View metadata, citation and similar papers at core.ac.uk
brought to you by CORE
provided by University of Kentucky

Kentucky Law Journal

Volume 89 | Issue 2 Article 8

2000

The Americans with Disabilities Act after Sutton v. United Air Lines--Can It Live Up to Its Promise of Freedom for Disabled Americans?

Ashley L. Pack
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Disability Law Commons
Click here to let us know how access to this document benefits you.

Recommended Citation
Pack, Ashley L. (2000) "The Americans with Disabilities Act after Sutton v. United Air Lines--Can It Live Up to Its Promise of Freedom for Disabled Americans?," *Kentucky Law Journal*: Vol. 89 : Iss. 2 , Article 8.
Available at: https://uknowledge.uky.edu/klj/vol89/iss2/8

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

The Americans with Disabilities Act after *Sutton v. United Air Lines*—Can It Live Up to Its Promise of Freedom for Disabled Americans?

BY ASHLEY L. PACK*

INTRODUCTION

Ten years after its enactment, the Americans with Disabilities Act ("ADA") is still being hotly litigated. Touted as a measure to protect those whom "society has tended to isolate and segregate,"[1] the ADA has proven to be a treacherous area of law in which plaintiffs have faced a difficult burden of proof in order to prevail. A comprehensive statistical analysis of cases under the ADA reported that "defendants prevail in more than 93 percent of reported ADA employment discrimination cases decided on the merits at the trial court level. Of those cases appealed, defendants prevail in 84 percent of reported cases. The statistics . . . are stark in showing plaintiffs' lack of success under the [A]ct."[2]

In a recent decision by the U.S. Supreme Court, *Sutton v. United Air Lines, Inc.*,[3] plaintiffs' burden became even more difficult to meet. Ignoring the ADA's legislative history,[4] federal agency guidelines,[5] traditional judicial deference to agency findings,[6] and decisions from a vast majority

* J.D. expected 2001, University of Kentucky. The author would like to thank David and Louise Cleek and Marilyn T. McClure-Demers for their continued support and guidance.

[1] 42 U.S.C. § 12101(a)(2) (1994).

[2] Erwin Chemerinsky, *Unfulfilled Promise: The Americans with Disabilities Act*, TRIAL, Sept. 1999, at 88.

[3] Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

[4] *See infra* notes 47-49 and accompanying text.

[5] *See infra* notes 56-58 and accompanying text.

[6] *See infra* notes 51, 160 and accompanying text.

of the circuit courts,[7] the Court concluded that a person's impairment should be evaluated in a mitigated or corrected state when determining if that person is disabled under the Act.[8] The hoopla and hope that heralded the ADA's passage has all but vanished, as this decision has significantly narrowed the Act's coverage. Many intended plaintiffs now find themselves excluded from the ADA's protection, leaving the Act that was originally passed as "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"[9] powerless to effectuate its intended goal. *Sutton*, cited as "a significant victory for employers,"[10] forces plaintiffs to determine ways in which to minimize the force of this decision.

This Note focuses on the impact that the Supreme Court's decision in *Sutton* has had upon the ADA, with an emphasis upon Title I employment discrimination. A thorough understanding of the background of the ADA is helpful in interpreting *Sutton* and appreciating the gravity of the Supreme Court's actions in rejecting the Act's legislative history and the Equal Employment Opportunities Commission ("EEOC") guidelines promulgated to interpret the Act. Consequently, Part I of this Note reviews the purpose of the ADA, its legislative history, and the EEOC guidelines.[11] Part II then investigates the circuit split on the issue of whether to take mitigating measures into account when determining whether an individual is "disabled" under the ADA.[12] Part III examines the facts and majority decision of *Sutton* and provides an assessment of the Court's holding.[13] Part IV focuses on the implications of this significant decision, with particular emphasis on methods plaintiffs should employ to minimize its pro-defendant bias.[14]

I. HISTORY OF THE ADA

Enacted on July 26, 1990, the ADA was designed to prohibit covered entities from discriminating against disabled individuals because of their

---

[7] *See infra* Part II.

[8] *See infra* Part III.B.

[9] 42 U.S.C. § 12101(b)(1) (1994).

[10] Robert Lewis, *Supreme Court Narrows Scope of Coverage Under the ADA*, EMP. L. STRATEGIST, July 1999, at 2.

[11] *See infra* notes 15-58 and accompanying text.

[12] *See infra* notes 59-86 and accompanying text.

[13] *See infra* notes 87-163 and accompanying text.

[14] *See infra* notes 164-78 and accompanying text.

disabilities.[15] Consistent with this general purpose, the ADA also sought to furnish "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"[16] and to establish "clear, strong, consistent, enforceable standards" for identifying and addressing such discrimination.[17]

One of the central areas in which the ADA's drafters sought to protect handicapped individuals from discrimination was the workplace.[18] It has been an unfortunate historical reality that disabled individuals have faced isolation and segregation from society in many areas of employment.[19] At the time of the ADA's enactment, only twenty-six percent of America's forty-three million disabled individuals[20] were employed full time, yet sixty- to seventy-percent desired full-time work.[21] Clearly, some disabled Americans have been precluded from the satisfaction, both financial and personal, that full-time work can provide.[22]

---

[15] *See* 42 U.S.C. §§ 12101-12213 (1994). The legislative history of the ADA appears in the following congressional reports: Senate Labor and Human Resources Committee Report, S. REP. NO. 101-116 (1989); House Public Works and Transportation Committee Report, H.R. REP. NO. 101-485, pt. 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267; House Education and Labor Committee Report, H.R. REP. NO. 101-485, pt. 2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303; House Judiciary Committee Report, H.R. REP. NO. 101-485, pt. 3 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445; House Energy and Commerce Committee Report, H.R. REP. NO. 101-485, pt. 4 (1990), *reprinted in* 1990 U.S.C.C.A.N. 512; and the Conference Reports, H.R. CONF. REP. NO. 101-558 (1990), 1990 WL 259240; H.R. CONF. REP. NO. 101-596 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565.

[16] 42 U.S.C. § 12101(b)(1) (1994).

[17] *Id.* § 12102(b)(2).

[18] *See id.* §§ 12101 - 12117.

[19] *Id.* § 12101(a)(2).

[20] While Congress cited the number of Americans who "have one or more physical or mental disabilities" at forty-three million, 42 U.S.C. § 12101(a)(1) (2000), this number seems destined to grow, due to both the aging of the nation's population and the increase in the number of employees injured on the job. Eric Wade Richardson, Comment, *Who Is a Qualified Individual with a Disability Under the Americans with Disabilities Act*, 64 U. CIN. L. REV. 189, 189 (1995).

[21] Richardson, *supra* note 20, at 189 (citing Peter M. Burkery, Jr., *The Americans with Disabilities Act; Its Impact on Small Business*, NAT'L PUB. ACCT., Sept. 1990, at 42).

[22] *See id.*

Because the ADA prohibits employment discrimination against any "qualified individual with a disability,"[23] the statute's definition of a disability is crucial to an understanding of the ADA's coverage. The ADA categorizes 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."[24] However, the Act fails to define essential terms such as "physical or mental impairment," "substantially limits," or "major life activities."[25] The absence of definitions for these key terms has resulted in multiple difficulties in achieving a clear and comprehensive understanding of the Act.

The legislative history of the ADA provides a possible basis for its interpretation: courts evaluating the ADA could follow the regulations established under the Rehabilitation Act of 1973.[26] In addition, because the

---

[23] *See* 42 U.S.C. §§ 12111 - 12117. Specifically, Title I of the ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privilege of employment." *Id.* § 12112(a). Title I goes on to define "qualified individual with a disability" as someone "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8).

Title II, which deals with public services, establishes that "[s]ubject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *Id.* § 12132.

[24] *Id.* § 12102(2).

[25] Although the ADA failed to define these terms, it did expressly exempt certain conditions from its "disability" definition. *Id.* § 12211(b). *See also infra* note 46 and accompanying text.

[26] The Rehabilitation Act provides that:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a) (1994).

intent[27] and language[28] of the ADA and the Rehabilitation Act are similar, courts interpreting the ADA often look to judicial decisions involving the Rehabilitation Act for guidance.[29]

In determining the applicability of the Rehabilitation Act, various courts have defined "disability" to include: epilepsy,[30] cardiovascular disease,[31] former drug use,[32] psychiatric problems,[33] legal blindness,[34] manic depressive syndrome,[35] ankylosing spondylitis,[36] nervous and heart conditions,[37] multiple sclerosis,[38] blindness in one eye,[39] heart condition,[40] osteoarthritis of the knee joints,[41] cerebral palsy and dyslexia,[42] leg amputation,[43] and unusual sensitivity to tobacco smoke.[44] The ADA and its legislative history demonstrate that Congress intended "disability" to encompass muscular dystrophy, AIDS or HIV, mental retardation,

---

[27] The Rehabilitation Act was passed to "prohibit public sector employers from discriminating against mentally and physically disabled individuals." Alysa M. Barancik, Comment, *Determining Reasonable Accommodations Under the ADA: Why Courts Should Require Employers to Participate in an "Interactive Process,"* 30 LOY. U. CHI. L.J. 513, 520 (1999) (citing JOEL WM. FRIEDMAN & GEORGE M. STRICKLER, JR., THE LAW OF EMPLOYMENT DISCRIMINATION 63 (3d ed. 1993)). Since the Rehabilitation Act only applied to public sector employees, Congress enacted the ADA to extend disability discrimination coverage to disabled workers in the private sector. *Id.* at 522 (citations omitted).

[28] Congress used much of the language from the Rehabilitation Act to draft Title I of the ADA, since both dealt with disabilities in the workplace. *Id.* (citing FRIEDMAN & STRICKLER, *supra* note 27, at 961).

[29] Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1995).

[30] Fitzgerald v. Green Valley Area Educ. Agency, 589 F. Supp. 1130, 1135-36 (S.D. Iowa 1984).

[31] Bey v. Bolger, 540 F. Supp. 910, 916 (E.D. Pa. 1982).

[32] Davis v. Bucher, 451 F. Supp 791, 796 (E.D. Pa. 1978).

[33] Doe v. N.Y. Univ., 666 F.2d 761, 775 (2d Cir. 1981).

[34] *See* Norcoss v. Sneed, 755 F.2d 113 (8th Cir. 1985).

[35] *See* Gardner v. Morris, 752 F.2d 1271 (8th Cir. 1985).

[36] *See* Sisson v. Helms, 751 F.2d 991 (9th Cir. 1985).

[37] *See* Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983).

[38] *See* Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372 (10th Cir. 1981).

[39] Holly v. City of Naperville, 603 F. Supp. 220, 229 (N.D. Ill. 1985).

[40] Bento v. I.T.O. Corp. of R.I., 599 F. Supp. 731, 741 (D.R.I. 1984).

[41] *See* Guinn v. Bolger, 598 F. Supp. 196 (D.D.C. 1984).

[42] Fitzgerald v. Green Area Educ. Agency, 589 F. Supp. 1130, 1135-36 (S.D. Iowa 1984).

[43] Longoria v. Harris, 554 F. Supp. 102, 103 (S.D. Tex. 1982).

[44] Vickers v. Veterans Admin., 549 F. Supp. 85, 86-87 (W.D. Wash. 1982).

alcoholism, and emotional illness,[45] but did not intend the term to cover transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or use of illegal drugs.[46]

Although this list provides some guidance in evaluating whether a particular condition might be considered a disability under the ADA, it provides no insight into the mitigation issue. The use of mitigating measures can curb the seriousness of many of the conditions listed above, but the ADA fails to expressly address whether conditions that can be controlled or nearly eliminated by mitigation can be considered "disabilities" under the Act. Thus, it becomes necessary to look outside the Act to determine whether mitigated conditions can be considered disabilities.

A. *The ADA's Legislative History and the Mitigation Issue*

The legislative history of the Act repeatedly indicates that a disability should be evaluated in its unmitigated state. The Senate Report regarding the ADA states that "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accomodations or auxiliary aids."[47] Similarly, according to the Report of the House Committee on Education and Labor:

> Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under . . . the definition of disability, even if the effects of the impairment are controlled by medication.[48]

The House Judiciary Committee Report employed like language: "The impairment should be assessed without considering whether mitigating

---

[45] H.R. REP. NO. 101-485, pt. 2, at 51 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 333.

[46] 42 U.S.C. § 12211(b) (1994).

[47] S. REP. NO. 101-116, at 23 (1989).

[48] H.R. REP. NO. 101-485, pt. 2, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334.

measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation."[49]

B. Agency Interpretation of the Role of Mitigating Measures

In addition to the legislative history of the ADA, agency regulations also provide some insight into the mitigation issue. To assist in the ADA's implementation, the Act itself charged the Equal Employment Opportunity Commission ("EEOC") with promulgating regulations and interpretative guidance for Title I of the ADA.[50] Pursuant to this statutory delegation, courts should defer to the EEOC's determinations unless such determinations are found "arbitrary, capricious, or manifestly contrary to the statute."[51] The EEOC, while defining "disability" with terminology identical to that used in the ADA's definition,[52] went on to elaborate upon the definition's key terms. A "physical or mental impairment" was characterized as:

> [a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or [a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[53]

The EEOC explained that "major life activities" include "functions such as caring for oneself, performing manual tasks, walking, seeing,

---

[49] H.R. REP. NO. 101-485, pt. 3, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 451.

[50] 42 U.S.C. § 12116 (1994).

[51] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

[52] 29 C.F.R. § 1630.2(g) (2000).

[53] *Id.* § 1630.2(h). "For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by medicine. Similarly, an individual with hearing loss would be considered to have an impairment even if the condition were correctable through the use of a hearing aid." *Id.* pt. 1630, app. § 1630.2(h) (1999).

hearing, speaking, breathing, learning, and working."[54] Further, the EEOC defined "substantially limits" as:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.[55]

In addition, the EEOC issued an Interpretive Guidance, which stated that "[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."[56] The Department of Justice, charged with promulgating regulations implementing Title II,[57] agreed with the EEOC's Interpretive Guidance, noting that "[t]he question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids and services."[58] As will be discussed later in this Note, the Supreme Court ignored this guidance in the first case that put the mitigating measures issue before the Court.

II. THE CIRCUIT SPLIT

A decisive majority of federal circuits prior to *Sutton* had addressed the mitigating measure issue favorably to plaintiffs' claims. These courts,

---

[54] *Id.* § 1630.2(i) (2000). The Supreme Court recently added reproduction to this list, which it called "illustrative, not exhaustive." Bragdon v. Abbott, 524 U.S. 624, 639 (1998).

[55] 29 C.F.R. § 1630.2(j)(1) (2000). In determining whether an individual is substantially limited in a major life activity, the EEOC listed three relevant factors: "(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." *Id.* § 1630.2(j)(2).

[56] 29 C.F.R. pt. 1630, app. § 1630.2(j) (1998).

[57] 42 U.S.C. § 12134 (1994).

[58] 29 C.F.R. pt. 35, app. A, § 35.104 (1998).

which included the First,[59] Second,[60] Third,[61] Seventh,[62] Eighth,[63] Ninth,[64] and Eleventh[65] Circuits, determined that mitigating measures should not be considered when evaluating whether a person was disabled under the Act.[66] In so concluding, these courts based their decisions primarily on the legislative history of the Act and the EEOC regulations and guidelines, in accordance with the principle of agency deference.[67]

The Fifth Circuit, in *Washington v. HCA Health Services of Texas, Inc.*,[68] reached an intermediate position by concluding that the appropriateness of considering mitigating measures in a disability determination depends upon the characteristics of the disability and mitigating measure at issue.[69] The court in *Washington* deferred to the legislative history and EEOC Guidelines, but interpreted them narrowly.[70] While noting that (1) the EEOC had sufficient expertise to interpret the ADA and had consistently maintained that mitigating measures should not be considered, and (2) the ADA's legislative history was consistent with the EEOC Guidelines, the court recognized situations where mitigating measures should be

---

[59] Arnold v. United Postage Serv., Inc., 136 F.3d 854, 859 (1st Cir. 1998).

[60] Bartlett v. N.Y. State Bd. of Law Exam'rs, 156 F.3d 321, 329 (2d Cir. 1998), *vacated by* 527 U.S. 1031 (1999). *Bartlett* involved a claim under Title II, rather than Title I, of the ADA. *Id.* at 328. Nonetheless, at least one lower court within the Second Circuit reached the same conclusion as the *Bartlett* court in the Title I context. *See* Schaefer v. State Ins. Fund, No. 95 Civ. 0612(JFK), 1998 WL 126061, at *6 (S.D.N.Y. Mar. 19, 1998), *vacated by* 207 F.3d 139 (2d Cir. 2000).

[61] Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937 (3d Cir. 1997).

[62] Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 629 (7th Cir. 1998).

[63] Doane v. City of Omaha, 115 F.3d 624, 627-28 (8th Cir. 1997).

[64] Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996).

[65] Harris v. H & W Contracting Co., 102 F.3d 516, 520-21 (11th Cir. 1996).

[66] In addition to these circuits, lower courts in the Fourth and D.C. Circuits had also concluded that mitigating measures should not be considered. Fallacaro v. Richardson, 965 F. Supp. 87, 92-93 (D.D.C. 1997); Shiflett v. GE Fanuc Automation Corp., 960 F. Supp. 1022, 1029 (W.D. Va. 1997), *aff'd per curiam*, 151 F.3d 1030 (4th Cir. 1998) (unpublished table opinion).

[67] *See supra* notes 59-66.

[68] Washington v. HCA Health Servs. of Tex., Inc., 152 F.3d 464 (5th Cir. 1998), *vacated by* 527 U.S. 1032 (1999).

[69] *Id.* at 470-71. Prior to its decision in Washington, the Fifth Circuit had hinted, albeit in dicta, that it might favor considering mitigating measures. Ellison v. Software Spectrum, Inc., 85 F.3d 187, 191 n.3 (5th Cir. 1996).

[70] *Washington*, 152 F.3d at 470.

considered.[71] The Fifth Circuit restricted application of the legislative history and EEOC Guidelines by ruling that "only serious impairments and ailments that are analogous to those mentioned in the EEOC Guidelines and the legislative history . . . will be considered in their mitigated state."[72] The court concluded that only mitigating measures that are used repeatedly and regularly, such as daily medication or prosthesis, could be ignored in the disability determination.[73] Mitigating measures that amount to permanent corrections, on the other hand, must be considered.[74] In this manner, the court distinguished between continuous impairments such as diabetes, epilepsy, and hearing impairments, which it said should be evaluated in an unmitigated condition, and permanent corrections such as hip replacements and transplanted organs, which should be evaluated in a mitigated condition.[75] Applying this standard to the facts at hand, the Fifth Circuit determined that an employee afflicted with Adult Stills Disease, which is a degenerative rheumatoid condition that affects bones and joints, must be evaluated for disability in an unmitigated state.[76]

While the Fifth Circuit questioned the reasonableness of ignoring mitigating measures in the disability determination, the court stopped short of outright disregarding the legislative history and EEOC guidelines.[77] The Sixth Circuit, however, became the only circuit court prior to *Sutton* to entirely reject the ADA's legislative history and EEOC Guidelines.[78] In a badly fractured opinion, the Sixth Circuit decided by a 2-1 margin that mitigating measures should be considered in an ADA disability determina-

---

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.* at 470-71.

[75] *Id.* at 471.

[76] *Id.* No reported case employing the Fifth Circuit's *Washington* framework ever used it to conclude that a plaintiff's disability should be evaluated in a mitigated state. *See* Gonzales v. City of New Braunfels, Tex., 176 F.3d 834, 837 (5th Cir. 1999) (holding that the disability determination for a plaintiff with a diabetic condition should be made without considering the effect of mitigating measures); Pate v. Baker Tanks Gulf S., Inc., 34 F. Supp. 2d 411, 416 (W.D. La. 1999) (holding that mitigating measures should not be considered in evaluating a plaintiff with diabetes); Ahl v. Univ. of Miss., No. 1:96CV304-S-D, 1999 WL 1068597, at *3 (N.D. Miss. May 4, 1999) (ruling that a plaintiff who was unable to speak without a mechanical device because his larynx had been removed should be examined in an unmitigated state).

[77] *Washington*, 152 F.3d at 470.

[78] Gilday v. Mecosta County, 124 F.3d 760 (6th Cir. 1997).

tion.[79] Still, no other circuit had adopted this view prior to *Sutton*, leaving the weight of precedent squarely on the side of ignoring mitigating measures when determining an individual's disability.

The Tenth Circuit's decision in *Sutton v. United Air Lines, Inc.*[80] broke sharply with the overwhelming majority of other circuits[81] and agency interpretations.[82] The court dismissed the plaintiffs' complaint for failure to state a claim upon which relief could be granted and, in doing so, turned away from the reasoning of a majority of the federal circuits. The plaintiffs alleged that United Air Lines had violated the ADA by rejecting their applications for employment on the basis of a disability or, alternatively, by rejecting them because it regarded them as having a disability.[83] The Tenth Circuit held that mitigating measures should always be taken into account when determining whether an individual's impairment substantially limits a major life activity.[84] The court concluded that the EEOC's Interpretive Guidance conflicted with the plain meaning of the ADA and

---

[79] *Id.* at 767-68 (Kennedy, J., concurring in part and dissenting in part); *id.* at 768 (Guy, J., concurring in part and dissenting in part). The *Gilday* case was heard by a panel of three judges—Kennedy, Guy and Moore—each of whom penned an opinion. Judge Moore delivered the judgment of the court and the opinion of the court except as to the mitigating measures issue. *Id.* at 761. Judge Moore argued that mitigating measures should never be considered, but was not joined in this belief by either Judge Kennedy or Moore. *Id.* at 762-65; *id.* at 767-68 (Kennedy, J., concurring in part and dissenting in part); *id.* at 768 (Guy, J., concurring in part and dissenting in part). Judge Kennedy argued for a wholesale rejection of the legislative history and Interpretive Guidelines as inconsistent with the statutory text and EEOC regulations. *Id.* at 767-68 (Kennedy, J., concurring in part and dissenting in part). Judge Guy also disagreed with Judge Moore's assessment that mitigating measures should never be considered. *Id.* at 768 (Guy, J., concurring in part and dissenting in part). But while Judge Guy's opinion seemed to agree with that of Judge Kennedy, it also seemed to leave room for application of an interpretive framework similar to the Fifth Circuit's *Washington* rubric. *Id.* ("In my view, the impact of mitigating measures must be decided on a case-by-case basis."). *See also Washington*, 152 F.3d at 471 n.11 (equating its approach with that of Judge Guy).

[80] Sutton v. United Air Lines, Inc., 130 F.3d 893 (10th Cir. 1997), *aff'd*, 527 U.S. 471 (1999).

[81] *See supra* notes 59-79 and accompanying text.

[82] *See supra* note 56 and accompanying text.

[83] *Sutton*, 130 F.3d at 895.

[84] *Id.* at 902.

rejected it.[85] The Tenth Circuit's decision created a conflict that the Supreme Court deemed worthy of certiorari.[86]

III. *SUTTON V. UNITED AIR LINES*

A. Facts

After their complaint was dismissed by the Tenth Circuit, Ms. Sutton and Ms. Hinton, twin sisters who suffered from severe myopia, appealed to the Supreme Court, which granted certiorari. Petitioners' uncorrected visual acuity was 20/200 or worse in their right eyes and 20/400 or worse in their left eyes, but both petitioners' vision improved to 20/20 with corrective lenses.[87] The sisters had applied for employment as commercial airline pilots with the respondent, United Air Lines.[88] The petitioners fulfilled the basic requirements for the position, such as age, education, experience, and FAA certification.[89] At their interviews, however, the petitioners were told that they did not meet the airline's minimum vision requirement of 20/100 uncorrected visual acuity, and their interviews were terminated without an offer of employment.[90] The petitioners subsequently alleged that the airline's stated justification for refusing to hire them violated the ADA.[91]

As outlined above, to establish a claim under the ADA a plaintiff must show that he or she is (1) disabled (within the meaning of the ADA); (2) qualified for employment (able to perform the essential functions of the job, with or without reasonable accommodation); and (3) discriminated against by the employer in an employment decision because of his or her alleged disability.[92] In *Sutton*, the petitioners argued for the interpretation of "disability" already adopted by a majority of the circuits—that an impairment should be determined without regard to corrective measures.[93] They maintained that since the ADA did not directly address the issue,

---

[85] *Id.*
[86] *See* Sutton v. United Airlines, Inc., 525 U.S. 1063 (1999).
[87] Sutton v. United Air Lines, 527 U.S. 471, 475 (1999).
[88] *Id.*
[89] *Id.* at 475-76.
[90] *Id.* at 476.
[91] *Id.*
[92] Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997) (citations omitted).
[93] *Sutton*, 527 U.S. at 481.

courts should defer to federal agency interpretations of the Act.[94] Thus, the sisters argued, the Supreme Court should define impairment or disability without regard to mitigating measures.[95] The petitioners claimed that they possessed the qualifications for the positions of commercial airline pilots and that United Air Lines had discriminated against them in an employment decision due to their alleged disability; therefore, the only remaining issue was whether the petitioners were disabled persons within the meaning of the ADA.[96]

The respondent, on the other hand, argued that an impairment should not be evaluated in its unmitigated state.[97] Claiming that "an impairment does not substantially limit a major life activity if it is corrected,"[98] United Air Lines argued that the ADA's phrase "substantially limits one or more major life activities" only made sense if the substantial limitations "actually and presently exist."[99] The respondent's position was that the Court should ignore the agency guidelines because they conflicted with the plain meaning of the ADA.[100]

B. Majority Opinion

By a 7-2 margin, the Supreme Court adopted the Tenth Circuit's position and held that mitigating measures should be taken into account when determining whether an individual is disabled under the ADA.[101]

Justice Sandra Day O'Connor, writing for the majority, rested her decision on three main points. First, Justice O'Connor noted that "[b]ecause the phrase 'substantially limits' appears in the Act in the present indicative verb form, we think the language is properly read as requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability."[102] Thus, the majority opinion concluded that a disability does not exist where a physical or mental

---

[94] *Id.*; *see also* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (holding that courts should defer to agency interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute").

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

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.* at 481-82.

[101] *Id.* at 475.

[102] *Id.* at 482.

impairment "might," "could," or "would" substantially limit a major life activity if not for mitigating measures.[103] Justice O'Connor concluded that a person whose disability was corrected by mitigating measures, while still saddled with the original impairment, cannot be disabled under the ADA because a corrected impairment does not "substantially limit" a major life activity.[104]

The Court further relied on the statutory definition of a disability to determine that disabilities should be assessed "with respect to an individual."[105] The majority argued that this individualized inquiry conflicts with the agency guidelines requiring individuals to be evaluated in their unmitigated states.[106] Justice O'Connor wrote that the agency guidelines force "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."[107] Therefore, the majority opinion concluded that the agency approach was "contrary to both the letter and spirit of the ADA"[108] because it "would create a system in which persons often must be treated as members of a group of people with similar impairments, rather than as individuals."[109] Because of this determination, the Court declined to consider the legislative history of the ADA in addressing this issue.[110]

Justice O'Connor's third point addressed Congress's findings in enacting the ADA. In its findings, Congress stated that "some 43,000,000 Americans have one or more physical or mental disabilities."[111] The Court had difficulty determining the source of this number,[112] but after evaluating several potential sources concluded that the forty-three million figure "reflect[ed] an understanding that those whose impairments are largely

---

[103] *Id.*

[104] *Id.* at 483.

[105] *Id.* (citing 42 U.S.C. § 12102(2)(A) (1995)).

[106] *Id.*

[107] *Id.* The dissent argued that the majority's approach treats individuals as members of a group and not as true individuals. The dissent further maintained that examining an individual in an unmitigated state is no more difficult than examining the individual in a mitigated state. *Id.* at 508-09 (Stevens, J., dissenting).

[108] *Id.* at 484.

[109] *Id.* at 483-84.

[110] *Id.* at 482.

[111] *Id.* at 484 (citing 42 U.S.C. § 12101(a)(1) (1994)).

[112] *Id.*

corrected by medication or other devices are not 'disabled' within the meaning of the ADA."[113] The majority opinion then attempted to buttress this conclusion by the somewhat specious reasoning that if Congress had intended to include all persons with mitigated or corrected disabilities within the Act, it would have cited a higher number of disabled persons in its findings.[114]

The Court criticized the dissent's suggestion that the majority opinion would exclude from the definition of disability those who use prosthetic limbs or take medicine for epilepsy or high blood pressure.[115] Justice O'Connor explained that "[t]he use of a corrective device does not, by itself, relieve one's disability"[116] if the individual, with the mitigating measure (such as a prosthetic limb), remains substantially limited in a

---

[113] *Id.* at 486.

[114] *Id.* at 487. This argument is somewhat dubious for two reasons. First, as the dissent pointed out, the Court had previously made clear "that a 'statement of congressional findings is a rather thin reed upon which to base' a statutory construction." *Id.* at 511 (Stephens, J., dissenting) (quoting Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 260 (1994)).

Second, the majority, failing to locate any direct source for Congress' forty-three million figure, essentially engaged in a numerical balancing of figures from outside studies. *Id.* at 484-87. The Court weighed figures from studies using a functional (mitigating) definition of disability against estimates from studies using a disability definition similar to an unmitigated assessment. *Id.* Even though the Court proved unable to unearth any figures that closely matched the number used by Congress, the majority reasoned that, because the figures used in the former group were numerically closer to forty-three million than were the estimates of the latter group, Congress must have intended that mitigating measures be considered. *Id.* It is quite likely, however, that the Court's estimates of covered individuals under an unmitigated disability definition are inflated because they fail to exclude impairments that are not substantially igniting. *Id.* at 511-12 (Stevens, J., dissenting). Furthermore, the Court's circuitous attempt to ascertain Congressional intent from a potentially flawed numerical comparison seems quite strained, especially since the legislative history clearly states that mitigating measures should have no part in disability determinations. H.R. REP. NO. 101-485, pt. 2, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334; H.R. REP. NO. 101-485, pt. 3, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 451; S. REP. NO. 101-116, at 23 (1989).

[115] H.R. REP. NO. 101-485, pt. 3, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 451.

[116] *Sutton*, 527 U.S. at 488.

major life activity, since the individual would still be considered disabled under the Court's analysis.[117]

After determining that the petitioners had failed to state a claim that they were disabled under subsection (A), which characterizes a disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual,"[118] the Court next evaluated the facts under subsection (C), which covers individuals "regarded as having such impairment."[119] Subsection (C) provides two potential routes by which an individual may qualify: "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities."[120] This subsection seeks to remedy the "stereotypic assumptions not truly indicative of . . . individual ability,"[121] which Congress had recognized could be just "as handicapping as are the physical limitations that flow from actual impairment."[122]

The Court in *Sutton* dismissed the petitioners' argument that the airline "mistakenly believe[d] their physical impairments substantially limit[ed] them in the major life activity of working."[123] The sisters did not argue that the airline regarded them as substantially limited in the major life activity of seeing, but only that United was mistaken in its belief that they were substantially limited in the major life activity of working.[124] Thus, petitioners argued that respondent's vision requirement was "based on myth and stereotype"[125] and that this requirement substantially limited them in their ability to work as global airline pilots.[126] The Court maintained that "[s]tanding alone, the allegation that respondent has a vision requirement in place does not establish a claim."[127] In fact, the majority opinion noted that "the ADA allows employers to prefer some physical attributes over

---

[117] *Id.*

[118] 42 U.S.C. § 12102(2)(A) (1994).

[119] *Sutton*, 527 U.S. at 489 (quoting 42 U.S.C. § 12102(2)(C) (1994)).

[120] *Id.*

[121] 42 U.S.C. § 12101(a)(7) (1994).

[122] *Sutton*, 527 U.S. at 489 (quoting Sch. Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 284 (1987)).

[123] *Id.* at 490.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

others."[128] According to Justice O'Connor, the ADA is only implicated when the employer "makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity."[129]

The Court used the EEOC's interpretation to provide a definition of the term "substantially limits" in conjunction with the major life activity of working.[130] This EEOC interpretation classifies "substantially limits" as being restricted from performing a broad class of jobs, and not merely unable to perform a particular job.[131] The majority concluded that since a global airline pilot constituted merely a single job among many that utilize the sisters' skills, the petitioners were not substantially limited in the major life activity of working.[132]

C. *Companion Cases*

Along with the *Sutton* decision, the Supreme Court decided two companion cases that will also shape future ADA litigation. In the first of these companion cases, *Murphy v. United Parcel Service, Inc.*,[133] the plaintiff suffered from high blood pressure.[134] Murphy's untreated blood pressure was 250/160, but medication prevented his hypertension from significantly limiting his major life activities.[135]

Murphy sought employment with United Parcel Service ("UPS") as a mechanic, a position that necessitated that he drive commercial motor vehicles.[136] To drive these vehicles, Murphy had to satisfy certain Department of Transportation regulations, one of which mandated "no current clinical diagnosis of high blood pressure likely to interfere with [the] ability to operate a commercial vehicle safely."[137] UPS mistakenly granted Murphy a Department of Transportation certification, even though he had high blood pressure.[138] When the employer discovered its error, Murphy was fired.[139]

---

[128] *Id.*
[129] *Id.*
[130] *Id.* at 491.
[131] 29 C.F.R. § 1630.2(j)(3)(i) (2000).
[132] *Sutton*, 527 U.S. at 493.
[133] Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999).
[134] *Id.* at 519.
[135] *Id.*
[136] *Id.*
[137] *Id.* (quoting 49 C.F.R. § 391.41(b)(6) (1998)).
[138] *Id.* at 520.
[139] *Id.*

Consequently, Murphy filed suit against UPS, alleging a violation of the ADA.[140] The U.S. District Court for the District of Kansas dismissed his claim and the Tenth Circuit affirmed.[141] The Supreme Court affirmed the lower courts' rulings based on its decision in *Sutton*.[142]

In the second case, *Albertson's, Inc. v. Kirkingburg*,[143] Kirkingburg worked for Albertson's, Inc. as a truck driver.[144] Kirkingburg had an uncorrectable condition, amblyopia, that resulted in visual acuity of 20/200 in his left eye.[145] In contrast, the federal vision requirement for commercial truck drivers was corrected visual acuity of 20/40 in each eye.[146] Kirkingburg was hired after a doctor mistakenly certified that Kirkingburg met the vision requirement.[147] He was fired two years later, however, when the error was discovered.[148] Kirkingburg brought suit alleging an ADA violation.[149] The Ninth Circuit rejected the employer's argument and concluded that Kirkingburg did have a disability.[150] The Supreme Court reversed the Ninth Circuit's decision, once again relying upon the *Sutton* case.[151] The Court concluded that Kirkingburg's brain had developed mechanisms to compensate for his visual impairments—thus, his own body mitigated his disability.[152]

Both *Murphy* and *Kirkingburg* further strengthen the opinion in *Sutton*. Unlike the relatively easy case of correctable myopia present in *Sutton*, these cases dealt with more well-accepted disabilities. The plaintiff in *Murphy* battled high blood pressure, a condition that can be life-threatening if left untreated. While most people can use medication to manage the condition, it bears the potential for deadly consequences—quite unlike the vision problems involved in *Sutton*. The *Kirkingburg* decision carries significant ramifications, as it extended the notion of mitigating measures to *internal* mitigation. Under the *Kirkingburg* holding, a person cannot be

---

[140] *Id.*
[141] *Id.*
[142] *Id.* at 521-25.
[143] Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999).
[144] *Id.* at 558.
[145] *Id.* at 559.
[146] *Id.* at 558-59 (citing 35 Fed. Reg. 6458, 6463 (1970); 57 Fed. Reg. 6793, 6794 (1992); and 49 C.F.R. § 391.41(b)(10) (1998)).
[147] *Id.* at 559.
[148] *Id.* at 559-60.
[149] *Id.*
[150] *Id.* at 561.
[151] *Id.* at 562-67.
[152] *Id.* at 565-66.

considered disabled under the ADA if his body somehow adapts to combat his otherwise disabling characteristic. The further narrowing of the ADA's coverage by virtue of these two companion cases renders the *Sutton* reasoning an even more entrenched and difficult hurdle for potential plaintiffs.

D. Assessment

Although the majority's opinion seems to make sense at face value, the Court loses sight of the ADA's goals. The ADA was intended to protect a discrete and insular minority—one that had suffered from discrimination in every aspect, economically and socially.[153] The Court's narrow interpretation is inconsistent with the Act's original remedial purpose.[154] Justice Stevens's dissent captured the significance of this action: "in order to be faithful to the remedial purpose of the Act, we should give it a generous, rather than a miserly, construction."[155] In fact, in its miserly construction, the Court ignored both the legislative history of the Act and traditional judicial deference to agency findings.[156]

The Court completely disregarded the legislative history of the Act, substituting its own definition of disability for that provided by the ADA's drafters. The dissenters noted that "[a]ll of the Reports . . . are replete with references to the understanding that the Act's protected class includes individuals with various medical conditions that ordinarily are perfectly 'correctable' with medication or treatment."[157] Additionally, each of the three agencies responsible for implementing the ADA—the EEOC, the Justice Department, and the Department of Transportation—had all determined that an individual should be evaluated for a disability in his or her uncorrected or unmitigated state.[158]

The Court has "traditionally accorded respect" when an agency has "played a pivotal role in setting [the statutory] machinery in motion."[159] In

---

[153] *See supra* notes 15-17 and accompanying text.

[154] *See supra* notes 15-17 and accompanying text.

[155] Sutton v. United Air Lines, Inc., 527 U.S. 471, 495 (1999) (Stevens, J., dissenting).

[156] *See* H.R. REP. NO. 101-485, pt. 2, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334; H.R. REP. NO. 101-485, pt. 3, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 451; S. REP. NO. 101-116, at 23 (1989); 29 C.F.R. pt. 1630, app. § 1630.2(j) (1998); 29 C.F.R. pt. 35, app. A, § 35.104 (1998); *see also* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

[157] *Sutton*, 527 U.S. at 501 (Stevens, J., dissenting) (citations omitted).

[158] *Id.*

[159] *Id.* (alteration in original) (quoting Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980)).

addition, when the "interpretations 'constitute a body of experience and informed judgment to which [the Court] may properly resort' for additional guidance," it should do so.[160] However, the majority's decision ignored this principle. A dangerous system exists when the Court not only ignores the legislative history and purpose of the Act, but also disregards the extensive findings of governmental agencies that Congress has entrusted with the authority to interpret the Act.

Why, then, did the Court decide to drastically limit the scope of the ADA? The decision was purely an economic one. The majority's rationale focused heavily on Congress's estimate of the number of disabled individuals (forty-three million).[161] The majority, however, proved unable to determine the exact source of this congressional estimate, but based its decision upon the estimate nonetheless. The dissent correctly stated, "[T]he Court has been cowed by respondent's . . . argument that viewing all individuals in their unmitigated state will lead to a tidal wave of lawsuits."[162] Commentators have also been quick to point out the practical impetus for the decision. For instance, one newsletter observed that the Court's failure to rule that mitigating measures should be taken into account "would cause the number of persons covered by the ADA to expand exponentially."[163] Thus, the Court, fearing that the ADA's wide coverage presented a danger of a litigation explosion, limited the scope of the Act.

Economics should not be a major concern of the Court. The Court's duty is to uphold the Act's true purpose and evaluate the law through the lens of this purpose. The Court ignored this duty in *Sutton*, at the expense of many disabled Americans. Perhaps the only remaining redress for those now-excluded handicapped individuals is to push for a statutory amendment to the ADA codifying the inclusive intent made so clear by its legislative history.

IV. IMPLICATIONS

Is all hope lost for plaintiffs challenging discrimination under the ADA? The question remains unanswered; however, an analysis of the *Sutton* decision provides potential avenues for success.

---

[160] *Id.* at 502 (Stevens, J., dissenting) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[161] *See id.* at 484.

[162] *Id.* at 508 (Stevens, J., dissenting).

[163] Kristen L. Brightmire, *The U.S. Supreme Court Has Spoken*, OKLA. EMP. L. LETTER, July 1999, at 2.

The decision will obviously change the manner in which employees and employers interact and contest their positions under the ADA. It is readily apparent that the trilogy of decisions by the Supreme Court "substantially narrow[s] the definition of disability and therefore the protections of the ADA."[164] Under these holdings, a plaintiff "may find himself or herself in a no-win situation."[165] That plaintiff, employing the use of a mitigating measure, "will be required to prove that the impairment, considered with the corrective measure, substantially limits a major life activity."[166] Conversely, the "plaintiff must [also] be careful not to establish that the impairment is so 'substantially limiting' that it [renders him unqualified for the position]."[167] The Tenth Circuit's decision captured this anomaly by stating:

> Plaintiffs cannot have it both ways. They are either disabled because their uncorrected vision substantially restricts their major [life] activity of seeing and, thus, they are not qualified individuals for a pilot position with United, or they are qualified for the position because their vision is correctable and does not substantially limit their major life activity of seeing.[168]

In addition to this obstacle, a plaintiff must show that he is unable to perform a wide range of jobs. The Court held that the plaintiffs in *Sutton* could not be substantially limited in the major life activity of working because they were qualified for jobs other than global airline pilot.[169] In order to succeed under the ADA, plaintiffs must show that they are unable to perform not only the job for which they are applying, but also a wide range of jobs for which they are qualified given their background, skills, and experience.[170] The inability to perform one specific job does not constitute a substantial limitation in the major life activity of working.[171]

It seems that plaintiffs would have to present evidence—possibly skills tests and vocational experts—to prove their limitations. Courts should be

---

[164] Chemerinsky, *supra* note 2, at 89.

[165] Susan E. Dallas, Sutton*: Use of Mitigating Measures to Determine Disability Under the ADA*, 28 COLO. LAWYER 59, 61 (1999).

[166] *Id.*

[167] *Id.*

[168] *Id.* (quoting Sutton v. United Air Lines, Inc., 130 F.3d 893, 903 (10th Cir. 1997), *aff'd*, 527 U.S. 471 (1999)).

[169] Sutton v. United Air Lines, Inc. 527 U.S. 471, 493 (1999).

[170] 29 C.F.R. § 1630.2(j)(3)(i) (2000).

[171] *Id.*

vigilant in limiting the scope of the range of jobs that can prevent an ADA claim; otherwise, plaintiffs' right to choose their profession or trade will be curtailed.

The federal circuits after *Sutton* will be forced to resolve some remaining questions not addressed by the decision. It appears that there are at least two ways plaintiffs can structure their arguments to fit under the post-*Sutton* ADA.

First, a plaintiff might show that the medications he or she is taking to control his disability produce side effects that interfere with the ability to work. This argument seems to be the most capable of minimizing the force of the *Sutton* decision. Medications often cause side effects, such as extreme drowsiness, headache, and nausea, and can have a cumulative effect that is damaging to the ability to engage in major life activities. In fact, *Sutton* provides guidance on this issue: if a person is mitigating an impairment, "the effects of those measures—both positive and negative—must be taken into account" when determining whether a disability exists.[172] Justice O'Connor recognized in *Sutton* that certain side effects can be very severe.[173] Using this reasoning, lower court decisions construing *Sutton* broadly would result in a larger class of plaintiffs who would be eligible to claim discrimination under the ADA.

Plaintiffs, however, will be required to demonstrate that the side effects of their corrective measure substantially limit a major life activity. The EEOC has outlined three factors that should be considered in determining what constitutes a substantial limitation of a major life activity: "(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he long-term impact of the impairment."[174] An interesting question for courts in the future is whether temporary side effects will be considered disabilities. The EEOC's technical assistance manual for the ADA states that "[t]emporary, non-chronic impairments that do not last for a long time and that have little or no long term impact usually are not disabilities."[175] The legislative history

---

[172] *Sutton*, 527 U.S. at 482.

[173] *Id.* at 484. O'Connor cited three examples of very severe side effects: (1) antipsychotic drugs that can cause neuroleptic malignant syndrome and painful seizures, (2) drugs for Parkinson's disease that can lead to liver damage, and (3) antiepileptic drugs with "serious negative side effects." *Id.* (citations omitted).

[174] 29 C.F.R. § 1630.2(j)(2) (2000).

[175] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § 2.2(a)(iii) (1992).

of the ADA, however, is conspicuously absent on this issue.[176] In addition, courts cannot seem to agree whether a temporary side effect can constitute a disability.[177] Plaintiffs should closely watch the courts for guidance on this decisive issue.

Second, a plaintiff could choose not to mitigate his disability. The Court in *Sutton* held that a "'disability' exists only where an impairment 'substantially limits' a major life activity, not where it 'might,' 'could' or 'would' be substantially limiting if mitigating measures were not taken."[178] In recognizing that a disability determination is an individualized inquiry that must be done in the individual's present state and not a potential or hypothetical state, the Court leaves open the option for a plaintiff to choose not to mitigate so that he may retain disabled status under the ADA. Arguably, this is in fact what the Court's decision will drive plaintiffs to do. For example, a person with bipolar disorder may chose not to take the recommended drug lithium because of its side effects such as weight gain. The choice between mitigating, which would result in no coverage by the ADA, and not mitigating, which would result in coverage, may present a difficult decision for some disabled individuals.

Relatedly, if a plaintiff chooses not to mitigate, can an employer question the appropriateness of the employee's failure to use the mitigating drug or device? It seems impossible that the Court would allow this action by employers. Employees would be required to consult their employers about treatment decisions, although most employers are ill-equipped to determine the risks associated with certain mitigation devices or the potential side effects from such mitigation. Furthermore, such employer meddling intrudes upon an individual's right of personal autonomy and the freedom to choose one's own medical care. Courts in the future should be sensitive to an individual's decision whether to mitigate or correct disabilities.

CONCLUSION

What can advocates for disabled employees do? It may be possible to dilute the limiting effects of *Sutton* in subsequent cases using the two

---

[176] Robert L. Burgdorf, Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 475-76 (1997).

[177] *Compare, e.g.*, Graaf v. N. Shore Univ. Hosp., 1 F. Supp. 2d 318, 321 (S.D.N.Y. 1998), *and* Stronkowski v. St. Vincent's Med. Ctr., Civ. No. 3:94CV2175 AHN, 1996 WL 684407, at *7 (D. Conn. Aug. 1, 1996), *with* Aldrich v. Boeing Co., 146 F.3d 1265, 1270 (10th Cir. 1998), *cert. denied*, 526 U.S. 1144 (1999).

[178] Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999).

arguments mentioned above. That seems a difficult task. It may be that the only means to address this issue is for Congress to amend the ADA. The trilogy of decisions, all 7-2 votes, forecloses the possibility of judicial modification in the near future. The need for balance between economic or other consequences (including the burdensome litigation that concerned both the ADA's advocates and critics alike) and the protection intended by the Act seems lost in *Sutton*. Congress may have to restore this balance by statutory amendment.

Has this pronouncement by the Supreme Court left the ADA with little clout in the workplace? Has it cost disabled persons their protection against employment discrimination in the workplace? These questions can only be answered as the lower courts begin to apply the *Sutton* decision, as the true impact and scope of *Sutton* will lie in its application. Whatever its final legacy, *Sutton* has certainly changed the face of the ADA's protections and removed the shield of legal protection from a large class of people.