 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." 42 U.S.C. § 12102(2) (1994).

[60] *Sutton*, 527 U.S. at 481.

the "disabled" or "regarded as disabled" definition of the ADA because their vision was fully corrected through the use of corrective eyewear.[61]

Although the Court was silent as to inability to afford corrective measures, its language and rationale imply that inability to pay for mitigating measures is a reason to evaluate a plaintiff in his unmitigated state. First, the Court expressly stated that "*if* a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures . . . must be taken into account."[62] Because the Court did not state that consideration should be given to mitigating measures whenever measures are medically available, regardless of whether they are practically available, the logical inference is that consideration of mitigating measures is limited to those plaintiffs who are actually utilizing them.

Furthermore, in explaining its decision, the Court stated that "a person must be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability. A disability exists only where an impairment substantially limits, not where it 'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken."[63] By extension, disability must also exist where the impairment substantially limits the plaintiff because he cannot afford to take mitigating measures, not where the impairment "might not," "could not," or "would not" be substantially limiting if mitigating measures could be taken.

Moreover, the Court also emphasized that the ADA's disability definition demands an individualized inquiry into the particular effects of the impairment on the individual's major life activities.[64] This individualized inquiry should encompass consideration of one's economic ability to utilize mitigating measures, because this partly controls the impairment's effect on the individual's major life activities. Additionally, because consideration of an individual's ability to afford corrective measures focuses on the individual's actual situation, and the actual effects of the impairment, rather than generalizing, this consideration of economic status achieves the goal of individualized inquiry.

Also, to the extent that the Court was motivated by a concern that a broad interpretation of the ADA disability definition would re-

---

[61] *Id.* at 477.

[62] *Id.* at 482 (emphasis added).

[63] *Id.*

[64] *Id.* at 483. The Court stressed that "[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." *Id.* at 488.

sult in a flood of frivolous lawsuits,[65] consideration of economic need as an exception to evaluating one in his mitigated state would not result in an overwhelming increase in ADA lawsuits. The *Sutton* decision did not preclude future ADA lawsuits from being filed. Rather, it may have shifted the focus of the lawsuits to the "regarded as" and "record of" disability causes of action.[66] Additionally, ADA plaintiffs may still argue that their corrective measures are not corrective enough, and that they are still substantially limited in a major life activity. Therefore, non-impoverished ADA plaintiffs have these avenues of litigation open to them and would not need to rely on a false claim of economic need.

B. Lower Court Decisions Regarding Justifiable Reasons Not to Utilize Mitigating Measures

One court has directly confronted the issue of economic status as a justifiable reason not to utilize mitigating measures in an ADA case.[67] *Haworth v. Procter & Gamble Manufacturing Co.*[68] involved a forklift operator who suffered from cervical radiculopathy,[69] but did not regularly buy his prescribed medication or receive epidural blocks due to a lack of health insurance and limited financial resources. After he was fired, he sued his former employer under Title I of the ADA. Procter & Gamble moved for summary judgment, arguing that Haworth did not have an impairment that substantially limited a major life activity because he sporadically used medication that mitigated his impairment.

In deciding the case, the court noted:

---

[65] *See id.* at 483. The Court stated that a bright line rule requiring that persons be judged in their unmitigated state would run counter to the ADA's mandated individualized inquiry because this blanket approach "would often require courts and employers to speculate about a person's condition and would, in many cases, force them to make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition." *Id.*

[66] *See* 42 U.S.C.§12102(2)(B)-(C) (1994) (stating that the term disability means a record of or being regarded as having such an impairment).

[67] Prior to the *Sutton* decision, eight circuits interpreted the ADA as requiring an evaluation of an impairment in its unmitigated state, in which case courts would not have had to deal with inability to afford mitigating measures. *See* McGarity, *supra* note 13, at 1168 n.41 (citing Baert v. Euclid Beverage, 149 F.3d 626, 629-30 (7th Cir. 1998); Washington v. HCA Health Servs. of Texas, Inc., 152 F.3d 464, 470-471 (5th Cir. 1998); Bartlett v. N.Y. State Bd. of Law Exam'rs, 156 F.3d 321, 329 (2d Cir. 1998); Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 863 (1st Cir. 1998); Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir. 1997); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937 (3d Cir. 1997); Harris v. H & W Contracting Co., 102 F.3d 516, 520-21 (11th Cir. 1996); Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996)). But now that the Supreme Court has held that mitigating measures must be considered, courts are likely to have to deal with this issue.

[68] No. Civ.A. 97-2149-EEO, 1998 WL 231062, at *1 (D. Kan. Apr. 30, 1998).

[69] Cervical radiculopathy is a condition that causes inflammation in neck muscles and tissues and a consequent loss of mobility. *Id.* at *3.

> It is an undisputed fact, for purposes of summary judgment, that plaintiff, due to lack of income and health insurance, has often gone months without adequate medication, and has put off additional doctor's treatments such as epidural blocks. Thus, the facts do not support the conclusion that plaintiff "utilized" corrective measures. *Sutton* does not directly address the situation presented here. We hesitate to read Sutton as broadly as defendant, and therefore cannot conclude, as defendant does, that the holding in *Sutton* "conclusively establishes" that plaintiff does not have a disability.[70]

The court, however, granted summary judgment to Procter & Gamble "[n]otwithstanding the foregoing, because plaintiff has failed . . . to meet his burden to present evidence from which a jury could conclude that the plaintiff is significantly restricted in his ability to perform a class of jobs or a broad range of jobs in various classes."[71]

Since Haworth did not meet his burden of proof, the court did not have to resolve Haworth's inability to afford medically available corrective measures. It is significant, however, that the court took note of Haworth's inability to pay and declared that *Sutton* did not address such a situation. This implies that the court felt that his inability to pay was a good excuse for not using corrective measures. Furthermore, the court's comments suggest that it thought that inability to afford corrective measures should not mean that a person conclusively does not have a disability. The comments further suggest that the court should view these types of cases as different from the *Sutton* case. The court did not, however, provide any in-depth rationale for its finding, nor did it offer any guidance for determining when one cannot afford to utilize corrective measures.

While other courts have not directly confronted this issue, several have indicated a receptiveness to considering economic need as a basis for evaluating a plaintiff in his unmitigated state. For example, the *Bowers v. Multimedia Cablevision, Inc.*[72] court held that an employee who quit taking his anti-depression medication and began missing work often must be evaluated in his mitigated state because even though the employee's mental condition substantially limited a major life activity when he did not take his medication, an employee "cannot gain ADA protection by unilaterally deciding, without *justification*, not to use prescribed medication which corrects or alleviates

---

[70] *Id.* at *6.
[71] *Id.*
[72] No. Civ.A.96-1298-JTM, 1998 WL 856074, at *1 (D. Kan. Nov. 3, 1998).

his condition."[73] The court did not, however, elucidate what a justifiable reason might be because the specific facts in *Bowers* did not give rise to one.[74]

Additionally, courts might be receptive to consideration of economic need because they have already expanded the disability determination concept through the consideration of the aggregate effect of multiple impairments on an individual. In *Creswell v. Deere,*[75] an employee defeated his employer's summary judgment motion by showing that although his asthma and diabetes, when viewed separately, did not constitute a substantial limitation of a major life activity, the conditions considered together did.[76] Given the expansion of the ADA disability analysis to encompass cumulative effects, along with the ADA's intent to remove barriers to employment for people with disabilities who have historically been economically disadvantaged, the courts should also be receptive to considering economic status as a justifiable reason for evaluating the employee in his unmitigated state. Economic status, like multiple impairments, has a cumulative effect on a disability.

C. Text of the Americans with Disabilities Act of 1990

The ADA was passed to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[77] Although the text of the ADA is silent as to whether one's economic status should be considered in the disability determination, several textual provisions implicitly support evaluating an employee in his unmitigated state if he is unable to afford mitigating measures.

First, the ADA expressly acknowledges the economic barriers that people with disabilities have faced by stating that "census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are *severely disadvantaged* socially, vocationally, *economically,* and educationally."[78] The ADA further states that 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."[79] Given the ADA's textual emphasis on eliminating economic barriers and promoting self-sufficiency

---

[73] *Id.* at *4 (emphasis added).
[74] *See id.*
[75] No. Civ.A.3:96-CV-1392-P., 1997 WL 667928, at *1 (N.D. Tex. Oct. 21, 1997).
[76] *See id.* at *24.
[77] 42 U.S.C. § 12101(b)(1) (1994).
[78] *Id.* § 12101(a)(6) (emphasis added).
[79] *Id.* § 12101(a)(8) (emphasis added).

for people with disabilities, it is fair to assume Congress did not intend for one's economic inability to utilize mitigating measures to be a barrier to employment.

The ADA's undue hardship defense[80] also implicitly supports consideration of economic status. The defense exempts an employer from making an accommodation if it can show that the accommodation would cause an undue hardship in light of the employer's overall financial resources, the nature of the employer's business, and the type and cost of the needed accommodation.[81] If an employer's economic status can exempt it from making an accommodation for the employee, but the employee's economic status does not also constitute a justifiable reason to evaluate him in his unmitigated state, the ADA's goal of eliminating economic barriers for people with disabilities would be thwarted. Moreover, it would be unfair for the ADA to be sensitive to the employer's economic hardship but not those of people with disabilities whom it seeks to protect.

Finally, the ADA text mandates that the disability determination be an individualized inquiry by defining the term "disability . . . with respect to an individual."[82] This individualized inquiry excludes a per se or hypothetical disability because people differ in the degree of the effects of impairments.[83] Because the ADA demands an individualized inquiry, and one's economic ability to mitigate is part of those individualized circumstances, a plaintiff's economic ability to mitigate must be considered.

D. Legislative History of the ADA

The legislative history of the ADA also supports considering one's economic inability to utilize mitigating measures as a reason to evaluate one in his unmitigated state. This support is evinced by the House Committee Report, which states that "[t]he underlying premise of [Title I] is that persons with disabilities should not be excluded

---

[80] The defense exempts an employer from having to provide a reasonable accommodation if "such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." *Id.* § 12112(b)(5)(A).

[81] *Id.* § 12111(10)(B).

[82] *Id.* § 12102(2). Additionally, in order to be disabled under ADA, one must have "a physical or mental impairment that substantially limits" a major life activity. *Id.* Furthermore, in order to claim ADA protection, one must be a "qualified *individual* with a disability." *Id.* § 12111(8) (emphasis added). Moreover, the definition of a qualified individual requires an individualized inquiry into whether one can perform the essential functions of the job with or without reasonable accommodation. *Id.*

[83] For example, a person with a 10% hearing loss in one ear who can hear normally except if one is whispering is probably not substantially limited in hearing while a person with a 50% loss in both ears probably would be substantially limited.

from job opportunities unless they are actually unable to do the job."[84] This premise implicitly rejects the idea that a person's inability to afford a corrective device should preclude him from being hired if, despite his impairment, he is able to do the job with reasonable accommodations.[85]

Additionally, the House Committee Report highlighted congressional intent for the ADA to serve as a vehicle for people with disabilities to overcome barriers and participate in the job market.[86] The reports emphasized that many of these barriers "are not inherent in their disabilities, but arise from barriers that have been imposed *externally* and unnecessarily."[87] Economic disadvantage is one such external barrier. Consequently, if the court does not consider economic need as a justifiable reason to consider an individual in his unmitigated state even though corrective measures exist, it will obstruct the ADA's purpose by allowing economic status to be an unnecessary external barrier to eligibility. Furthermore, given the ADA's intent to dismantle physical and social barriers for people with disabilities, considering economic need as a justifiable reason to evaluate an individual in his unmitigated state is in keeping with the spirit of the ADA.

Finally, the House Committee Report emphasized the inferior economic status that often accompanies people with disabilities, and the congressional aim to ensure that economic dependency was not an inevitable consequence of having a disability.[88] Therefore, Congress

---

[84] H.R. REP. NO. 101-485 pt. 2, at 61 (1990). The House Committee Report also stated that the purpose of the ADA is to bring individuals with disabilities "into the economic and social mainstream of American life." *Id.* at 38.

[85] While the House Committee Report also states that an economic disadvantage such as being poor does not, alone, constitute a physical or mental impairment, a poor person who also has a physical or mental impairment may be considered as having a disability under the ADA. *Id.* at 42. Therefore, a person who cannot afford a corrective device and who has a physical or mental impairment could be disabled under the ADA and should be evaluated in his unmitigated state.

[86] *Id.* at 58 ("To remove the unnecessary barriers shackling people with disabilities is to avail our society of the full range of their talents and abilities.") (quoting Justin Dart, Jr.). *See also id.* at 59 ("The elimination of these barriers will enable society to benefit from the skills and talents of persons with disabilities and will enable persons with disabilities to lead more productive lives.") (quoting Attorney General Thornburgh); *id.* at 61 ("A break in any link in the chain that connects individuals with disabilities to the workplace or prevents them from functioning independently creates a barrier which many times cannot be bridged.") (quoting Jay Rochlin).

[87] *Id.* at 49 (quoting former Senator Lowell Weicker) (emphasis added).

[88] For example, the House Committee Report stated:

> Historically, the inferior economic and social status of disabled people has been viewed as an inevitable consequence of the physical and mental limitations imposed by disability. . . .
>
> . . . .

did not envision that the ADA would be interpreted in such a way that an individual's economic status could preclude them from the ADA's protection by forcing an individual to be evaluated in his potentially mitigatable state, even though he cannot afford to mitigate. This interpretation of the ADA would not protect people with disabilities, but would instead perpetuate discrimination against them.

III. SELECTING AN ECONOMIC NEED MODEL

If courts agree that economic need is a justified reason to trigger an unmitigated ADA disability analysis, the concept of economic need must then be defined. This raises two issues. First, the parameters of economic hardship must be established. Should it include only those who cannot afford corrective measures at all, or should it extend to an individual who cannot afford corrective measures without selling his car, taking out a second mortgage, or cutting back on his groceries? Second, what framework should be used for assessing economic need? The courts can choose from economic need models, ranging from simple to complex, used in other areas of the law. While all these models consider income, financial assets, and financial liabilities, they vary in complexity according to the needs of the program they serve. Some models sacrifice ease of implementation for accuracy, while others are less burdensome to implement but are under or over-inclusive in capturing who is economically needy. The goal of this Note is to choose a model that balances accuracy with ease of implementation.

In selecting this model, the following factors must be considered. First, the model should be detailed enough to discern false claims and help ensure that the non-needy do not abuse the system. Minimally, this will require some documentation of an individual's income, fi-

---

> The first major challenge to the notion that being disabled meant lifelong economic dependency was the enactment of the first Rehabilitation Act, the Fess-Kenyon Act of 1920 . . . .
>
> From a civil rights perspective, a profound and historic shift in disability public policy occurred in the 1970s. Through landmark litigation and legislation, Americans with disabilities were recognized for the first time as a minority group that was subject to discrimination, and worthy of basic civil rights protections. . . .
>
> . . . .
>
> The Americans With Disabilities Act completes the circle begun in 1973 with respect to persons with disabilities by extending to them the same civil rights protections provided to women and minorities beginning in 1964. . . . The ADA is a comprehensive piece of civil rights legislation which promises a new future: a future of inclusion and integration, and the end of exclusion and segregation.

Id. at 39-41.

nancial assets, and financial liabilities. At the same time, however, the process of analyzing this information should not be so complex that the court cannot assess it without using excessive time and resources. The model must also be flexible enough to allow for the ADA's mandated individualized assessment. This is particularly important in light of the varying mitigation costs associated with disabilities. A corrective measure for a person with a hearing impairment could range from $1,000 for a hearing aid to $40,000 for a cochlear implant. Therefore, the model selected must be capable of capturing economic need in relation to the variable corrective measures costs. Finally, the model must be straightforward enough so that once the economic need determination is made, a meritorious claim is not tied up in disputes over economic need.

This Section first delineates the boundaries of economic hardship and then analyzes three available models for determining economic need:[89] complex, balancing analysis, and simple. This Note ultimately argues that a balancing model such as the ADA in forma pauperis approach best meets this Note's criterion.

A. Establishing the Parameters of Economic Need

The boundaries of the economic need concept must be established before selecting a model for identifying economic need. Should someone who has a car, but who cannot afford a corrective device, be forced to sell the car and take public transportation so that he can afford the device? Do we want a person to take a second mortgage out on his home so that he can acquire it? Should an individual have to apply for an assistive technology loan in order to utilize mitigating measures?

This Note argues that the answer to all of these questions is no. The underlying policy of both the ADA and this Note's economic need proposal is that a disabled person's economic status should not be an additional barrier to employment, and he should not have to incur financial hardship when utilizing mitigating measures. It seems reasonable to agree that taking out a second mortgage on one's home in order to afford a corrective device is a financial hardship. Likewise, it seems unreasonable to expect someone to sell his vehicle and rely upon public transportation in order to afford a corrective device when

---

[89] A thorough examination of the definition of the poverty concept is beyond the scope of this note. For a comprehensive discussion of the issue, see MEASURING POVERTY: A NEW APPROACH (Connie F. Citro & Robert T. Michael, eds. 1995). *See also* ALDI J.M. HAGENAARS, PERCEPTION OF POVERTY (1986); PATRICIA RUGGLES, DRAWING THE LINE: ALTERNATIVE POVERTY MEASURES AND THEIR IMPLICATIONS FOR PUBLIC POLICY (1990).

public transportation may be unreliable, unavailable, or burdensome. Furthermore, an automobile may be an essential part of one's job or may be essential to arriving on-time for work, and at least one court has held that prompt and regular arrival at work is an essential function of many jobs.[90] The problem, however, arises when someone owns or leases an expensive car, has investment resources, and then tries to claim economic hardship.[91] But the analytical framework that this Note proposes for determining economic need disposes of this problem by weighing vehicles and other assets in the analysis.

Finally, this Note is not arguing that the government or an employer should provide the employee with the corrective device or provide financial assistance. Rather, this Note argues that someone who cannot afford mitigating measures should be evaluated in his unmitigated state. If this unmitigated state evaluation results in the employee being classified as disabled under ADA, then the employer would have to make a reasonable accommodation. Therefore, since the government is not providing funds or other direct financial assistance to an economically disadvantaged person with a disability, one's value assessments should not be as closely scrutinized. If an employee cannot afford a corrective device without incurring some type of financial hardship, then he should be evaluated in his unmitigated state.

B. Simplified Economic Need Model: Section 8 Housing

Now that the boundaries of economic need have been set, the courts must devise a method for identifying economic hardship. One available model is the simplified approach employed by the government's assisted housing program. The program's goal is to provide funds to "assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of lower income."[92] Under the program, eligible families are defined as either very low-income families whose incomes do not exceed 50% of the median family income for the area,[93] low-income families whose income does not exceed 80% of the median family income for the

---

[90] *See* Lyons v. Legal Aid Society, 68 F.3d 1512, 1516 (2d Cir. 1995) (citation omitted).

[91] *See infra* Part IV.B.

[92] 42 U.S.C. § 1437 (1994).

[93] 42 U.S.C. § 1437a(b)(2) (1994) ("[T]he Secretary may establish income ceilings higher or lower than 50 per centum of the median for the area on the basis of the Secretary's findings that such variations are necessary because of unusually high or low family incomes.").

area,[94] or families that qualify to receive vouchers under other federal programs.[95]

While this simplified approach is effective in the housing context because affordable housing in a region is proportionate to the regional median income, it may result in an under-inclusive approach in other contexts. Specifically, this approach will not work in the ADA context because an individual's ability to afford a corrective measure is not based on his household's percentage of the area median income, but instead is based on the relation between the household's resources and the cost of the corrective measure. Therefore, although the simple model is easy to implement, it is not accurate enough to be used in the ADA context.

C. Balancing Economic Models: In Forma Pauperis Proceedings & ADA Undue Hardship

Two judicial balancing approaches to economic need, the in forma pauperis proceedings and the ADA undue hardship analysis, are also options for the court. Both models use a balancing approach, but only the in forma pauperis model requires specific detailed financial information. The in forma pauperis statute exempts a civil or criminal litigant from paying administrative court costs if he is unable to afford the court fees.[96] The ADA undue hardship defense exempts an employer from making a reasonable accommodation for an employee if the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the . . . [employer's] business."[97] While the concept of undue hardship is not identical to that of economic need, it does consider the employer's financial resources, and therefore is relevant to this Note's discussion.

---

[94] *Id.* ("[T]he Secretary may establish income ceilings higher or lower than 80 per centum of the median for the area on the basis of the Secretary's findings that such variations are necessary because of prevailing levels of construction costs or unusually high or low family incomes.").

[95] 12 U.S.C. § 4113(f)(2) (2000). For example, families may be eligible for vouchers under Section 4113 if they are "a low-income family; or . . . a moderate-income family that is: (I) an elderly family; (II) a disabled family; or (III) residing in a low-vacancy area; and...residing in eligible low-income housing on the date of the prepayment of the mortgage or voluntary termination of the insurance contract." *Id.*

[96] 28 U.S.C. § 1915 (1994). The exact language of the statute states: "Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes an affidavit that he is unable to pay such costs or give security therefor." *Id.* § 1915(a).

[97] 42 U.S.C. § 12112(b)(5)(A) (1994). *See also* Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1995).

1. In Forma Pauperis Proceedings

In order to be granted in forma pauperis status, a litigant must submit to the court a sworn affidavit attesting to his poverty along with a completed form containing income, asset, and debt information.[98] Specifically, applicants must provide the following information about their assets: total monthly income from employment, available cash, gifts, alimony, child support, retirement, disability, unemployment, and public assistance. In addition, information is required about other assets such as homes, real estate, and motor vehicles. The form also inquires about the applicant's and his/her spouse's employment history. Also, applicants report the following expense information: total outstanding debt, number of dependents, average monthly rent or mortgage, utilities, home maintenance, food, clothing, laundry, medical, dental, transportation (excluding motor vehicle payments), recreation and entertainment expenses, all types of insurance, taxes, and alimony or support paid to others.[99] The form also allows the applicant to list any other circumstances explaining why he/she cannot afford the docket fees for the appeal.[100]

Although the in forma pauperis model contains much of the same detailed financial information as the complex Food Stamp Act model, it does not include deduction, exemption, or other mathematical formulas, and it does not have a minimum threshold income value.[101] Rather, the court compares the plaintiff's assets with his liabilities to assess whether the applicant "cannot because of his poverty 'pay or give security for the costs . . . and still be able to provide' himself and dependents 'with the necessities of life.'"[102] This standard, however, does not require one to be "wholly destitute."[103] A applicant's unemployment status, financial liabilities, and lack of meaningful assets are all common factors of the cases in which in forma pauperis status was granted.[104] Furthermore, while courts often

---

[98] 28 U.S.C. § 1915 (1994).

[99] 28 U.S.C. app. § 4 (1998).

[100] *Id.*

[101] *See infra* Part III.D for a discussion of the complex food stamp model.

[102] Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331, 339 (1948).

[103] *Id.*

[104] *See* Johnson v. City of Port Arthur, 892 F. Supp. 835, 839 (E.D. Tex. 1995) (determining that an employee who had been unemployed for over a year, received $212 monthly for food stamps, received government assistance for utility bills, no longer received worker's compensation, had spent all $3,000 of his retirement plan on living expenses, had a $1,500 van, had no savings, and who had fallen behind on child support and rent payments, satisfied the in forma pauperis standard). The ADA courts have also considered factors such as dependents in making economic need determinations under the in forma pauperis statute. *See* Alvarado v. Chicago Bd. of Educ., No. 95-C-7718, 1996 WL 166947, at *1 (N.D. Ill. Mar. 14, 1996) (holding that an unemployed plaintiff with an annual income of $2,900 who had no assets and who "tries to contribute support to his mother whenever possible" was sufficiently impoverished under the in

grant poverty status to applicants who lack financial assets, an applicant's showing of some assets is not a bar to poverty status. In *Mathis v. Pete Georges Chevrolet*,[105] the court determined that an employee who filed a discrimination claim was entitled to in forma pauperis status because he had been unemployed for almost one year prior to the commencement of the suit and his sole income was social security benefits totaling $540 per month.[106] The court also noted that although the employee owned a car and had purchased a $65,000 home, he only had $15,000 in equity and "this financial condition [was] sufficient to grant . . . [the plaintiff's] in forma pauperis application."[107]

2. Undue Hardship Analysis

The ADA defines undue hardship as an action requiring "significant difficulty or expense" in relation to the following factors: nature and cost of the accommodation, employer's overall financial resources, including the facility's resources and the headquarter's resources, and the employer's type of operation.[108] In making the undue hardship determination, many courts focus on the individual employer's financial situation rather than the general financial situation of the industry. Thus, what may be a reasonable accommodation for most employers may be an undue hardship for one specific employer.[109]

This individualized assessment is central to this Note's economic need analysis. The model's flaw, however, is that while most courts have alluded to some set of factors to consider in making the undue hardship determination, the courts have been terse in their reasoning on the subject. This seems to be due largely to the fact that many defendants did not present any concrete proof that the accommodation would create an undue burden and did not engage in any cost-benefit

---

forma pauperis standard); Richardson v. Draper & Kramer, Inc., No. 95-C-5260. 1995 WL 583923, at *1 (N.D. Ill. Sept. 29, 1995) (holding that an ADA plaintiff with a lung disease met the in forma pauperis poverty requirements because he had been unemployed for over a year, he had no assets, and he supported his wife).

[105] No. 95-C-7938, 1997 WL 85159, at *1 (N.D. Ill. Feb. 24, 1997).

[106] *Id.*

[107] *Id.*

[108] 42 U.S.C. § 12111(10)(A) (1994). In addition to the statutory definition of "significant difficulty or expense," legislative history defines undue hardship as "unduly costly." S. REP. No. 101-31, at 35 (1989).

[109] *See, e.g.*, Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995) (stating that the undue hardship analysis "permits an employer to escape liability if he can carry the burden of proving that a disability accommodation reasonable for a normal employer would break him"); Barth v. Gelb, 2 F.3d 1180, 1186-87 (D.C. Cir. 1993) (noting that an accommodation that might be reasonable for the industry as a whole may still create an undue hardship on a particular employer because of factors unique to that employer's own operation).

analysis.[110] Another complication is that the courts either do not require the defendant to submit detailed information regarding the employer's financial resources and liabilities, or the defendant does not provide the court with such information.[111] This is problematic because it does not provide the courts with any guidance as to how to make the economic need determination, and it can result in less accuracy. Additionally, the undue hardship concept extends to non-economic factors, such as disruption to the employer's other programs.[112] While this extension is appropriate in the *undue* hardship context, it is inappropriate in the disability determination stage where the goal is to evaluate *economic* hardship.

D. Complex Economic Model: Food Stamp Program

Another economic need model available to the courts is the government-administered food stamp program.[113] The program's primary purpose is to "promote the general welfare, to safeguard the health and well-being of the Nation's population by raising levels of nutrition among low-income households."[114] A secondary goal is to promote employment as the primary route to economic self-sufficiency.[115] To achieve these goals, food stamps are provided to

---

[110] *See* Ward v. Mass. Health Research Inst., Inc., 209 F.3d 29, 37 (1st Cir. 2000) (reversing a grant of summary judgment to the employer because the employer had failed "to produce at least some modicum of evidence showing that [the requested accommodation] would be a hardship, financial or otherwise"); Bryant v. Better Bus. Bureau of Greater Md., Inc., 923 F. Supp. 720, 741 (D. Md. 1996) (noting that while the defendant was "not required to determine with mathematical certainty whether the [proposed accommodation] would have caused [the defendant] an 'undue hardship,' a decision lacking any substantial evidentiary basis whatsoever is clearly insufficient to support the Defendant's motion for partial summary judgment").

[111] *See* Worthington v. City of New Haven, No. 3:94-CV-00609, 1999 WL 958627, at *12 (D. Conn. Oct. 5, 1999) (holding that the requested accommodation was not an undue hardship for the employer because "[t]he defendant employs over 500 persons, and while it may not possess the same financial and personnel resources as a Fortune 500 company, it does retain a significant financial and personnel base . . . [such that] the relative cost of providing accommodations to the plaintiff would have been small"). The court, however, did not elaborate on the type of financial information on which it based its decision. *Id.*

[112] *See, e.g.*, Cehrs v. N.E. Ohio Alzheimer's Research Ctr., 155 F.3d 775, 783 (6th Cir. 1998) (denying summary judgment for the defendant and focusing on factors other than economics); Pascuiti v. N.Y. Yankees, 87 F. Supp. 2d 221, 225 (S.D.N.Y. 1999) (noting that it would consider the "overall Parks Department budget . . . [so that it could] obtain a realistic picture of the resources available to the City for proposed modifications, while balancing the cost of those modifications against potential harms to other Parks Department programs"); Mohamed v. Marriott Intl., Inc., 905 F. Supp. 141, 153 (S.D.N.Y. 1995) (holding that when considering the four undue hardship factors, a jury could find that hiring an interpreter or retaining one for one meeting would not have been an undue *difficulty* or expense) (emphasis added).

[113] 7 U.S.C. §§ 2011-36 (2000); *see also* Federal Pell Grants, 20 U.S.C. § 1070a (Supp. V 1999), for an example of another agency program which uses complex economic need formulas to determine eligibility.

[114] 7 U.S.C. § 2011 (2000).

[115] *See* H.R. REP. NO. 104-350, at 1943 (1995) (discussing a Senate amendment to make the program's goal to "support the employment focus and family strengthening mission of pub-

"households whose incomes and other financial resources . . . are determined to be a substantial limiting factor in permitting them to obtain a more nutritious diet."[116]

In light of these goals, a household's eligibility is established by comparing a household's adjusted income to the national poverty guidelines,[117] in households whose incomes fall below 100% of the guidelines are eligible.[118] In order to determine adjusted income, the household submits annual income, monthly housing or rent expenses, childcare expenses, dependent care expenses, medical expenses, savings accounts, retirement accounts, and financial assets information.[119] The adjusted income is then calculated according to a detailed series of income exemptions, deductions, and financial asset additions.[120] There are fifteen exempted categories of income relating to the program's goal of promoting employment as a means of self-sufficiency, such as education-related loans, child care expenses, and government or non-profit energy and self-sufficiency assistance.[121]

Additionally, the Food Stamp Act contains seven deduction categories, ranging from a standard deduction to excess shelter expense deductions,[122] with some of the deductions containing additional expense exclusions.[123] The deductions are either assigned a predetermined value or calculated according to mathematical formulas.[124] The financial asset computation includes the value of non-essential items,[125] with a household being ineligible for the program

---

lic welfare . . . programs by facilitating transition to economic self-sufficiency through work, promoting employment as the primary means of income support and reducing barriers to employment").

[116] 7 U.S.C. § 2014(a) (2000). This closely parallels the goal of this Note. See *infra* Part IV.A for a discussion of how this Note's goal is to devise an economic need analysis that determines when a person's income and other financial resources are a substantial limiting factor in permitting him to utilize corrective measures to mitigate a disability.

[117] The 2000 Poverty Guidelines for the 48 contiguous states are as follows: $8,350 for a family of 1; $11,250 for a family of 2; $14,150 for a family of 3; $17,050 for a family of 4; $19,950 for a family of 5; $22,850 for a family of 6; $25,750 for a family of 7; and $28,650 for a family of 8. *See* Notice, Annual Update for the U.S. Dep't of Health and Human Services Poverty Guidelines, 65 Fed. Reg. 7555, 7555 (Feb. 15, 2000).

[118] *See* 7 U.S.C. § 2014(c)(1) (2000).

[119] *See id.* § 2014 (stating that all household income is included except that excluded in § 2014(d)).

[120] *See id.* (dictating formula used).

[121] *Id.* § 2014(d).

[122] *Id.* § 2014(e).

[123] For example, the dependent care deduction excludes expenses paid on behalf of the household by a third party from the deduction. *Id.* § 2014 (e)(3)(B).

[124] *Id.* § 2014(e). A pre-assigned deduction example is the standard deduction, which ranges from $118 to $269, depending on the household's geographic location. *Id.* § 2014(e)(1). An example of a calculated deduction is the earned income deduction, calculated as 20 percent of all earned income. *Id.* § 2014(e)(2).

[125] This includes items such as recreational boats, snowmobiles, airplanes, vacation homes, vacation mobile homes, any licensed vehicle whose fair market value exceeds $4,650 and that is

if its resources exceed $2,000 per year.[126] Once the individual exemptions, deductions, and additions are determined, they are added together to obtain the final adjusted household income.

IV. USING THE IN FORMA PAUPERIS MODEL TO DETERMINE ECONOMIC NEED: A MODIFIED PROPOSAL

Overall, the ADA in forma pauperis model, with its weighing analysis of detailed financial information, seems to be an ideal balance between accuracy and simplicity of implementation. This Section, therefore, advocates that the in forma pauperis balancing approach be used. The model that this Note proposes, however, varies from the in forma pauperis model in two ways. First, it advocates that a variation of the undue hardship factors should be considered in the analysis. Second, it argues that a different standard should be used to determine economic need. The balancing analysis and the level of detail required, however, is the same as the in forma pauperis model. This Section explains the scope of these two modifications, as well as why they are necessary in the ADA context. Additionally, it outlines the application of the model. Finally, the Section explores the implications of considering economic need in the ADA context. Will this consideration subject the courts to a flood of new ADA cases? Will this model result in disincentives to utilize corrective measures? Does it lead to unfair results between ADA plaintiffs with the same disability but different economic statuses? Is consideration of a plaintiff's economic need an unfair burden on the employer?

A. Slight Modifications to the In Forma Pauperis Economic Need Model

This Note advocates that the in forma pauperis economic need model be used to determine economic hardship in the ADA disability analysis, with two modifications. First, the in forma pauperis requirement that the litigant not be able to afford the court costs without being unable to support his family would not be used. This standard eliminates individuals whose financial status is a substantial limiting factor to obtaining corrective measures, but for whom financial status is not a complete bar from the economic need concept. A person who could afford to pay for court costs if he took public transportation for a year would presumably be ineligible for in forma pauperis status

---

used for household transportation or to obtain or continue employment, and any savings or retirement account. *Id.* § 2014(g).

[126] *Id.* § 2014(g)(1). Assets may not exceed $3,000 per year for households with a member who is 60 years or older. The financial asset computations also include exemptions for vehicles necessary to earn income, family burial plots, and non-liquid resources. *Id.* § 2014(g).

because he could still support his family. Therefore, a different standard is needed. Second, the test would incorporate factors similar to the undue hardship factors in the balancing analysis. While these factors are arguably already implicitly considered during the in forma pauperis proceedings, they should explicitly be considered in order to ensure greater accuracy. Furthermore, consideration of the undue hardships will help achieve an individualized inquiry. The factors also help ensure that the model is flexible enough to account for the varying costs of mitigating measures and other factors, such as living in a high rent area, affecting a person's ability to afford a corrective measure.

With these considerations in mind, the judicial rule that this Note proposes is that one who meets the other criteria for being disabled under the ADA should be evaluated in his unmitigated state when his income and other financial resources are determined to be a substantial limiting factor in permitting him to utilize existing mitigating measures.[127] To determine if the plaintiff is economically needy, the courts should employ a balancing test similar to the in forma pauperis model, which also considers the following factors: (1) the nature and cost of the corrective device or mitigating measure needed, (2) the overall financial resources of the plaintiff, (3) proportion of financial resources that must be expended in order to utilize corrective measures, and (4) any other special circumstances affecting the plaintiff's ability to afford mitigating measures.

B. Applying the Balancing Approach

To assert a claim of economic need, an ADA plaintiff must submit an affidavit and application listing his income, assets, and liabilities as required in the in forma pauperis form.[128] Once the court has this information, the first factor it should examine is the cost of the mitigating measure, with the actual expenditure being calculated. For an employee who does not buy medication because he cannot afford it, the corrective device cost should be based on its expected cost. The determination of the second factor, overall financial resources, should be made by evaluating the information provided in the economic need application.[129]

---

[127] This is similar to the purpose of the Food Stamp Act. See *supra* Part III.D for a discussion of the purpose of the Food Stamp Act.

[128] *See* 28 U.S.C. app. § 4 (Supp. V 1999).

[129] *Id.* Specifically, the elements the court should consider are total monthly income from employment, gifts, alimony, child support, retirement, disability, unemployment, and public assistance, the litigant's and his/her spouse's employment history, the amount of cash the litigant has in a bank account or otherwise, assets such as homes, real estate, motor vehicles, debt owed, number of dependents, average monthly expenses including rent or home-mortgage pay-

The court should next look at the proportion of resources that must be expended to utilize corrective measures in comparison to the available resources. The guiding principle behind calculating this proportion is determining whether one is substantially limited in his ability to utilize mitigating measures based on his overall financial resources. There is no set threshold for this determination because, given the unique circumstances of each household, including household size, 30% of one household's financial resources could be substantially limiting, while only 10% of financial resources could be substantially limiting for another household. It would not be fair, therefore, to have a bright line rule. Furthermore, plaintiffs may incur substantially different costs in mitigating an impairment because the types of disabilities vary widely. For example, a plaintiff may have $2,000 in resources but may need to spend $20,000 or more on a mitigating measure whereas another plaintiff only needs to spend $2,000 on a mitigating measure. This again achieves the ADA's mandate for an individualized inquiry.

Finally, the courts should consider special circumstances in making the financial need determination. It is unreasonable, for example, to classify a single householder who earns $27,000 a year, and who has "money available from investment dividends, his state Public Employees Retirement System contributions, and . . . drives a 2000 Chevrolet Blazer that he leases for $255 a month," as substantially limited in his ability to utilize mitigating measures.[130] In this case, the court could decline to find economic need.

Under this factor, the court could also consider the fact that a plaintiff has four children, is a single parent, and pays $400 a month for an unheated room[131] in the high-price real estate area of Silicon Valley, California, where "'poor' means a family of four scraping by on $53,100 a year or an individual earning less than $37,200."[132] The

---

ment, utilities, home maintenance, food, clothing, laundry and dry-cleaning, medical and dental expenses, transportation (excluding motor vehicle payments), recreation and entertainment, all types of insurance, taxes, any mortgage payments, and alimony or support paid to others. *Id.*

[130] Editorial, YOUNGSTOWN VINDICATOR, Oct. 13, 2000, at A4 (opining that a local Common Pleas Court judge was correct in refusing to find a criminal defendant indigent).

[131] *See* Martha Mendoza, *Silicon Valley's Poor People Definitely Not in the Chips*, FORT WORTH STAR TELEGRAM, Feb. 14, 1999, at 33 (noting that Connie Tort, a 25-year-old single mother of four, spends $400 a month for an unheated room).

[132] *See* Evelyn Nieves, *$53,000 and Homeless Social Issues: In Silicon Valley, Workers Making What Would Be a Good Wage Elsewhere are Struggling*, ORANGE COUNTY REG., Feb. 20, 2000, at A4. The article also notes that in Silicon Valley, the median home price is $410,000, an average two-bedroom apartment costs $1,700 per month, and studio apartments cost over $1,000 per month. *Id. See also* Randi Feigenbaum, *Rising Cost of Renting on Long Island*, NEWSDAY, Sept. 10, 1999, at A7 (reporting that a person would have to earn three times the minimum wage to afford a one-bedroom apartment in Long Island); Martin Miller, *In a Bind as Rents Go Through the Roof: L.A. Renters Seek Roommates, Use Up Their Savings—Or are*

court may deem this plaintiff, because of special circumstances, to be economically disadvantaged.

C. *Why Complex Economic Need Models Such As the Food Stamp Act Would Be Inappropriate*

Although the complex economic need model and the in forma pauperis model are similar, only the in forma pauperis balancing approach allows the court to assess the information without using time-consuming mathematical formulas or lengthy deductions and exemptions. Furthermore, the in forma pauperis model is flexible enough to achieve the ADA's mandated individualized inquiry. The complex model, with its reliance on the poverty guidelines as a minimum threshold income level, is too rigid to achieve an individualized inquiry. The minimum poverty guidelines, for example, do not vary geographically.[133] Housing costs, however, can vary geographically, and a household in a high rent area of the country could have a calculated income greater than the poverty guideline but still struggle to obtain a corrective measure because of the high housing costs.

Also, due to the varying nature of disabilities, the complex model's rigidity may eliminate some needy households if applied in the ADA context. People may make more than the poverty guideline income but still may be economically disadvantaged because of the expenses incurred in mitigating their impairment. For example, Sarah and Robert Bergeon have a fixed $21,000 annual income, of which $6,500 (approximately one-third) is spent on prescription drugs for heart disease, diabetes, gout, and high blood pressure.[134] The Bergeons are covered by Medicare, but Medicare does not cover prescription drugs.[135] Under the 2000 Poverty Guidelines, a two-person household is poor if its annual income is $11,250 or below.[136] Therefore, the Bergeons would not qualify as poor. But expending one-

---

Simply Shut Out, L.A. TIMES, Aug. 1, 1999, at E1 (reporting that high housing rents make affordable housing difficult to find for low-income and middle-income working families); Charles Piller, *High-Tech Model of Inconsistency Quality of life: Community is Plagued By a Gap Between Haves and Have-Nots Involving Housing, Jobs and Other Issues*, L.A. TIMES, Jan. 9, 1999, at C3 (noting that the median area income of $74,000 could afford only 39.8% of Silicon Valley housing).

[133] *See* Notice, Annual Update of the U.S. Dep't of Health and Human Services Poverty Guidelines, 65 Fed. Reg. 7555, 7555 (Feb. 15, 2000).

[134] *See* David Noonan, *Why Drugs Cost So Much*, NEWSWEEK, Sept. 25, 2000, at 22. Heart disease, diabetes, and high blood pressure can be disabilities under the ADA if they substantially limit a major life activity. *See* 42 U.S.C. § 12102 (1994).

[135] *See* Noonan, *supra* note 134, at 24.

[136] *See* Notice, Annual Update of the U.S. Dep't of Health and Human Services Poverty Guidelines, 65 Fed. Reg. at 7555.

third of one's income on medication would substantially affect one's ability to use mitigating measures.

The food stamp formula also fails to account for government assistance in its income calculation.[137] A household with an income below the poverty level that receives government assistance may still be able to afford a corrective device, however, because of the extra income the government assistance provides. Additionally, while the complex deduction, exemption, and asset formula is justified in the context of the Food Stamp Program because it is a means to accurately assess a household's ability to obtain a nutritional diet so that tax-payer funds are used only to help the needy, such a degree of accuracy is not needed here. Rather, just requiring the detailed financial information to be submitted is sufficient here to help prevent abuse by the non-needy. Furthermore, many of the food stamp exemptions and deduction formulas are related to the program's goal of promoting employment as a means of self-sufficiency and ensuring that people are not penalized for obtaining employment. As the Court's goal is to determine if one cannot afford a corrective measure, the complex deductions and exemption formulas are not needed.

D. Will Consideration of Economic Need Lead to Fraudulent Claims?

A historical concern with any legal determination based upon economic need has been to ensure that the non-needy do not abuse the system, and to deal with people who may be disinclined to pay for mitigating measures.[138] Should someone who pays $250 monthly to lease a 2000 Chevrolet Blazer, has two televisions, and cable television, but who alleges he cannot afford to utilize a mitigating measure, be considered economically disadvantaged? Here it is doubtful that the court would tolerate this abuse of the system. First, based on the existing case law, although the court has not elucidated what a justified reason for not utilizing an existing mitigating measure is, it has

---

[137] *See* 7 U.S.C. § 2014(e)(2)(A) (2000) (excluding income from support programs attributable to public assistance from applicants' earned income figures).

[138] *See, e.g.*, H.R. REP. No. 95-464, at 2 (1977) (stating that one objective in amending the Food Stamp Act of 1964 was to "eliminate the non-needy from the program so that those who do not need food stamps do not get them"); ROBERT RECTOR ET AL., THE HERITAGE FOUNDATION BACKGROUNDER NO. 791, HOW "POOR" ARE AMERICA'S POOR? (1990), *available at* http://www.heritage.org/library/categories/healthwel/bg791.html. The Heritage Report's authors argue that the Census Bureau's methodology for determining poverty should be abolished and replaced with different standards because under that methodology, 62% of "poor" households own a car, with 14% owning two or more cars, almost half of all "poor" households have air-conditioning, 31% have microwave ovens, and 22,000 "poor" households have heated swimming pools or Jacuzzis. *Id.*

clearly stated that a plaintiff must have a justified reason.[139] Claiming economic hardship to make an employer pay for a reasonable accommodation rather than paying for the corrective measure oneself is not a justified reason. Furthermore, courts can employ a device similar to the in forma pauperis dismissal clause[140] to help deter the filing of false indigence claims and frivolous claims. Under this clause, cases will be dismissed if the court determines that the plaintiff lied about being poor, the suit is frivolous or malicious, or is nonmeritorious.[141] While no system is foolproof, this will help deter false claims.

E. Consideration of Plaintiff's Economic Need Does Not Unfairly Burden the Employer

Another set of questions arising from the consideration of economic need in the ADA disability determination relates to the employer's burden. Does consideration of economic need unduly burden an employer? Is it fair to make the employer absorb these costs? Is the employer better able to absorb and spread the cost of the accommodation than the individual who has to go into debt to pay for a mitigating measure?

This Note argues that consideration of economic need in the disability determination does not place an undue burden on the employer because the employer is not expected to pay for the corrective measure, it is only expected to make a reasonable accommodation. This is the same burden that the employer already bears under the current ADA disability analysis. Furthermore, consideration of economic need only gets the plaintiff past the summary judgment stage. He must still prove his case in order for the employer to bear the responsibility of making a reasonable accommodation. Additionally, the employer is still entitled to the undue hardship defense if it can show that providing the reasonable accommodation would cause an undue financial hardship.[142] Recent studies have suggested that the employer's average cost of accommodation is only $45.[143] Studies have also shown that both employees with and without disabilities benefit from the accommodations that the employer makes for the employee

---

[139] *See* Bowers v. Multimedia Cablevision, Inc., No. Civ.A.96-1298-JTM, 1998 WL 856074, at *4 (D. Kan. Nov. 3, 1998) (holding that "[t]he plaintiff cannot gain ADA protection by unilaterally deciding, without justification, not to use prescribed medication which corrects or alleviates his condition").

[140] *See* 28 U.S.C. § 1915(e)(2) (1994 & Supp. V 1999).

[141] *See id.*

[142] *See* 42 U.S.C. § 12112(b)(5)(A) (1994).

[143] *See* Berven & Blanck, *supra* note 22, at 65 (citing Sears study that from 1990-1997 the employer's average cost for accommodations was $45).

with a disability. These benefits may be in the form of increased employee satisfaction, safety, or convenience.[144] Customers also benefit from increased safety and convenience. Therefore, the employer may get unexpected benefits from making the accommodation.

Finally, since employers typically will have greater financial resources than an individual employee, employers may be better financially able to make a reasonable accommodation than an employee who cannot afford to use mitigating measures without incurring financial hardship. Furthermore, the employer may be able to spread the cost to consumers. Therefore, it seems especially desirable to expect an employer to make the reasonable accommodation for an economically disadvantaged individual.

F. Courts Will Not Be Faced with a Flood of Additional ADA Litigation

Courts will not be subjected to a flood of new ADA litigation by considering economic need in the disability determination. While the *Sutton* decision limited the number of suits filed under the ADA's disability prong, it did not foreclose suits filed under the "regarded as" or "record of" prongs of the ADA.[145] Additionally, ADA plaintiffs may argue that even with their corrective measures, they have a disability because they are still substantially limited in a major life activity. Litigants may also argue that the side effects of the mitigating measures result in the substantial impairment of a major life activity.[146] Therefore, non-impoverished ADA plaintiffs have alternative avenues of litigation and would not need to rely on an economic need claim.

Furthermore, this proposal balances the ADA's goal of enabling people with disabilities to have access to the labor market without flooding the courts with frivolous litigation because only the most severely disabled or most severely economically disadvantaged will incur severe financial hardship, and they are the ones most need the ADA's protection.

---

[144] *See id.* at 64-65.

[145] *See* 42 U.S.C. § 12102(2) (1994) (defining a disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; . . . a record of such impairment; . . . or being regarded as having such an impairment"). For a discussion of these provisions, see *infra* Part IV.G.

[146] *See* McGarity, *supra* note 13 (arguing that in the wake of the *Sutton* decision, ADA plaintiffs will shift their focus to arguing that the side effects of their mitigating measures substantially impair a major life activity).

G. Consideration of Economic Need Will Not Produce Unfair Results

Does it makes sense to provide one plaintiff with ADA protection because he cannot afford his prosthetic arm but to deny another plaintiff ADA protection because he pays for his prosthesis or because it is covered by insurance?[147] In the broad scheme of the ADA, with its goal of eliminating external barriers to employment, this distinction makes sense when economic disadvantage is preventing the first plaintiff, who is as equally qualified as the second plaintiff, from entering the labor force. Furthermore, while the second plaintiff whose prosthesis is covered by insurance does not get a reasonable accommodation from his employer and the first plaintiff does, this is fair because the first plaintiff does not need an accommodation since he has a prosthetic device.

Also, the employee who can afford to pay is not completely eliminated from ADA protection. He may qualify as disabled under the ADA's "regarded as" or "record of" prongs.[148] The "regarded as" prong provides an employee who does not have disability protection from an employer who nonetheless views the employee as having a disability.[149] In *EEOC v. Texas Bus Lines*,[150] a morbidly obese female applicant for a bus driving position successfully sued the bus lines after it refused to hire her because it believed she would be unable to move quickly in an emergency.[151] The court held that the woman had satisfied the "regarded as" prong because she presented evidence that the bus line viewed her as having a perceived disability in that it believed she would not be able to move quickly in an emergency due to her weight.[152] Therefore, a person with a prosthesis would also be able to sue an employer who viewed the employee as having a disability because of his prosthesis.

Additionally, while *Sutton* may have limited a disabled person's chances of success under the disabled prong, the "record of" prong of the ADA is still available to litigants.[153] This provision of the ADA makes it unlawful for an employer to discriminate against an employee who has a history of or has been misclassified as having a dis-

---

[147] *See* Isaac S. Greaney, *The Practical Impossibility of Considering the Effect of Mitigating Measures Under the Americans With Disabilities Act of 1990*, 26 FORDHAM URB. L.J., 1267, 1295 (1999) (arguing that covering plaintiff 1 and not plaintiff 2 because plaintiff 1 does not pay for the prosthetic arm "makes little sense").

[148] *See* 42 U.S.C. § 12102(2) (1994).

[149] *See id.*

[150] 923 F. Supp. 965 (S.D. Tex. 1996).

[151] *See id.* at 979 (holding that such belief was wholly unreasonable).

[152] *See id.* at 976.

[153] *See* 42 U.S.C. § 12102(2) (1994) (listing three prongs for defining a disability).

ability.[154] An employee who had previously been hospitalized with tuberculosis would fall under this provision.[155] A person who recently acquires a prostheses may be also able to sue on the basis of having had a disability prior to acquiring the prostheses.

CONCLUSION

The Supreme Court's decision in *Sutton* has the potential to expose courts to ADA plaintiffs who cannot afford to utilize mitigating measures. This Note argues that an ADA plaintiff who, due to economic hardship, cannot afford to utilize mitigating measures should be evaluated in his unmitigated state during the disability analysis. This result is supported by the *Sutton* decision itself, the text of the ADA, and the legislative history of the ADA. Furthermore, the courts should use a modified version of the ADA in forma pauperis model, which considers the cost of the mitigating measure in comparison to the plaintiff's overall financial resources, to determine who is economically disadvantaged. Using this model, the courts will be able to effect the purpose of the ADA to remove barriers to employment for persons with disabilities, while also maintaining the ADA's mandate of individualized inquiry.

CHRISTINE M. TOMKO[†]

---

[154] *See* 29 C.F.R. app. § 1630.2(k) (2001).

[155] *See* Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 281 (1987) (holding that a school teacher's hospitalization 20 years ago for tuberculosis sufficed to show a record of impairment).

[†] Thank you to Professor Entin and Professor Hoffman for your patience and guidance with this Note. Also a huge thank you to Mom and Dad T, Jimmy, Mom and Dad C, Marty, Nancy, Matt, Evan, Claire, and the rest of my family for your endless support and many sacrifices while I was writing this Note and throughout my entire law school career. Finally, thank you James, the love my life. I couldn't have done this without you.