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Why an Employer Does Not Have to Answer for Preventing an Employee with a Disability from Utilizing Corrective Measures: The Relationship Between Mitigation and Reasonable Acommodation

Thad LeVar

Why an Employer Does Not Have to Answer for Preventing an Employee with a Disability from Utilizing Corrective Measures: The Relationship Between Mitigation and Reasonable Accommodation*

I. INTRODUCTION

When Congress enacted the Americans with Disabilities Act ("ADA") of 1990,[1] one of the enumerated purposes of the statute was to eliminate "discrimination against individuals with disabilities."[2] Various obstacles have prevented the ADA from fully accomplishing that purpose. Restrictive judicially created standards for summary judgment in ADA claims for employment discrimination have severely inhibited many disabled individuals' opportunities to receive redress.

A threshold question in an ADA claim for employment discrimination is whether the plaintiff is a "qualified individual with a disability."[3] This Note addresses a current loophole for employers. If a claimant can utilize mitigating measures to correct her disability but her employer prevents her from doing so, an ADA suit by that claimant may not survive summary judgment because the claimant may not be a "qualified individual with a disability." Part II provides an overview of the employment portion of the ADA and recent Supreme Court decisions relating to the Act, focusing on what is necessary for a plaintiff to defeat a motion for summary judgment. Part III explores *Nawrot v. CPC International*,[4] the primary case of this Note. *Nawrot* is an ADA employment discrimination case filed in the U.S. District Court of the Northern District of Illinois in which the plaintiff failed to defeat the defendant's motion for summary judgment. Part IV argues for a single qualification test to evaluate whether a claimant qualifies to bring an ADA employment discrimination claim, rather than the currently employed bifurcated qualification test. *Nawrot* provides one example of how this test could

 Comments are welcome and can be directed to THAD@BYU.NET.

1. Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1994).
2. 42 U.S.C. § 12101(b)(1).
3. 42 U.S.C. §§ 12111(8), 12112(a).
4. No. 99 C 630, 2000 U.S. Dist. LEXIS 8973 (N.D. Ill. June 21, 2000).

close the loophole for employers who prohibit employees from utilizing mitigating measures to correct disabilities. Part V summarizes the differences between the single qualification test and the bifurcated qualification test.

II. THE AMERICANS WITH DISABILITIES ACT

Congress declared in the ADA that "historically, society has tended to isolate and segregate individuals with disabilities,"[5] that such discrimination continues "to be a serious and pervasive social problem,"[6] that "individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination,"[7] that individuals with disabilities have been "relegated to a position of political powerlessness in our society . . . resulting from stereotypic assumptions,"[8] and that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis."[9] One enumerated purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of unnecessary discrimination against individuals with disabilities."[10] Title I of the ADA deals with employment.[11]

A. The Bifurcated Qualification Test

The general rule of Title I provides that no employer "shall discriminate against a qualified individual with a disability because of the disability of such individual."[12] Federal courts have established that for a claimant to establish a prima facie case for disability discrimination by an employer, she must establish: "(1) that she is disabled within the meaning of the [ADA]; (2) that she is qualified to perform the essential functions of the job either with or without accommodation; and (3) that she has suffered adverse employment action because of the disability."[13]

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5. 42 U.S.C. § 12101(a)(2).
6. *Id.*
7. 42 U.S.C. § 12101(a)(4).
8. 42 U.S.C. § 12101(a)(7).
9. 42 U.S.C. § 12101(a)(9).
10. 42 U.S.C. § 12101(b)(1).
11. 42 U.S.C. §§ 12111-12117.
12. 42 U.S.C. § 12112(a).
13. Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, 948 (8th Cir. 1999) (citing Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112 (8th Cir. 1995)). *See also* White v. York Int'l Corp., 45 F.3d 357, 360-61 (10th Cir. 1995); Tyndall v. National Educ. Ctrs., 31 F.3d 209, 212 (4th Cir. 1994); Barth v. Gelb, 2 F.3d 1180, 1186 (D.C. Cir. 1993); Chandler v. City of Dallas, 2 F.3d 1385, 1390 (5th Cir. 1993); Gilbert v. Frank, 949 F.2d 637, 640-42 (2d Cir. 1991); Lucero v. Hart, 915 F.2d 1367, 1371 (9th Cir. 1990).

This Note refers to the first two prongs of that three part test as the bifurcated qualification test because it bifurcates, or splits, the "qualified individual with a disability"[14] standard of the ADA into two tests: (1) whether a claimant has a disability, and (2) whether that claimant is a qualified individual.

It is difficult to meet the bifurcated qualification test of first establishing that the claimant has a disability and then that the claimant is a qualified individual. As a result, most ADA claims for employment discrimination do not survive summary judgment. No single explanation can completely explain that phenomena, but it is certain that current ADA case law establishes a high threshold for a plaintiff to get a claim before a jury.[15] Because motions for summary judgment are so prevalent in ADA cases, this Note's primary focus is on one of the many instances in which a claimant loses an ADA case on summary judgment.

The initial question in the bifurcated qualification test, determining whether an individual has a disability, relies on the ADA definition of "disability." This definition includes: "(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."[16] Often, the most difficult hurdle for plaintiffs is to establish that their disability limits a major life activity.[17]

B. Surviving Summary Judgment Under the ADA: Mitigation

Prior to 1999, the legislative history of the ADA, Equal Employment Opportunity Commission ("EEOC") guidelines, and federal case law created uncertainty regarding whether a court, when determining whether an

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14. 42 U.S.C. § 12111(8).

15. *Compare* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 101 (1999) (noting that 93% of ADA cases in U.S. District Courts and 84% at the appellate level bring results for defendants, asserting that federal judges "are abusing the summary judgment device and failing to defer to agency guidance in interpreting the ADA."), *with* Jeffrey A. Van Detta & Dan R. Gallipeau, *Judges and Juries: Why Are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before a Jury? A Response to Professor Colker*, 19 REV. LITIG. 505 (2000) (arguing that one reason for the high summary judgment rate in ADA cases is inadequate representation by plaintiffs' attorneys).

16. 42 U.S.C. § 12102(2)(A)-(C). This Note does not address the unique issues involved in defining a disability under each of these three tests, but rather focuses on how to define a condition that substantially limits a major life activity. That definition is crucial to all three tests.

17. For example, the law is not entirely clear about whether "working" qualifies as a major life activity. While the EEOC (Equal Employment Opportunity Commission) takes the position that under certain circumstances working does qualify as a major life activity, *see* 29 C.F.R. § 1630.2(j)(3)(i) (2000), the Supreme Court has declined to rule definitively on the issue. *See, e.g.*, Sutton v. United Airlines, 527 U.S. 471, 492 (1999) ("Assuming without deciding that working is a major life activity . . .").

an individual has a disability, should consider mitigating measures that an individual can utilize to correct her impairment.[18] The legislative history of the ADA contains statements that could support either result.[19] EEOC guidelines prior to 1999 favored evaluating a disability without reference to mitigating measures.[20] Federal courts were split. Most circuits followed the EEOC position, including the First, Second, Third, Seventh, Eighth, Ninth, and Eleventh Circuits.[21] The Sixth and Tenth Circuits ruled contrary to the EEOC position, holding that disability analysis requires consideration of mitigating measures.[22] The Supreme Court settled the issue in 1999 with the "*Sutton* Trilogy."[23]

1. Sutton

In *Sutton*, petitioners with severe myopia were not hired by United Airlines because of a requirement mandating uncorrected visual acuity of 20/100 or better.[24] The petitioners brought an ADA action alleging that

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18. *See* Timothy S. Bland & Thomas J. Walsh, Jr., *U.S. Supreme Court Resolves Mitigating Measures Issue Under the ADA*, 30 U. MEM. L. REV. 1, 7-15 (1999); Joshua C. Dickinson, *Will the Supreme Court Allow Employers to Consider Reasonable Mitigating Measures not Presently Utilized by Employees When Determining Whether a "Disability" Exists Under Section A of the ADA?*, 68 UMKC L. REV. 389, 391-94 (2000); Perry Meadows, M.D. & Richard A. Bales, *Using Mitigating Measures to Determine Disability Under the Americans with Disabilities Act*, 45 S.D. L. REV. 33, 39-44 (2000); Stacie E. Barhorst, Note, *What Does Disability Mean: The Americans with Disabilities Act of 1990 in the Aftermath of* Sutton, Murphy, *and* Albertsons, 48 DRAKE L. REV. 137, 138-151 (1999).

19. The House Labor Report on the ADA states that a disability "should be assessed without regard to the availability of mitigating measures, such as reasonable accommodation or auxiliary aids." H.R. REP. NO. 101-485, pt. 2, at 52 (1990). The Senate Labor and Human Resources Committee Report contains an identical statement, but further indicates that the focus should be on the effects of the impairment, rather than the qualities of the impairment. S. REP. NO. 101-116, at 22-24 (1989). *See also* Bland & Walsh, *supra* note 18, at 7-8; Meadows & Bales, *supra* note 18, at 39-40.

20. "[T]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. § 1630.2(j) (1998). The EEOC deleted this statement from the regulations in 2000. *See* 29 C.F.R. § 1630.2(j) (2000).

21. *See, e.g.,* Arnold v. United Parcel Service, Inc., 136 F.3d 854 (1st Cir. 1998); Baert v. Euclid Beverage, Ltd., 149 F.3d 626 (7th Cir. 1998); Bartlett v. New York State Bd. of Law Exam'rs, 156 F.3d 321, 329 (2d Cir. 1998), *vacated in part by* Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933 (3d Cir. 1997); Harris v. H & W Contracting Co., 102 F.3d 516 (11th Cir. 1996). *See also* Bland & Walsh, *supra* note 18, at 12-15; Dickinson, *supra* note 18, at 393-94; Meadows & Bales, *supra* note 18, at 42-43; Barhorst, *supra* note 18, at 146-48.

22. *See* Gilday v. Mecosta County, 124 F.3d 760, 767-68 (6th Cir. 1997); Sutton v. United Airlines, Inc., 130 F.3d 893 (10th Cir. 1997). *See also* Bland & Walsh, *supra* note 18, at 10-12; Dickinson, *supra* note 18, at 393-94; Meadows & Bales, *supra* note 18, at 43; Barhorst, *supra* note 18, at 148-50.

23. Sutton v. United Airlines, Inc., 527 U.S. 471 (1999); Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999). *See also* Meadows & Bales, *supra* note 18, at 44 (referring to the "*Sutton* Trilogy").

24. *See Sutton*, 527 U.S. at 475-76.

they had an impairment that substantially limited them in the major life activity of working, and that they were regarded as having such an impairment.[25] The District Court granted summary judgment for United Airlines because the petitioners could correct their vision and thus were not substantially limited in any major life activity.[26] In addition, the Court stated that "petitioners had alleged only that respondent regarded them as unable to satisfy the requirements of a particular job," therefore they "had not stated a claim that they were regarded as substantially limited in the major life activity of working."[27] The Court of Appeals for the Tenth Circuit affirmed.[28]

The Supreme Court also affirmed, with Justice O'Connor writing for the majority, stating that "disability under the [ADA] is to be determined with reference to corrective measures."[29] The majority rejected the EEOC guidelines[30] as "an impermissible interpretation of the ADA," noting that because "by its terms, the ADA cannot be read in this manner, we have no reason to consider the ADA's legislative history."[31]

Justice O'Connor provided three reasons for this decision.[32] First, because the phrase "substantially limits" appears in the definition of "disability" in the "present indicative verb form,"[33] that term requires "that a person be presently – not potentially or hypothetically – substantially limited."[34] Second, because the "disability" definition requires an evaluation of "whether an impairment substantially limits the 'major life activities of such individual,'"[35] that evaluation should be an individualized one.[36] Evaluating individuals without reference to mitigation would require treating individuals "as members of a group of people with similar impairments, rather than as individuals."[37] Justice O'Connor also pointed out that a failure to consider mitigating measures would preclude consideration of any negative side effects of mitigation, a result "inconsistent with the individualized approach of the ADA."[38] Third, the Court noted that in the findings of the ADA, Congress found that "some

25. *See id.*
26. *See id.*
27. *Id.* at 476-77.
28. *See id.* at 477.
29. *Id.* at 488.
30. *See supra* note 20 and accompanying text.
31. *Sutton*, 527 U.S. at 482.
32. *See id.*
33. *Id. See also* 42 U.S.C. § 12102(2)(A) (1994).
34. *Sutton*, 527 U.S. at 482.
35. *Id.* at 483 (quoting 42 U.S.C. § 12102(2)).
36. *See id.* (citations omitted).
37. *Id.* at 483.
38. *Id.* at 484.

43,000,000 Americans have one or more physical or mental disabilities."[39] Concluding that this figure is inconsistent with a definition of "disability" that does not consider mitigating measures, the majority evaluated statistics and reports to support that position.[40]

Justice O'Connor then evaluated whether the petitioners were regarded as substantially limited in the major life activity of working. The EEOC recognizes work as a major life activity, but defines "substantially limited" in that context as being:

> [S]ignificantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.[41]

"Assuming without deciding that working is a major life activity and that the EEOC regulations interpreting the term 'substantially limits' are reasonable,"[42] the majority concluded that the petitioners' impairment did not meet the EEOC standard.[43] While the petitioners alleged that United Airlines regarded their impairment as preventing them from holding "global airline pilot" positions, that single job did not qualify as a class or broad range of jobs, particularly where the petitioners were not precluded from other types of pilot jobs.[44]

2. Murphy

In addition to clarifying other aspects of ADA law, the Supreme Court applied the mitigation doctrine to two specific circumstances in the other cases of the *Sutton* Trilogy. In *Murphy v. United Parcel Service, Inc.*, the Court classified the petitioner's blood pressure medication as a mitigating measure that a court must consider when determining whether the petitioner had a disability.[45]

3. Albertson's

In *Albertson's, Inc. v. Kirkingburg*, the petitioner suffered from "amblyopia, an uncorrectable condition that leaves him with 20/200 vision in

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39. *Id.* (quoting 42 U.S.C. 12101(a)(1)).

40. *See id.* at 484-88.

41. *Sutton*, 527 U.S. at 491 (quoting 29 C.F.R. § 1630.2(j)(3)(i) (1998)). *See also* 29 C.F.R. § 1630.2(j)(3)(i) (2000) (containing the same guideline).

42. *Sutton*, 527 U.S. at 492.

43. *See id.* at 493.

44. *See id.*

45. Murphy v. United Parcel Service, Inc., 527 U.S. 516, 521 (1999).

his left eye and monocular vision in effect."[46] After addressing other issues, the majority pointed out that subconscious mechanisms for coping with an impairment constitute mitigating measures, noting that "[w]e see no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems."[47] The majority pointed out that monocularity must be proved as a disability with reference to an individual's "own experience."[48]

C. Surviving Summary Judgment Under the ADA: Reasonable Accommodation

The ADA requires an evaluation of reasonable accommodation at two levels of a claim. If a claimant demonstrates that she has a disability under the ADA, she still must establish that she is a "qualified individual with a disability" to survive summary judgment.[49] The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodations, can perform the essential functions of the employment position that such individual holds or desires."[50] Additionally, the ADA definition of "discriminate" includes "not making reasonable accommodations" for the employee unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity."[51] The ADA provides some examples of what reasonable accommodation may require.[52]

Thus, to survive summary judgment against the claimant, that claimant may have to provide evidence of reasonable accommodations that would enable her to "perform the essential functions" of the job.[53] Addi-

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46. Albertson's, Inc. v Kirkingburg, 527 U.S. 555, 559 (1999).

47. *Id.* at 565-66.

48. *Id.* at 567.

49. 42 U.S.C. § 12111(8) (1994).

50. *Id.*

51. 42 U.S.C. § 12112(b)(5)(A).

52. The ADA does not specifically define reasonable accommodation, but states that it "may include":

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

42 U.S.C. § 12111(9)(A)-(B). The ADA also provides guidelines for what constitutes an "undue hardship." *See* 42 U.S.C. § 12111(10).

53. 42 U.S.C. § 12111(8).

tionally, a claimant can demonstrate substantive discrimination by establishing that her employer failed to provide reasonable accommodations.[54] This Note does not address the second evaluation of reasonable accommodation, instead focusing on how it affects whether a claimant is a "qualified individual with a disability."[55]

The Supreme Court recently addressed reasonable accommodation as part of the *prima facie* case in an ADA employment claim in *Cleveland v. Policy Management Systems Corp.*[56] The lower courts had granted summary judgment to the employer because the plaintiff had, in a separate action, applied for Social Security disability benefits, alleging in that claim that she was unable to work.[57] The lower courts had reasoned that because the plaintiff had alleged she was unable to work in the Social Security context, the courts should apply a presumption that she is not able to "perform the essential functions" of the job in the ADA context.[58]

The Supreme Court reversed, holding that the Social Security claim and the ADA claim are not necessarily mutually exclusive.[59] One of the reasons for the reversal was that while the ADA requires courts to consider reasonable accommodation when determining whether a claimant can "perform the essential functions" of the job, the Social Security Administration does not consider any reasonable accommodations when determining whether an individual is able to work.[60] Nevertheless, the Court affirmed the position that to survive summary judgment in an ADA claim, a claimant must establish that she can "perform the essential functions [of the job], at least with 'reasonable accommodation.'"[61] This case affirms the role that reasonable accommodation plays in determining whether a claimant is a "qualified individual with a disability."[62]

III. NAWROT V. CPC INTERNATIONAL

A. Facts

Ralph Nawrot ("Nawrot") began working for CPC International, now known as Bestfoods, Inc. ("Bestfoods"), in 1976.[63] Nawrot was em-

54. *See* 42 U.S.C. § 12112(b)(5)(A).
53. 42 U.S.C. § 12111(8) (1994).
56. 526 U.S. 795 (1999).
57. *See id.* at 798.
58. *See id.* at 799-800.
59. *See id.* at 802-03.
60. *See id.* at 797-98, 805-06.
61. *Id.* at 798.
62. 42 U.S.C. § 12111(8) (1994).
63. *See Nawrot*, No. 99 C 630, 2000 U.S. Dist. LEXIS 8973, *4 (N.D. Ill. June 21, 2000).

ployed as a warehouse supervisor for Bestfoods.[64] He is a diabetic and sufferer of hypoglycemia who uses insulin and food to control his blood sugar level.[65] There was a dispute over whether Bestfoods allowed Nawrot to take breaks to monitor his blood sugar level throughout his employment.[66]

In 1995, another Bestfoods employee complained of three comments Nawrot had made concerning her religion.[67] In 1996, other employees accused Nawrot of embarrassing one supervisor and shouting at other employees.[68] On February 19, 1997, Nawrot refused to shake hands with a new employee, telling her, "I would shake your hand but I just went to the bathroom and did not wash my hands."[69] Nawrot provided his plant manager with a note from his doctor indicating that Nawrot's hypoglycemia had caused him to make the statement, but the plant manager gave Nawrot a written warning indicating that "[f]uture occurrences of this or similar behavior will result in your termination."[70]

Beginning in January 1997, Nawrot began requesting permission to take frequent short breaks because he was having more trouble with his hypoglycemic reactions.[71] Nawrot's supervisors did not grant that request, and Nawrot took a medical leave of absence.[72] In the application for that leave, Nawrot's doctor indicated that hypoglycemia had caused Nawrot's inappropriate behavior, including the February 19, 1997 incident.[73]

Nawrot continued to request short breaks, but his supervisors recommended either transferring to the refinery or taking a short term disability leave and then applying for a long term disability leave.[74] Nawrot declined both options because he knew that the refinery was going to be closed soon and because he was concerned about losing his job if he did not qualify for a long term disability leave.[75] Nawrot's doctor indicated that he could return to work in April 1997, but Bestfoods prevented him from returning to work until June 1997.[76] Nawrot continued to request

64. *See id.*
65. *See id.*
66. *See id.* at *4-5.
67. *See id.* at *5.
68. *See id.* at *6-7.
69. *Id.* at *7.
70. *Id.* at *8.
71. *See id.*
72. *See id.* at *8-9.
73. *See id.* at *9.
74. *See id.*
75. *See id.* at *9-10.
76. *See id.*

accommodations to allow him to regulate his blood sugar at work, but alleged that he never received an affirmative response.[77]

In 1998, other employees complained of several instances of inappropriate behavior by Nawrot.[78] One employee accused Nawrot of yelling at her and grabbing and twisting her arm.[79] Nawrot admitted confronting that employee but denied touching her.[80] Because of allegations that Nawrot was stalking and soliciting an employee that he had previously helped with an arbitration claim, a supervisor advised Nawrot to refrain from contact with that employee, who continued to file complaints against Nawrot.[81]

In August 1998, Nawrot took a two-week vacation, during which time Bestfoods completed its investigation of the allegedly stalked employee's complaints, concluding "that Nawrot had ignored the order to avoid contact with [her, and] that he had harassed her, and that Nawrot had assisted her with the arbitration case against Bestfoods."[82] Bestfoods terminated Nawrot on August 24, 1998.[83] After receiving a right-to-sue letter from the EEOC, Nawrot brought a suit in federal district court alleging that Bestfoods violated both the disparate treatment and reasonable accommodation components of the ADA.[84] The suit also alleged violations of the retaliation provisions of the ADA[85] and Title VII of the Civil Rights Act of 1964,[86] as well as violations of the Age Discrimination in Employment Act ("ADEA").[87]

B. The Court's Reasoning

The court granted Bestfoods' motion for summary judgment on all counts.[88] The ADA analysis focused on whether Nawrot was a "qualified individual with a disability."[89] Because there was no dispute regarding whether Nawrot was able to perform his employment duties, he satisfied the "qualified individual" aspect.[90] Nawrot's claim that he was disabled

77. *See id.* at *10.
78. *See id.* at *12-13.
79. *See id.* at *12.
80. *See id.*
81. *See id* at *13.
82. *Id.* at *14.
83. *See id.*
84. *See id.* at *15.
85. 42 U.S.C. § 12203(a) (1994).
86. 42 U.S.C. §§ 2000e-2003(a) (1994).
87. 29 U.S.C. §§ 621-624 (1994); *Nawrot*, 2000 U.S. Dist. LEXIS 8973 at *1, 14.
88. *See Nawrot*, 2000 U.S. Dist. LEXIS 8973 at *28.
89. *Id.* at *15.
90. *See id.*

rested on two grounds: "that he [was] substantially limited in the major life activity of working,"[91] and, in the alternative, "that he was regarded as disabled."[92]

The court first pointed out that it must analyze Nawrot's diabetes "with reference to mitigating measures."[93] The court then noted that Nawrot had experienced hypoglycemic reactions which had rendered him unconscious or incoherent while at work, but concluded "that they occurred when Nawrot was unable to successfully maintain his blood sugar level."[94] The court determined that those incidents did not qualify Nawrot as disabled because they occurred "in the absence of corrective measures" and had not prevented Nawrot from performing his duties over the course of his employment.[95]

Rejecting Nawrot's argument that he was "substantially limited in the major life activity of working,"[96] the court pointed out that while Nawrot indicated classes of occupations in which he cannot work, his allegations did not discuss whether he would be precluded from those occupations with his diabetes and hypoglycemia in a corrected state.[97] The court also stated that "[w]ithout establishing this fact, for which he bears the burden of proof, Nawrot cannot withstand summary judgment."[98]

Turning to Nawrot's claims that he was regarded as disabled, the court stated that to satisfy that test, the employer must perceive Nawrot as unable to perform "a class or range of jobs."[99] The court ruled that Nawrot had not satisfied that requirement.[100]

The court's explanation of why Nawrot was not a "qualified individual with a disability" demonstrates a problem with the *Sutton* mitigation rule.[101] Recognizing that "a question of material fact exists as to whether Bestfoods prohibited Nawrot from controlling his diabetic condition,"[102] the court pointed out that it was unable to reach that issue because *Sutton* requires that Nawrot be evaluated in his corrected state.[103] The court summed up the loophole created by the *Sutton* rule as follows: "the em-

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91. *Id.* at *16.

92. *Id.* at *18.

93. *Id.* at *16 (citing *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999)).

94. *Id.* at *17.

95. *Id.*

96. *Id.* at *16-18.

97. *See id.* at *17-18.

98. *Id.* at *18.

99. *Id.* at *19.

100. *See id.*

94. 42 U.S.C. § 12111(8) (1994).

102. *Id.* at *20.

103. *See id.*

ployer strips the plaintiff of all ameliorative measures, but in court, the judge pretends that the plaintiff is always clothed with those measures."[104] The court pointed out that while the Supreme Court in *Sutton* noted that the "regarded as" prong might provide some relief to plaintiffs,[105] that prong did not help Nawrot.[106] The court evaluated and dismissed all the other claims together.[107]

IV. ANALYSIS

A. Nawrot Demonstrates the Loophole

The summary judgment in *Nawrot* demonstrates a loophole for employers that the bifurcation of the ADA qualification test creates in context of the mitigation requirements from *Sutton*. Under the first prong of the qualification test, the court ruled that Nawrot was not disabled because he was able to utilize mitigating measures.[108] However, part of that mitigation required Nawrot to control his diabetes with insulin and food.[109] While Nawrot alleged that Bestfoods prevented him from utilizing those mitigating measures by preventing him from taking breaks, because of the bifurcation of the qualification test the court could not address the merits of that claim.[110] That test required the court to rule that because Nawrot could, under ideal circumstances, mitigate his condition through insulin and food, the case could not proceed.[111] The court could not advance to other issues, such as whether Nawrot's requested accommodation constituted a "reasonable accommodation" under the ADA, or whether Nawrot had a disability in his actual condition while Bestfoods was preventing him from utilizing his mitigating measures.

B. This Loophole Allows Employers to Discriminate

Nawrot's circumstances are comparable to a hypothetical situation in which an employee at a manufacturing plant has severe myopia, as did

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104. *Id.* at *21.

105. *See id. See also Sutton*, 527 U.S. at 490.

106. *See Nawrot*, 2000 U.S. Dist. LEXIS 8973 at *22.

107. *See id.* at *22-28. Nawrot's other claims were based on allegations that his termination was retaliatory.

108. *See Nawrot*, 2000 U.S. Dist. LEXIS 8973 at *17-18.

109. *See id.* at *4.

110. *See id.* at *20 ("Here, a question of material fact exists as to whether Bestfoods prohibited Nawrot from controlling his diabetic condition. Yet according to *Sutton*, this court cannot reach the question of discrimination because Nawrot is not deemed disabled when viewed in his corrected state.").

111. *See id.* at *19-20.

the plaintiffs in *Sutton*, but is able to perform the "essential functions" of her job through the use of a corrective lenses. Under this loophole, her employer could arbitrarily prevent her from using the corrective lenses at the plant and then terminate her because she cannot perform her job without them. Under the bifurcated qualification test and the mitigation requirements from *Sutton*, this employee would be barred from bringing a claim under the ADA. Under *Sutton*, individuals with myopia who can correct that condition probably do not qualify as disabled for ADA purposes.[112] Under the bifurcated qualification test, the inquiry ends there. A court is unable to evaluate whether allowing the employee to use the corrective lenses would constitute a "reasonable accommodation" under the ADA, or whether the employee has a disability while being prevented from using corrective lenses.

C. Single Qualification Test Eliminates the Loophole

A single qualification test, combining the first two requirements for a prima facie case into a single evaluation,[113] could close this loophole for employers without affecting other ADA cases. Under this test, a court would determine whether a claimant is a "qualified individual with a disability"[114] under a single evaluation. The court would evaluate whether the claimant has a disability[115] in context of whether the claimant is a "qualified individual," meaning that the claimant, "with or without reasonable accommodation, can perform the essential functions of the employment position."[116]

This single qualification test would allow courts to consider mitigation and reasonable accommodation in concert. A claimant whose condition is not a disability because she can utilize mitigating measures to control her condition would be a "qualified individual with a disability"[117] if the employer fails to provide reasonable accommodations, preventing her from utilizing those measures.[118] This approach would still require the claimant's condition, in the state created by the employer's accommodation or failure to accommodate, to meet the ADA definition of "disability."[119] The court would not evaluate the claimant based on the mitigation

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112. *See Sutton*, 527 U.S. at 488-89.

113. *See supra* notes 12-13 and accompanying text.

114. 42 U.S.C. § 12111(8) (1994).

115. *See supra* note 16 and accompanying text.

116. 42 U.S.C. § 12111(8).

117. *Id.*

118. This inquiry would require the plaintiff to demonstrate that the corrective measures she is requesting the employer to allow her to make fall within the limits of reasonable accommodation. *See supra* note 49 and accompanying text.

119. *See supra* note 16 and accompanying text.

she could hypothetically utilize, but based on the mitigation the claimant's employer allows her to utilize. This test bases the evaluation on the claimant's actual condition rather than her hypothetical or potential condition.

Nevertheless, under this approach Nawrot would not necessarily have survived summary judgment. The court indicated that it was unable to address whether Bestfoods discriminated against Nawrot by preventing him from taking breaks or whether those requested breaks constituted reasonable accommodation.[120] The court also gave a cursory evaluation of whether Nawrot was a "qualified individual" without evaluating the role that reasonable accommodation plays in that determination.[121] Using a single qualification test, the court could have evaluated whether Bestfoods' failure to reasonably accommodate Nawrot created a condition in which Nawrot's impairments constituted a disability.

The court might have determined that the breaks Nawrot was requesting to monitor his diabetes did not constitute a reasonable accommodation. Additionally, the court might have determined that even while being prevented from taking breaks Nawrot still did not have a disability. However, under the bifurcated qualification test, the court was not able to address these crucial questions.

Under a single qualification test, the outcome would not have been certain. The facts warranted more than the cursory evaluation that the bifurcated qualification test required, which mandated the conclusion that because diabetes is controllable, Nawrot was not disabled. The bifurcated qualification approach essentially creates a per se rule, excluding every condition that can be controlled from disability status, regardless of individual circumstances that might prevent an individual from utilizing the mitigation. While the single qualification test would not solve this problem for all individuals with a disability who do not use potential mitigating measures, it would at least enable an individual whose employer prevents her from utilizing mitigating measures to have a greater chance of surviving summary judgment in her ADA claim.[122]

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120. *See supra* note 100 and accompanying text.

121. *Nawrot*, 2000 U.S. Dist. LEXIS 8973 at *15.

122. Another case where the single qualification test might have provided a more appropriate evaluation is *Hein v. All America Plywood Co., Inc.*, 232 F.3d 482 (6th Cir. 2000). The plaintiff, a truck driver who used blood pressure medication, alleged that he had been terminated because he refused to make a delivery that was longer than his normal schedule and would have caused him to run out of his blood pressure medication before the delivery was complete. *See id.* at 485-87. The court evaluated the plaintiff in his medicated state, concluding that it was the plaintiff's own fault that he would have run out of medication during the delivery, and holding that the plaintiff was not disabled under the ADA because he was not disabled in his medicated state. *See id.* at 487-88. It certainly would have been more appropriate for the court to apply the single qualification test and evaluate whether the plaintiff was disabled in context of whether the plaintiff's request to avoid the

Just as the outcome in *Nawrot* under the single qualification test would not have been certain, this approach would not create the potential for significantly increased litigation. Plaintiffs would still have to establish that they meet all of the requirements to be a "qualified individual with a disability."[123] This approach likely would not change the outcome in a great number of cases. It would, however, open the potential to correct one injustice that currently cannot be corrected under the ADA, where an employer fails to provide reasonable accommodations to allow an employee to manage a controllable condition.

D. The Single Qualification Test is Consistent with the Text of the ADA

The text of the ADA supports the single qualification test. While the statute provides a definition of "disability,"[124] it does not establish that definition as the threshold question that courts have interpreted it to be. That definition appears in the introductory sections of the ADA, not in Title I, which contains the provisions relating to employment discrimination. However, Title I of the ADA clearly establishes a broader threshold question for a claimant: whether she is a "qualified individual with a disability."[125] This phrase is more properly considered in its entirety, considering how "qualified" and "disability" relate to each other. The bifurcated qualification test, however, creates two categories of individuals with a disability: (1) individuals with a disability and (2) qualified individuals with a disability.

This bifurcated qualification test can result in a plaintiff who fits the second category because her employer fails to reasonably accommodate her essential mitigating measures, but loses at summary judgment because those mitigating measures are hypothetically available, and thus she does not fit the more restricted definition of the first category. The statute, on its face, does not establish two categories of disabled persons. The definition of disability is positioned in the statute so that it is most reasonably read as a supplement to the definition of a "qualified individual with a disability"[126] contained in Title I.

The tendency of the courts to utilize the statutory definition of disability as the threshold question may be the result of inadequate appre-

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longer delivery was a reasonable accommodation under ADA guidelines. By applying the bifurcated qualification test, the court was able to avoid the issue of whether the plaintiff's request was a reasonable accommodation, tersely concluding that the plaintiff's circumstances were his own fault without evaluating those circumstances under reasonable accommodation guidelines.

123. 42 U.S.C. § 12111(8).

124. *See supra* note 16 and accompanying text.

125. 42 U.S.C. § 12111 (8). "No covered entity shall discriminate against a qualified individual with a disability." 42 U.S.C. § 12112(a) (1994).

126. 42 U.S.C. § 12111(8).

ciation of a fundamental difference between disability discrimination and other areas of discrimination. A claimant who is a member of a protected class for race or age discrimination is generally a static member of that class. The group of individuals Congress designed the ADA to protect is much less static. An individual's physical or mental condition may change from day to day. General changes in technology and treatment procedures as well as specific changes in an individual's financial status or employment conditions can drastically alter that individual's ability to employ mitigating measures. The drafters of the ADA demonstrated their understanding of this reality by defining a "qualified individual with a disability" to include consideration of reasonable accommodation.[127] The Supreme Court also has pointed out this reality in recent decisions.

E. The Single Qualification Test is Consistent with Recent Supreme Court Decisions

While the Supreme Court has never made reasonable accommodations by an employer a factor in the determination of whether an employee has a disability, the reasoning from recent Supreme Court decisions lends some support to the single qualification test. The Court addressed the role of reasonable accommodation in defining a "qualified individual with a disability" in *Cleveland v. Policy Management Systems Corp.*[128] Pointing out the differences between the appropriate evaluations for an ADA plaintiff and an applicant for Social Security Disability Insurance benefits, the Court noted that "the ADA defines a 'qualified individual' to include a disabled person 'who . . . can perform the essential functions' of her job '*with reasonable accommodation.*'"[129] Whether an employer provides reasonable accommodations to allow an employee with a disability to utilize mitigating measures is clearly a factor in determining whether that employee is a "qualified individual."[130]

As one of the justifications for applying the mitigation standard in *Sutton*, Justice O'Connor pointed out that the ADA "is properly read as requiring that a person be presently – not potentially or hypothetically – substantially limited in order to demonstrate a disability."[131] One author, while arguing that employers should not consider mitigating measures that employees choose not to utilize, pointed out that "[o]ne thing seems evident from the [*Sutton* Trilogy]; it is the actual condition that the employee presents herself in at the time of consideration which is pertinent

127. *See* 42 U.S.C. § 12111(8).

128. 526 U.S. 795 (1999).

129. *Id.* at 803 (quoting 42 U.S.C. § 12111 (8)).

130. 42 U.S.C. § 12111(8).

131. Sutton v. United Airlines, Inc., 527 U.S. 471, 482 (1999).

to the disability inquiry."[132] Where an employer fails to reasonably accommodate an individual and prevents her from utilizing mitigating measures, the employee clearly is presently disabled, and a court could only consider the employee not to be disabled in a potential or hypothetical sense.

1. Single qualification test treats individuals as individuals

Justice O'Connor acknowledged that "whether a person has a disability under the ADA is an individualized inquiry."[133] She also noted that whether an individual is disabled "depends on whether the limitations an individual with an impairment *actually* faces are in fact substantially limiting."[134] That "individualized inquiry"[135] does not seem consistent with a test that mandates that no controllable condition qualifies as a disability. An individual's condition under the restrictions her employer places on her is the relevant condition in which to evaluate the "limitations an individual with an impairment *actually* faces."[136] The per se rule that the bifurcated qualification test promotes runs directly counter to another reason Justice O'Connor provided for the mitigation rule – to prevent individuals from being "treated as members of a group of people with similar impairments, rather than as individuals."[137]

In *Albertson's*, the Supreme Court pointed out that under the ADA individuals must "prove a disability by offering evidence that the extent of the limitation in terms of their own experience . . . is substantial."[138] An individual's "own experience"[139] certainly includes the restrictions her employer places on her. The single qualification test is consistent with the reasoning in *Sutton* and *Albertson's*. The test simply combines the mitigation requirements for defining a disability the Supreme Court articulated in *Sutton* with the requirement the Court noted in *Cleveland* that the determination of whether an individual is a "qualified individual"[140] requires consideration of whether her employer provides reasonable accommodations. These two standards easily fit together into a single qualification test to determine whether a claimant is a "qualified individual with a disability."[141]

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132. Dickinson, *supra* note 18, at 398.
133. *Sutton*, 527 U.S. at. 483.
134. *Id.* at 488.
135. *Id.* at 483.
136. *Id. See* Dickinson, *supra* note 18, at 400-01.
137. *Sutton*, 527 U.S. at 483-84.
138. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 567 (1999).
139. *Id.*
140. 42 U.S.C. § 12111(8) (1994).
141. *Id.*

2. Per se rules are inappropriate

The Supreme Court has declined to establish a per se rule for defining a disability under the ADA in another context. While the Court in 1998 decided that HIV infection in a particular case was a disability under the ADA, the Court declined to determine "whether HIV infection is a *per se* disability under the ADA."[142] While ruling that HIV infection substantially limited the plaintiff in the major life activity of reproduction,[143] by declining to establish a per se rule for HIV infection, the Court implied that the necessary individual inquiry might be different under other circumstances.[144] Other federal court decisions show that similar conditions may qualify as a disability under the ADA in some scenarios, but not in others.[145] These cases further demonstrate that a per se rule is inappropriate in ADA cases. Such cases require an individualized inquiry into the claimant's circumstances, including factors such as employer policies that may prevent the claimant from utilizing corrective measures. While the bifurcated qualification test promotes a per se rule requiring that a controllable condition does not constitute a disability under the ADA, the single qualification test better facilitates the individualized inquiry that is necessary in ADA claims, allowing a broader, more individualized inquiry into the claimant's particular circumstances.

V. CONCLUSION

Current federal court standards create a bifurcated qualification test for ADA claimants to maintain an action for employment discrimination. That test requires the claimant to establish first that she is disabled, in light of any corrective measures, and then that she is a "qualified individual."[146] The bifurcated qualification test essentially promotes a per se

142. Bragdon v. Abbott, 524 U.S. 624, 642 (1998).

143. *See id.* at 637-41.

144. *But see* Jones v. Rehab. Hosp. of Ind., No. 00-0681-C-T/G, 2000 WL 1911884, at *8 (S.D. Ind. Nov. 29, 2000) (recognizing that the Supreme Court declined to establish a per se rule for HIV infection under the ADA, but nevertheless holding that "both the agency interpretation of the ADA and the Act's legislative history support the conclusion that Congress intended HIV infection to be a per se disability.").

145. *See, e.g.*, Gasser v. Ramsey, 125 F. Supp. 2d 1 (D.D.C. 2000) (holding that the side effects of the anticoagulant medication Coumadin qualified as a disability under the ADA); Samul v. DaimlerChrysler Corp., 2000 WL 1480890 (E.D. Mich. 2000) (holding that in light of the plaintiff's individual circumstances and activities, the side effects of Coumadin were not sufficient to qualify as a disability under the ADA); Boone v. Reno, 121 F. Supp. 2d 109 (D.D.C. 2000) (holding that a plaintiff who controlled her asthma through medication was not disabled under the ADA); Riebe v. E-Z Serve Convenience Stores, Inc., 2000 WL 1566516 (S.D. Ala. 2000) (holding that even while using asthma medication, the plaintiff was substantially limited in her ability to breathe, walk, and run).

146. 42 U.S.C. § 12111(8) (1994).

rule mandating that no correctable condition can ever qualify as a disability under the ADA. That test also allows an employer to prevent an employee with a disability from utilizing mitigating measures, and prevents that employee from bringing an ADA claim under those circumstances. Under existing precedent there is no redress for that injustice which is clearly, to borrow a phrase used by Justice O'Connor in a different context, "contrary to both the letter and the spirit of the ADA."[147]

Courts should adopt a single qualification test, considering whether the claimant has a "disability" and whether the claimant is a "qualified individual" in concert. In the case of an individual whose condition requires mitigating measures, this inquiry may involve an investigation into whether the employer has provided reasonable accommodations to allow the individual to utilize those measures. This test is consistent with the text of the ADA, which prohibits employment discrimination against a "qualified individual with a disability" and defines that phrase to include consideration of the reasonable accommodation the employer provides to that individual.[148] This test is also consistent with recent Supreme Court precedent requiring an individualized evaluation of claimants in ADA cases, evaluating claimants in their actual present condition, rather than in a potential or hypothetical condition.

Most importantly, the single qualification test creates the potential to correct an injustice. Currently, employers who prevent employees from utilizing mitigating measures do not have to answer for that policy in any forum. The proposed test would simply make employers accountable to justify those actions. Courts could evaluate whether the requested accommodations constitute reasonable accommodations, where they now must dismiss the case without addressing that issue. An enumerated purpose of the ADA is "the elimination of discrimination against individuals with disabilities."[149] While there are countless obstacles preventing the fulfillment of that goal, the single qualification test is a simple way to eliminate one of those obstacles.

Thad LeVar

147. Sutton v. United Airlines, Inc., 527 US 471, 484 (1999).

148. *See supra* text accompanying note 50.

149. 42 U.S.C. § 12101(b)(1) (1994).