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MUST EMPLOYERS PAY FOR VIAGRA? AN AMERICANS WITH DISABILITIES ACT ANALYSIS POST-*BRAGDON* AND *SUTTON*

Stephen T. Kaminski[*]

INTRODUCTION

Bob Dole promotes it. Comedians swear by it. The head of Bear Sterns donated $1 million of it to the poor.[1] After gaining approval from the United States Food and Drug Administration (FDA) in 1997,[2] Pfizer's orally ingested erectile dysfunction (ED) combatant, Viagra, immediately commanded the world's attention. While men blush contentedly at the sight of the expensive little blue pills, health maintenance organizations (HMOs), traditional insurance companies, and state Medicaid suppliers cringe. Considerations regarding coverage by insurance providers dominate Viagra-related debates in the health-care arena. In contradistinction, this article focuses on a Viagra-centered issue that has garnered significantly less attention to date. Legal action based on the core of this exposition, however, possesses the potential to impact greatly the fields of health care, employment, and disability discrimination law.

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[1]*See Financier Giving to Poor $1 Million Worth of Viagra*, CHI. TRIB., June 11, 1998, at 3.

[2]*See id.*

I discuss the likelihood of employer liability under the Americans with Disabilities Act (ADA)[3]for refusing to provide employees with insurance plans that cover Viagra. Making the assumption that non self-insured employers may optionally purchase Viagra coverage from outside insurers, this article focuses on whether employers must fill their employees' pockets with Pfizer's wonder-drug. I attempt to delineate the obstacle-ridden path that an employee must endure to successfully recover his Viagra costs pursuant to a disability discrimination-based lawsuit against an employer who refuses to provide the drug.

Section I of this exposition introduces basic topics needed to comprehend fully the issue at hand: ED; Viagra; typical insurer Viagra policies, including optional coverage programs; and the ADA generally, and its sections salient to this discussion specifically. Section II considers the statutory question that a court must address prior to commencing a disability discrimination analysis: Does an individual stricken with ED qualify as "disabled" under the ADA in light of the Supreme Court's recent decisions in *Bragdon v. Abbot* and in *Sutton v. United Air Lines*? Finally, assuming arguendo that ED sufferers are statutorily "disabled," Section III illustrates the remainder of the process and pitfalls that an ED-plagued man presumably will encounter pursuant to an ADA challenge against his employer who refuses to provide Viagra coverage.

THE BASICS

A proper analysis of whether the ADA, as interpreted by the Supreme Court, requires employers to provide Viagra coverage for their employees necessitates a basic understanding of ED and its frequent conqueror, Viagra. Further, a summary of the current status of legislative and judicial trends surrounding insurance companies' standard Viagra policies is important to this discussion since I assume throughout the course of this paper that non self-insured employers may purchase Viagra coverage from insurers under optional-rider provisions. This section introduces each of these topics and concludes

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[3] 42 U.S.C. §§ 12101-12213 (1994).

by outlining the history of the ADA and its Title I proscription against disability discrimination in the employment field.

An Erectile Dysfunction Primer

Generally, an erection occurs after sexual arousal, when a man's brain transmits a signal commanding the blood vessels within his male organ to relax.[4] Immediately thereafter blood enters rapidly, causing his male organ to swell, while simultaneously compressing outflow veins that restrict the exit of blood.[5] In sum, these events produce an erection.[6]

ED generally results from impairment to a man's arterial (blood flow) system or nervous system.[7] The commonly accepted definition of ED, propounded by the National Institutes of Health (NIH), however, broadly characterizes ED as the inability to attain or maintain an erection sufficient for intercourse, regardless of the precursor impairment.[8] Employing this definition, the NIH estimates that ten to thirty million men in the United States suffer from ED,[9] including approximately five percent of forty-year old men, and between fifteen and twenty-five percent of men at age sixty-five.[10] The prevalence of ED among American men results from a wide variety of precursor conditions, including prostate surgery, diabetes mellitus, hypertension, vascular disease, high cholesterol, drug use, neurogenic disorders, renal failure and dialysis, and smoking.[11] Each such condition increases a man's likelihood of contracting ED.[12]

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[4] *See generally Pfizer Canada: Erectile Dysfunction Resource Centre for Consumers, at* http://www.edfactscanada.com/SITE/consumers/under30/CN7-3.html (last visited September 7, 1999).

[5] *Id.*

[6] *See id.*

[7] *See Pfizer Canada: Erectile Dysfunction Resource Centre for Consumers, at* http://www.edfactscanada.com/SITE/consumers/under30/CN5-3.html (last visited September 7, 1999).

[8] *See National Institutes of Health Consensus Development Conference Statement (Dec. 7-9, 1992), at* http://text.nlm.nih.gov/nih/cdc/www/91txt.html (last visited Oct. 20, 1999) [hereinafter *Conference Statement*].

[9] *See id.*; *see also Viagra Product Information: Erectile Dysfunction: It's Common? And Treatable, at* http://www.viagra.com/consumer/3a.htm (last visited Sept. 21, 1999).

[10] While the percentage of ED-positive men increases progressively with age, it is not an inevitable consequence of aging. *See Conference Statement, supra* note 8.

[11] Other factors include: hypogonadism in association with a number of endocrinologic conditions, low levels of high density lipoprotein, Peyronie's disease, priapism, depression,

While modern scientists now proffer technical explanations of ED's underlying sources, the anguish suffered by ED victims and resultant attempts at a "quick fix" reach back to antiquity. For thousands of years, philosophers, naturalists, bishops, and crackpots advocated miracle cures, from dried black ants with olive oil to melted fat from camel humps to concoctions including crushed rubies, gold dust, and whale vomit.[13] In the mid-1900's, sexual aids such as acrylic implants and vacuum-pump technology appeared.[14] Finally, in 1995, the FDA approved the first prescription anti-ED drug – Upjohn's Caverject®, which requires an interpenile injection.[15] Vivus' MUSE, administered via intraurethral insertion of a micropellet, and surgical procedures such as penile implants and vascular surgery also pre-dated Viagra.[16] But these often uncomfortable, complicated products and expensive, intimidating procedures left the market door wide open for an orally ingested drug that would provide similar results.

Viagra: The Wonder-Drug

As early as 1992, Pfizer began to develop an oral drug, sildenafil, for the treatment of angina – a chest pain afflicting heart patients.[17] While the drug failed to alleviate significantly angina patients' suffering, those stricken with ED reported sustained erections while consuming sildenafil.[18] These reports prompted Pfizer to investigate the effects resulting from ED victims' ingestion of sildenafil, now commonly known as Viagra.[19] After Pfizer's lengthy clinical studies and a six-

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alcohol ingestion, lack of sexual knowledge, poor sexual techniques, inadequate or deteriorated interpersonal relationships, and many chronic diseases. *See id.*

[12]*Id.*

[13]*See* Joseph Hooper, *Sex Science Timeline*, MEN'S JOURNAL (HEALTH AND FITNESS: SEX SPECIAL: BEYOND VIAGRA)(August, 1998), *available at* http://www.usrf.org./breakingnews/timeline.html.

[14]*See id.*

[15]*See id.*

[16]Other pre-Viagra therapies include: androgen replacement therapy for patients with testicular failure and psychotherapy as a remedy for primarily non-organic ED. *See Conference Statement*, *supra* note 8.

[17]*See* Hooper, *supra* note 13.

[18]*See id.*

[19]*See id.*

month priority review,[20]the FDA approved Viagra on March 27, 1997.[21]

Viagra, an orally ingested tablet, affects a man's response to sexual stimulation by increasing blood flow to the male organ, resulting in a greater likelihood of producing an erection.[22] Despite notable side effects such as heart problems, blurred vision, urinary tract infections, and reports of at least 130 deaths linked to Viagra in its first two years on the market,[23] the clamoring for Pfizer's non-painful sexual stimulant incited physicians to write more than ten million Viagra prescriptions for approximately five million men in less than two and a half years. [24] While this article focuses on Viagra coverage, a similar analysis will

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[20]*See* THE PINK SHEET, VOL. 60, ISS. 13 (March 30, 1998) [hereinafter PINK SHEET].

[21]Pfizer's clinical trials involved the administration of Viagra to more than 3,000 patients, aged 19 to 87 years, with ED of various etiologies, for a mean of five years. *See Pfizer Viagra® (sildenafil citrate), the FDA Approved Impotence Pill, available at* http://www.viagra.com/hcp/pro_pack_insert.htm (last visited Sept. 12, 1999) [hereinafter Package Insert]. The clinical tests report: in a study of 268 diabetes patients, 57% of Viagra patients reported improved erections compared to 10% of patients on a placebo, with 48% of intercourse attempts successful versus 12% on a placebo; in a study of 178 spinal cord patients, 83% of Viagra patients reported improved erections compared to 12% of patients on a placebo, with 59% of intercourse attempts successful versus 13% on a placebo; in a study of 179 patients with psychogenic etiology of dysfunction, 84% of Viagra patients reported improved erections compared to 26% on a placebo, with 70% of intercourse attempts successful versus 29% on a placebo; and in a study of patients that had undergone a radial prostatectomy, 43% of Viagra patients reported improved erections compared to 15% on a placebo *See* PINK SHEET, *supra* note 20.

[22]Pfizer reports Viagra's precise clinical mechanism of action as follows: "[T]he physiologic mechanism of erection of the penis involves release of nitric oxide (NO) in the corpus cavernosum during sexual stimulation. NO then activates the enzyme guanylate cyclase, which results in increased levels of cyclic guanosine mono phosphate (cGMP), producing smooth muscle relaxation in the corpus cavernosum and allowing inflow of blood. Sildenafil has no direct relaxant effect on isolated human corpus cavernosum, but enhances the effect of NO by inhibiting phosphodiesterase type 5 (PDE5), which is responsible for degradation of cGMP in the corpus cavernosum. When sexual stimulation causes local release of NO, inhibition of PDE5 by sildenafil causes increased levels of cGMP in the corpus cavernosum, resulting in smooth muscle relaxation and inflow of blood to the corpus cavernosum." *See* Package Insert, *supra* note 21.

[23]Viagra is potentially fatal to men taking nitrate-based heart medication. *See e.g.*, *Vasomax May Deflate Interest in Viagra: Impotence Drug Offers Quick Results*, WASH. TIMES, Jan. 6, 1999, at A1. After consultation with the FDA, on November 24, 1998, the FDA announced that Pfizer updated its Viagra labels and package inserts to include warnings of potential cardiac risk to users with preexisting cardiovascular disease. *See Pfizer Updates Viagra Warning*, ANDREWS PHARMACEUTICAL LITIG. REP., December 1998, at 15.

[24]*See Viagra Product Information: Erectile Dysfunction: It's Common and Treatable, available at* http://www.viagra.com/consumer/3a.htm (last visited Sept. 21, 1999).

presumably apply to competitors' upcoming products, inspired by projected annual Viagra sales in the billions.[25] Potential competitors to Pfizer's Viagra include: Vasomax,[26]licensed to Schering-Plough by Zonagen; Uprima, the joint project of Takeda Chemical Industries and Abbot Laboratories; and IC351, a collaboration of Eli Lilly and the ICOS Corporation.[27]

Viagra Coverage Policies

This article centers on whether employers must provide Viagra for its employees under the ADA via self-insurance or by way of payment to outside insurers. Because I assume that non self-insured employers may optionally purchase Viagra coverage from insurers, this discussion necessitates an introduction to the current status of outside insurers' Viagra policies. I also discuss the applicable political and legal trends that, while still in their infancy, may soon bear on the issue at hand.

Typical Outside Insurer Viagra Policies

Insurers widely disagree on the extent of Viagra coverage to provide. On one hand, insurers such as Prudential Insurance Company of America and Humana, Inc. flatly refuse to cover Viagra because of safety concerns and Viagra-related deaths.[28] On the other hand, several insurers cover anywhere from four to eight pills per month for medically qualified members.[29] Between these extremes, several of the United States' largest insurers offer employers the option to purchase

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[25]*See* Hazel Glenn Beh, *Sex, Sexual Pleasure, and Reproduction: Health Insurers Don't Want You to Do Those Nasty Things*, 13 WIS. WOMEN'S L.J. 119, 141 (1998).

[26]As of August 10, 1999, the FDA temporarily suspended clinical human trials of Vasomax pursuant to Zonagen's two-year rat study, which indicated a degree of brown fat tissue higher than in controls. The FDA allowed Zonagen to continue studies seeking to demonstrate that the rat findings totally relate to the host animal and lack relevance to humans. The clinical trials are expected to be delayed for approximately six months. *See Zonagen Crashes as FDA Terminates Phentolamine Studies*, MARKETLETTER (August 19, 1999).

[27]*See id.*

[28]*See More Men Suing to Get Health Plans to Cover Viagra*, SEATTLE TIMES, March 21, 1999, at A11.

[29]Insurers' Viagra coverage plans are in flux; therefore, the following figures are subject to change: As of June 20, 1998, United Healthcare provides eight pills per month, CignaHealth covers six pills per month, and Blue Cross and Blue Shield of Rochester, NY, pays for six pills per month for patients suffering from ED for more than six months. *See Kaiser Permanente Latest Provider to Reject Viagra Coverage*, AUGUSTA CHRON., June 20, 1998, at A11.

riders for Viagra coverage.[30] The optional-rider format closely imitates programs developed and still utilized by many insurers for contraceptive coverage.[31] The program offered by Aetna U.S. Healthcare, which covers nearly 14 million people, aptly illustrates a typical optional-rider plan for Viagra coverage.[32] Aetna's policy offers Viagra coverage only to employers of fifty or more workers and only at an additional cost to the employer.[33] Increases in employer premiums depend on the quantity of pills an employer agrees to provide and the level of employee co-pay.[34] For example, in addition to its standard plan, an Aetna-insured employer with one hundred workers must spend $1,884 per year to cover six pills every thirty-four days, if each benefiting employee pays one half of the prescription cost.[35] Without an employee co-payment, the cost for the same employer to cover twelve pills every thirty-four days rises to $7,080 annually.[36]

Legislative and Judicial Trends Affecting Outside Insurer Viagra Policies

This article's salience hinges in part on the continued existence of optional-rider programs available to employers from outside insurers for Viagra coverage. If legislative or judicial action mandates insurers to provide Viagra coverage, non self-insuring employers who provide employees with health insurance necessarily will cover Viagra, mooting this article's significance to all but self-insured employers. Currently, many outside insurers offer optional-rider Viagra programs.[37] At least four recent developments, however, suggest that momentum is building toward requiring outside insurers to cover Viagra: the erosion of contraceptive optional-rider programs, California's dismissal of an optional-rider program covering Viagra,

[30]For example, Anthem Blue Cross & Blue Shield provides Viagra coverage only to employers with more than forty-nine employees at an additional cost to the employer via an optional policy rider. *See* BUS. INS., Aug. 9, 1999, at 20.

[31]*See Aetna to Allow Coverage for Viagra*, AP ONLINE, June 23, 1998.

[32]*See id.*

[33]*See* Diane Levick, *Aetna Sets Add-On Fees for Viagra Coverage; Prudential Cites Safety in Refusing Coverage*, HARTFORD COURANT, July 3, 1998, at D1.

[34]*See id.*

[35]*See id.* Viagra typically costs $10 per pill retail. *See* Diane Levick, *Insurers Seeking Riders to Cover Viagra Costs*, HARTFORD COURANT, July 29, 1998, at D2.

[36]*See* Levick, *supra* note 33.

[37]*See id.*

results of the first Viagra-specific judicial opinion, and Medicaid's Viagra coverage mandate. While these events certainly fail to assure the demise of optional-rider Viagra coverage policies, I briefly outline each development to set this article into its proper context.

Contraceptive Coverage

At first glance, the endurance of long-standing oral contraceptive optional-rider plans offered by many insurers suggests that similar Viagra programs are sound. In October 1998, however, a federal employee contraception coverage amendment attached to a $13.4 billion spending bill successfully passed through Congress and the White House.[38] This law requires health plans providing benefits to federal employees to provide five types of contraceptives to federally employed civilian women of childbearing age, if the plans also cover prescription drugs.[39] While primarily symbolic and born only after a bill seeking to reimburse fully all women for FDA approved contraceptives failed,[40] the federal employee contraception coverage amendment suggests a weakening in support for optional-rider contraception coverage programs.

California's Dismissal of an Optional-Rider Program

State regulators possess the power to dismiss optional-rider programs and mandate insurers to cover Viagra.[41] On December 31, 1998, the California Department of Corporations (DOC), which regulates HMOs in California, dismissed a Viagra rider option offered by Kaiser Permanente.[42] This move required the nation's largest HMO[43] to cover

[38]*See, e.g.*, Stephanie Barr, *Birth Control, Not Money, Was Key in One Budget Battle*, WASH. POST, Oct. 19, 1998, at A19.

[39]*See id.*

[40]*See, e.g.*, Jan Ziegler, *The Gender Gap: Health Care's Next Frontier*, BUS. & HEALTH, Nov. 1998, at 29.

[41]*See State Issues Decision on Kaiser Request to Exclude Prescription Benefits for Sexual Dysfunction*, STATE OF CAL. DEPT. OF CORP. NEWS RELEASE 98-24, December 31, 1998, *available at* http://www.corp.ca.gov/pressrel/nr9824.htm.

[42]Additionally, Kaiser agreed to pay the state of California $250,000 to help cover the department's investigation costs; agreed to resolve currently pending grievances; and agreed to inform each of its members that received a Viagra prescription, from the date of FDA approval until Kaiser added Viagra to its formulary, about Kaiser's current policy and to resolve any grievances that result. *See State Closes Investigation of Kaiser's Prescription Practices*, STATE

Viagra in California.[44] California DOC Commissioner Dale Bonner[45] determined that Kaiser's optional-rider program for Viagra limited access to a "medically necessary" drug.[46] Generally indicating treatment recognized as appropriate in reference to community standards or to applicable medical beliefs without rising to the level of "essential," most states – including California – require insurers to cover "medically necessary" drugs and treatments.[47] Following in California's footsteps, New York and Connecticut reversed Kaiser's Viagra optional-rider policy.[48] On the other hand, twelve states and the District of Columbia approved the program.[49]

The First Viagra-Specific Judicial Opinion

Subsequent to initial Viagra coverage decisions by insurers, plaintiffs' lawyers, unsatiated ED victims, and even a federal judge spawned a barrage of lawsuits attacking insurers who announced policies refusing to cover Viagra or covering "too few" pills per month for ED sufferers' "needs."[50] In *Sibley-Schreiber v. Oxford Health Plans*, the Eastern

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OF CAL. DEPT. OF CORP. NEWS RELEASE 98-23, December 28, 1998, *available at* http://www.corp.ca.gov/pressrel/nr9823.htm.

[43]Kaiser Permanente covers 9.1 million people in total and 5.7 million California residents. *See* Eileen Glanton, *Biggest HMO Won't Cover Viagra, Says It Isn't a Medical Necessity*, BUFF. NEWS, June 20, 1998, at A12; Rhonda L. Rundle, *Kaiser Sees Higher Rates in Wake of Viagra Ruling*, WALL ST. J., January 4, 1999, at A14.

[44]The California DOC is considering Viagra coverage exclusion requests from Blue Cross of California, Pacificare of California, CIGNA HealthCare, Health Net, Aetna Inc., and Greater Pacific. *See California Says Kaiser Can't Cover Viagra Under Special Rider*, MANAGED CARE WEEK, January 11, 1999 [hereinafter MANAGED CARE].

[45]Dale Bonner relinquished his position as California DOC Commissioner on December 31, 1998. *See California Department of Corporations, A Message from the Acting Commissioner* (visited Sept. 23, 1999), *at* http://www.corp.ca.gov/aboutus.htm.

[46]The California DOC mandates that HMOs such as Kaiser, in addition to covering drugs on its formulary that are prescribed by physicians, must pay for non-formulary drugs that are "medically necessary." *See State Closes Investigation of Kaiser's Prescription Practices*, *supra* note 42. The California DOC determined that Kaiser could require a 50% co-payment for Viagra. *See* MANAGED CARE, *supra* note 44.

[47]*See* Beh, *supra* note 25, at 133.

[48]*See id.*

[49]*See* Jan Greene, *Al Wants More Hair, Less Fat, and a Better Sex Life and He Wants His Health Plan to Pay for It*, HOSPITALS & HEALTH NETWORKS, March 1, 1999, at 36.

[50]*See, e.g.*, Harrow v. Prudential Insurance Co. of America, No. 98-2464 (JWH) (D. N.J. filed May 21, 1998); Scholl v. QualMed Inc., No. 98-4968 (E.D. Pa. filed Sept. 16, 1998) (class-action suit filed by a federal bankruptcy judge in Philadelphia on behalf of all federal employees seeking to force his HMO, QualMed, to provide more than four pills per month);

District of New York - the first and only court to address the issue to date - denied defendant Oxford's motion to dismiss the class-action plaintiffs' complaint.[51] Oxford alleged the plaintiffs failed to exhaust the insurer's self-designated administrative procedures before filing suit.[52] The court pointed to § 503(2) of the Employee Retirement Income Security Act (ERISA), stating: "Exhaustion of the statutorily required administrative process is not always required. Most notably, exhaustion is excused where claimants make a clear and positive showing that pursuing available administrative remedies would be futile."[53] Because Oxford clearly communicated its "no exceptions" Viagra policy to the plaintiffs,[54] Judge Dearie determined the plaintiffs' failure to exhaust Oxford's administrative process met ERISA's "futility" exception.[55] Consequently, the court denied Oxford's motion to dismiss.[56] While it did not reach the salient issue of whether Oxford's policy wrongfully denied plaintiffs of Viagra coverage under ERISA,[57] the court's notable hostility toward the insurer at least indicates its willingness to hear Viagra coverage cases.

Medicaid Coverage of Viagra

Since July 2, 1998, state Medicaid programs[58] have been required to cover Viagra to retain eligibility for certain Medicaid rebates.[59] The

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Hittle v. Independence Blue Cross, No. 98-4969 (E.D. Pa. filed Sept. 17, 1998); Lentini v. Humana Inc., No 98-5896 Div. H, 13th Cir, (Hillsborough Co., Fla. filed Aug. 5, 1998).

[51]Sibley-Schreiber v. Oxford Health Plans (N.Y.), Inc., 1999 WL 669396 (E.D. N.Y. 1999).

[52]*See id.*

[53]*See* Kennedy v. Empire Blue Cross & Blue Shield, 989 F.2d 588, 594 (2d Cir. 1993), *cited* in Sibley-Schreiber, *supra* note 51, at *6.

[54]On May 1, 1998, Oxford stopped paying for Viagra until it announced its final policy; on June 15, 1998, Oxford announced its final policy: insurer payment for six Viagra pills per month, regardless of the number of pills prescribed by a physician. *See* Sibley-Schreiber, *supra* note 51, at *1.

[55]*See id.*

[56]Defendant filed a motion to dismiss plaintiffs' complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See id.* at *4.

[57]Plaintiffs claim that defendants denied them benefits in violation of the ERISA provisions codified at 29 U.S.C. § 1132(a)(1)(B) (1994) and 29 U.S.C. § 1104 (1994). *See id.* at *1.

[58]Medicaid is a public insurance program, with responsibilities shared by the federal government and states. It provides coverage for 36 million poor and disabled Americans, including 4 million men. *See, e.g., Health Care Financing Administration: Medicaid, at* http://www.hcfa.gov/medicaid (last visited Sept. 10, 2000).

Health Care Financing Administration (HCFA) – the federal agency within the U.S. Department of Health and Human Services (HHS) responsible for overseeing Medicaid – determined federal law requires Medicaid providers to purchase Viagra.[60] Pursuant to the Omnibus Budget Reconciliation Act of 1990,[61] which established the Social Security Act's drug rebate program,[62] state Medicaid programs must cover all FDA approved prescription drugs for their medically accepted indications, which are distributed by manufacturers who have entered into drug rebate agreements.[63] Specific drugs excepted from this mandate include drugs utilized for anorexia, for weight loss or weight gain, for cosmetic purposes or hair growth, for the symptomatic relief of cough and colds, and for the promotion of fertility or smoking cessation.[64] Notably, the HCFA determined Viagra fails to constitute a fertility-promoting drug.[65] Prompted by Congress, however, the HCFA urged vigorous Viagra-use monitoring in a request sent to states because the Secretary, upon determination that a drug is subject to clinical abuse or inappropriate use, may then properly add that drug to the list of exceptions.[66]

The Americans with Disabilities Act

Prior to 1990, only the Rehabilitation Act of 1973[67] and the Fair Housing Act as amended in 1988[68] provided federal statutory protection

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[59]For example, Wisconsin would jeopardize $31 million per year had it not approved coverage. Wisconsin estimated the cost of providing Medicaid coverage of Viagra at $250,000 per year. *See Medicaid Viagra Cost Estimates Overstated at Least 10-Fold – Pfizer*, THE PINK SHEET VOL. 60, ISS. 44 (Nov. 2, 1998).

[60]*See id.*

[61]Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388

[62]Social Security Act (Old Age Pension Act) of 1935 § 1927, 42 U.S.C. § 1396r-8 (1994).

[63]*See* 42 U.S.C. § 1396r-8 (1994).

[64]States may also exclude: prescription vitamins and mineral products (except prenatal vitamins and fluoride preparations); nonprescription drugs; barbituates; benzodiazepines; and drugs on which a manufacturer conditions sales on a requirement that associated tests or monitoring devices be purchased exclusively from the manufacturer or its designee. *See* 42 U.S.C. § 1396r-8(d)(2) (1994).

[65]*See* Letter from Sally K. Richardson, Director, *Center for Medicaid and State Operations*, to State Medicaid Directors (Nov. 30, 1998), *available at* http://www.hcfa.gov/medicaid/smd111308.htm. *See also Everything Into the Budget Pool*, PHARMACEUTICAL EXECUTIVE, December 1, 1998, at 36.

[66]*See* 42 U.S.C. § 1396r-8(d)(3) (1994).

[67]29 U.S.C. §§ 701-796 (1994).

to disabled individuals. Neither statute, however, comprehensively mandates the elimination of discrimination against individuals with disabilities. The Rehabilitation Act only proscribes discrimination by federal agencies and federal assistance recipients.[69] The Fair Housing Act only forbids discrimination in the realm of housing.[70] This dearth of protection motivated Congress to investigate thoroughly the status of disability discrimination in the United States. In 1989, the Senatorial Committee on Labor and Human Resources found that "discrimination against some 43 million Americans with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, institutionalization, health services, recreation, voting, and access to public services."[71] Further, the Committee determined that "unlike individuals who have experienced discrimination on the basis of race, color, national origin, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination."[72]

Pursuant to these findings, Congress acknowledged the need for an exhaustive federal proscription on discrimination against disabled individuals,[73] and thus, the Americans with Disabilities Act of 1990 (ADA) was born.[74] Designed to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" by providing "clear, strong, consistent, enforceable standards,"[75]the ADA proffers, *inter alia*, sweeping protection to disabled individuals from employment discrimination.[76] Congress directed the Equal Employment Opportunity Commission (EEOC) to administer and provide guidance in the interpretation of the ADA's employment provisions.[77]

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[68]42 U.S.C. §§ 3601-3631 (1994).

[69]*See* 29 U.S.C. §§ 701-796 (1994).

[70]*See* Susan M. Gibson, *The Americans with Disabilities Act Protects Individuals with a History of Cancer from Employment Discrimination: Myth or Reality*, 16 HOFSTRA LAB. L.J. 167, 170 (1998).

[71]42 U.S.C. § 12101(a) (1994).

[72]*Id.*

[73]*See* S. Rep. No. 101-116, at 5 (1989).

[74]42 U.S.C. §§ 12101-12213 (1994).

[75]42 U.S.C. § 12101(b) (1994).

[76]*See id.*

[77]*See* 42 U.S.C. § 12117 (1994).

Title I of the ADA provides the general rule against disability discrimination by employers: "No covered entity shall discriminate against a qualified individual[78] with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[79] Statutory terminology, legislative history, implementing regulations, and case law interpretation all undeniably indicate that an employee's fringe benefits, including employer-provided health benefits, are among the "terms, conditions, and privileges of employment."[80] The ADA prohibits employers from discriminating on the basis of disability in health insurance provisions provided to their employees, both directly and indirectly.[81] That is, the ADA not only bars self-insurers from discriminating against disabled employees, but also prohibits employers from participating in contractual or other relationships with

[78] "Qualified individual" describes "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *See* 42 U.S.C. § 12111(8) (1994). Thus, a person with a disability is statutorily "qualified" if he maintains the requisite skills, experience, and education for a job he holds or desires and can perform the essential functions of that job with or without reasonable accommodation. *See* Weiler v. Household Finance Corporation, 101 F.3d 519, 525 (7th Cir. 1996). Notwithstanding certain positions in the pornography industry, an ED-stricken individual presumably can perform the essential functions of his job with or without reasonable accommodation, such as Viagra.

[79] 42 U.S.C. § 12112(a) (1994).

[80] *See, e.g.*, 42 U.S.C. §§ 12101(a)(3), 12101(a)(5), 12112(a), 12112(b)(2) (1994) (the term "discriminate" includes discrimination via a relationship with an organization providing fringe benefits to an employee of the covered entity), 12112(b)(4) (1994); H.R. REP. NO. 485(II), at 59 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 341 ("[E]mployers may not deny health insurance coverage ... to an individual based on the person's ... disability."); H.R. REP. No 485(III), at 71 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 491; 29 C.F.R. § 1630.4(f) (1998); 29 C.F.R. § 1625.10(b) (1998); *EEOC: Interim Guidance on Application of ADA to Health Insurance*, DAILY LAB. REP. (BNA) No. 724, at 405:7115 (1993). [hereinafter Interim Guidance] ("[I]t is unlawful for an employer to discriminate on the basis of disability against ... [an] individual with a disability in regard to fringe benefits available by virtue of employment .... [H]ealth insurance plans provided by an employer to its employees, are a fringe benefit available by virtue of employment."); Gonzales v. Garner Food Services, Inc., 89 F.3d 1523, 1526 (11th Cir. 1996) ("It is ... undisputed that fringe-benefits, such as employer-provided health benefits, are one set of the 'terms conditions, and privileges of employment' protected from unlawful discrimination under the ADA."); Atkinson v. Wiley Sanders Truck Lines, 45 F.Supp.2d 1288, 1293-94 (M.D. Ala. 1998) ("[T]he type of fringe benefits which the ADA intended to protect from discrimination are privileges such as health ... benefits ....").

[81] *See* 42 U.S.C. § 12112(b)(2) (1994); 29 C.F.R. § 1630.6(a) (1998).

entities such as HMOs or traditional insurers that discriminate against an employer's own disabled employees.[82] These provisions apply to employers engaged in an industry affecting commerce that have fifteen or more employees.[83]

ARE ED SUFFERERS "DISABLED" UNDER THE ADA?

Before embarking on a detailed analysis of whether an employer's Viagra policy[84] discriminates against an ED-stricken employee, a court entertaining this issue must first determine whether a man with ED qualifies as "disabled" under the ADA. Overcoming this initial obstacle involves entering the core of two controversial statutory interpretation debates: (1) determining whether reproduction constitutes a "major life activity" under the ADA, and (2) determining the proper role of mitigating measures in deciding whether a person is "substantially limited" in a "major life activity." The United States Supreme Court recently tackled each debate, in *Bragdon v. Abbot*[85]and in *Sutton v. United Air Lines,*[86]respectively. After delineating the ADA's "disability" status requirements, this section analyzes an ED sufferer's prospects of qualifying as a "disabled" individual under the ADA in light of the Bragdon and Sutton decisions.

The Statutory Definition of "Disabled"

The ADA defines 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 having such an impairment; or

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[82]*See id.*

[83]*See* 42 U.S.C. § 12111(5)(A) (1994). Between the date that the employment provision of the ADA went into effect – July 26, 1992, and July 25, 1994, the statute applied to employers with more than 25 workers. *See* 20 C.F.R. § 1630.2(c) (1998).

[84]This analysis applies to claims against employers who either refuse to pay for an employee's Viagra prescription or allegedly do not provide "enough" Viagra.

[85]Bragdon v. Abbot, 524 U.S 624 (1998).

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

(C) being regarded as having such impairment.[87]

ADA disability definitions (B) and (C) necessarily incorporate definition (A). That is, the "such an impairment" language of definitions (B) and (C) comprises "impairments" that "substantially limit" one or more "major life activities," notwithstanding whether an individual actually possesses that condition.[88] Therefore, to properly determine whether a currently ED-stricken individual qualifies as statutorily "disabled," this article need only investigate ADA disability definition (A). Certainly, however, upon judicial determination that ED meets the requirements of definition (A), an individual not currently afflicted with ED, but either having a record of ED[89] or being regarded as having ED,[90] may qualify as "disabled" under ADA disability definitions (B) and (C), respectively.

Bragdon v. Abbot

The Supreme Court's 1998 decision in *Bragdon v. Abbot* directly impacts the analysis of whether ED constitutes an ADA-defined "disability" on two accounts. First, the Supreme Court examined ADA disability definition (A) and promulgated a three-prong test to determine whether an individual suffering from a given condition

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[87] 42 U.S.C. § 12102(2) (1994).

[88] *See id.*

[89] An individual maintaining "a record of having such an impairment" generally either once possessed or once had been misclassified as possessing a mental or physical impairment that substantially limits one or more major life activities. *See* 29 C.F.R. §1630.2(k) (1998); 45 C.F.R. § 84.3 (j)(2)(iii) (1998). *See also* Colwell v. Suffolk County Police Department, 158 F.3d 635, 643 (2d Cir. 1998) (referring to the EEOC Technical Assistance Manual for the ADA, which states that Section (B) of the disability definition is satisfied "if a record relied on by an employer indicates that the individual has or has had a substantially limiting impairment; the impairment indicated in the record must be an impairment that would substantially limit one or more of the individual's major life activities.").

[90] An individual "being regarded as having such impairment" either: (A) possesses a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; or (B) possesses a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment. *See* 29 C.F.R. § 1630.2(l) (1998); 45 C.F.R. § 84.3 (j)(2)(iv) (1998). *See also* Ellis v. Mohenis Services Inc., 1998 WL 564478, at *4 (E.D. Pa. Aug. 24, 1998) (stating that a court must decide whether the defendants regarded plaintiff as having an impairment, and whether the impairment, as perceived by the defendants, would have substantially limited one or more of his life activities).

qualifies as statutorily "disabled."[91] Second, the Court concluded that reproduction satisfies the "major life activity" prong of the three-part test, and further suggested that the sexual dynamics surrounding reproduction may also meet this statutory limitation.[92] After discussing the background and holding of *Bragdon, Bragdon's* three "disability" prerequisites from an ED sufferer's perspective will be explored.

In 1994, Sidney Abbot sought dental care at the office of Dr. Randon Bragdon.[93] On a patient registration form Abbot indicated her status as human immunodeficiency virus (HIV) positive but asymptomatic.[94] While conducting a routine dental examination Bragdon noted that Abbot needed a cavity filled.[95] Pursuant to his infectious disease policy, Bragdon offered to treat Abbot at a hospital, but refused to perform the procedure in his office.[96] Bragdon volunteered to charge her no more than his customary fee for the filling; however, responsibility for hospital expenses rested on Abbot.[97] Abbot declined Bragdon's proposition and filed suit in federal court under the ADA.[98] Abbot claimed she qualified as statutorily "disabled" under the ADA because her HIV infection affected her blood and reproductive systems.[99] Interpreting ADA disability definition (A), the United States District Court for the District of Maine held: (1) an HIV infection constitutes a "physical impairment;" (2) reproduction qualifies as a "major life activity;" and (3) Abbot's ability to reproduce was "substantially limited."[100] Consequently, according to the federal trial court, Abbot qualified as "disabled" under the ADA.[101] The United States Court of Appeals for the First Circuit affirmed.[102]

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[91] *See Bragdon*, 524 U.S. at 624.
[92] *See id.* at 637-38.
[93] *See id.* at 628.
[94] *See id.*
[95] *See id.*
[96] *See Bragdon*, 524 U.S. at 629.
[97] *See id.*
[98] *See id.*
[99] *See id.* at 631.
[100] *See* Abbot v. Bragdon, 912 F.Supp. 580, 585-86 (D. Me. 1995).
[101] *See id.*
[102] *See* Abbot v. Bragdon, 107 F.3d 934 (1st Cir. 1997).

The United States Supreme Court affirmed the First Circuit's holding an HIV infection constitutes an ADA disability.[103] Justice Kennedy, writing for the majority, analyzed definition (A) of disability under the ADA in three distinct steps, asking:

(1) whether the respondent's HIV infection was a physical impairment;

(2) whether the life activity that the respondent claims is limited constitutes a major life activity; and

(3) whether the impairment substantially limited the major life activity.[104]

In construing this portion of the ADA, Justice Kennedy recognized the ADA's disability definition is drawn almost verbatim from the definition of "handicapped individual" included in the Rehabilitation Act of 1973[105]and from the definition of "handicap" contained in the Fair Housing Amendments Act of 1988.[106] Congress also adopted a statutory provision in the ADA commanding: "Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 or the regulations issued by federal agencies pursuant to such title."[107] Therefore, throughout his discussion of "physical or mental impairment" and "major life activity," Justice Kennedy refers to regulations first issued by the Department of Health, Education, and Welfare (HEW) in 1977.[108] These regulations appear unaltered in the current Rehabilitation Act

[103]The Supreme Court remanded the case for review on the issue of "whether Bragdon was warranted in his judgment that the performance of certain invasive procedures on a patient in his office would have posed a direct threat to the health or safety of others." *See Bragdon*, 524 U.S. at 648.

[104]*See id.* at 631.

[105]*See* 29 U.S.C. § 706(8)(B) (1994).

[106]*See* 42 U.S.C. § 3602(h)(1) (1994).

[107]*Bragdon*, 524 U.S. at 632, *citing* 42 U.S.C. § 12201(a) (1994).

[108]*See id.*

regulations issued by the HHS and in the EEOC's current regulations to implement the equal employment provisions of the ADA.[109]

Physical or Mental Impairment

The first step in a disability determination under the ADA entails a "physical or mental impairment" analysis.[110] Embracing the HEW regulations implementing the Rehabilitation Act, the Supreme Court in *Bragdon* defined "physical or mental impairment" under the ADA as:[111]

> (A) any 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
>
> (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[112]

After a lengthy discussion of the medical consequences of HIV infection, the majority in *Bragdon* concluded that HIV qualifies as a physiological disorder detrimentally affecting the infected person's

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[109] 29 C.F.R. §§ 1630.1 - 1630.16 (1998).

[110] *Bragdon*, 524 U.S. at 632.

[111] Concerned that any specific enumeration might lack comprehensiveness, the HEW decided against including a list of disorders constituting physical or mental impairments in its Rehabilitation Act regulations. The commentary accompanying the applicable regulations, however, contains a representative list of disorders and conditions constituting physical impairments, including "such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, tuberculosis, drug addiction and alcoholism." *See* 42 Fed. Reg. 22685 (1977), *reprinted in* 45 C.F.R. pt. 84, App. A, p. 334 (1999).

[112] 45 C.F.R. § 84.3(j)(2)(i) (1997) (emphasis added).

hemic and lymphatic systems.[113] Therefore, the court holding placed HIV infection under the rubric of a statutory "physical impairment."[114]

ED as a Physical Impairment

While it did not directly address whether ED constitutes an ADA "impairment," the Supreme Court in *Bragdon* established that any physiological disorder or condition "affecting" the reproductive system satisfies this prong of its ADA "disability" test.[115] An ED-stricken individual by definition cannot engage in sexual intercourse; therefore, ED – primarily an organic, physiological condition – clearly "affects" reproduction.[116]

Case law also indicates that ED constitutes a physical impairment. In *Farmer v. National City Corporation*,[117] pursuant to a cost reduction program, National City Corporation (NCC) terminated Farmer, a Vice President and Assistant General Auditor in its audit department, after twenty-two years of service.[118] Farmer contended that his termination stemmed from, *inter alia*, his "disability" – prostate cancer, or the effects thereof – impotence (now dubbed ED by the NIH)[119] and incontinence.[120] Conversely, NCC maintained that Farmer failed to suffer from an ADA recognized "disability."[121] Citing the definition of "physical impairment" set forth in the regulations interpreting the ADA – a definition identical to the HEW regulations relied on by the Supreme Court in *Bragdon* – the District Court for the Southern District of Ohio concluded that Farmer suffered a "physical

[113] *Bragdon*, 524 U.S. at 637.

[114] *See id.*

[115] ED need not affect a man on a daily basis to constitute a physical impairment. *See* Cehrs v. Northeast Ohio Alzheimer's Research Center, 155 F.3d 775, 780 (6th Cir. 1998) (concluding that the plaintiff was physically impaired due to flare-ups of pustlar psoriasis, even though she did not experience flare-ups on a daily basis). *Cf.* Erjavac v. Holy Family Health Plus, 13 F.Supp.2d 737, 742 (N.D. Ill. 1998) (a disease clearly need not produce continuous, identifiable (to the casual observer) symptoms to constitute an impairment under the ADA)

[116] The "substantially limits" analysis addresses alternative reproductive techniques via non-intercourse methods; a disorder or condition need only "affect," not wholly eliminate, reproduction to constitute an ADA "impairment."

[117] Farmer v. National City Corporation, 1996 WL 887478 (S.D. Ohio Apr 5, 1996)

[118] *See id.*

[119] In 1992, the NIH concluded that the term "erectile dysfunction" should replace the term "impotence." *See Conference Statement*, *supra* note 8.

[120] *See Farmer*, 1996 WL 887478 at *5.

[121] *See id.*

impairment" under the ADA by virtue of the effects of impotence and incontinence.[122] Therefore, at least in conjunction with incontinence, the court determined that ED qualifies as an ADA "physical impairment."[123]

ED as a Mental Impairment

ED generally stems from a primarily organic disorder and therefore will customarily require a "physical impairment" determination. Occasionally, however, psychological processes such as depression and anxiety problems generate ED.[124] Such circumstances demand a "mental impairment" resolution under the ADA. Most courts addressing this issue assume that depression and anxiety qualify as mental impairments under the ADA and subsequently decide the case based on a "substantial limitation of a major life activity" analysis. However, a few courts unqualifiedly state that depression and anxiety constitute "mental impairments" under the ADA's disability provisions.[125] Therefore, it seems probable that psychologically generated ED qualifies an ADA defined "mental impairment."[126]

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[122]*See Farmer*, 1996 WL 887478 at *5, *citing* 29 C.F.R. § 1630.2(h)(1) (1998). The *Farmer* court, pre-*Bragdon*, determined that Farmer fell short of the ADA's disability standard because reproduction failed to qualify as a "major life activity." The "major life activity" portion of *Farmer* no longer stands as good law; *Bragdon* unqualifiedly states that reproduction constitutes a "major life activity."

[123]Deciding under the identical regulatory language as the *Bragdon* and *Farmer* courts, the Northern District of Illinois in Pacourek v. Inland Steel, 916 F.Supp. 797, 801 (N.D. Ill. 1996), held that a woman's unexplained infertility satisfied the "physical impairment" prong of the ADA's disability test. The court stated, "[i]t defies common sense to say that infertility is not a physiological disorder or condition affecting the reproductive system. In fact, infertility is the ultimate impairment of the reproductive system." While the HCFA's Medicaid policy regarding Viagra fails to recognize Viagra as a fertility-promoting drug, its decision lacks judicial authority; further, common definitions of infertility and ED suggest that the two conditions are quite analogous. Webster defines infertility as not fertile, that is, "[not] capable of reproducing." WEBSTER'S II NEW COLLEGE DICTIONARY 414, 568 (1st ed. 1995) [hereinafter WEBSTER'S II]. On the other hand, similar to the NIH's ED definition, Webster defines impotence as "incapable of sexual intercourse." *Id.* Alternative reproductive techniques via non-intercourse methods exist; however, it seems that infertility as a general condition, if not fully encompassing ED as a specific condition, at least relates closely enough to ED to justify an analogy between the two disorders.

[124]*See Conference Statement*, *supra* note 8.

[125]*See* Criado v. IBM Corporation, 145 F.3d 437, 442 (1st Cir. 1998) (stress relating to co-workers, depression, and anxiety adequately evidenced that plaintiff was disabled under the ADA); Pritchard v. Southern Co. Service, 92 F.3d 1130, 1132 (11th Cir. 1996), *amended on reh'g*, 102 F.3d 1118 (11th Cir. 1996) (major depression constitutes a mental impairment);

Major Life Activity

The second step of Justice Kennedy's three prong ADA "disability" test in *Bragdon* requires a determination of whether the life activity purportedly limited by a claimant's alleged statutory "disability" constitutes a "major life activity."[127] The *Bragdon* majority firmly established that reproduction qualifies as a "major life activity."[128] This section first introduces the points of contention regarding reproduction as a "major life activity" leading to the *Bragdon* decision, as illustrated by a distinctive split of judicial opinion. Subsequently, I will discuss the *Bragdon* holding and Chief Justice Rehnquist's dissent, which focuses on the contention that "major life activity" determinations require an individualized inquiry. Finally, this subsection asks whether sexual intercourse *qua* sexual intercourse constitutes a "major life activity." This portion of the article only examines reproduction and sexual intercourse because I believe these activities provide the greatest likelihood of establishing a foundation on which a court may properly determine that ED "substantially limits" a "major life activity." [129]

Reproduction as a Major Life Activity

While the ADA fails to define specifically "major life activity," regulations proffered by the EEOC delineate several qualifying activities: "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[130] As the regulatory language "such as" suggests, and as the *Bragdon* majority confirms, the EEOC list illustrates without

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Coleman v. Keebler Co., 997 F. Supp. 1102 (N.D. Ind. 1998) (post-traumatic stress disorder, manifested by tension, anxiety and, depression constitutes a mental impairment under the ADA).

[126]While ED regularly comprises a primarily physical condition, secondary psychological factors occasionally contribute to the disorder. Because ED presumably satisfies the ADA's disability "impairment" prong under either a "physical" or "mental" impairment analysis, this article need not hypothesize about whether a condition, both physical and mental in nature, reaches threshold eligibility under one impairment analysis but not the other

[127]*Bragdon*, 524 U.S. at 631.

[128]*See id.* at 638.

[129]This article leaves others to assess the probability of obtaining "major life activity" status for activities such as maintaining a solid marital relationship.

[130]29 C.F.R. § 1630.2(i) (1999).

exhausting statutorily permissible "major life activities."[131] An appendix to the EEOC regulations proposes that "sitting, standing, lifting, and reaching" also constitute "major life activities."[132] The EEOC never specifically refers to reproduction as a "major life activity" in its guidance provisions;[133] consequently, prior to the Supreme Court's *Bragdon* decision, courts were split on this issue of statutory interpretation. Two oft-cited cases, *Zatarain v. WDSU-Television*[134] and *Pacourek v. Inland Steel,*[135] exemplify the split in judicial opinion.

Zatarain v. WDSU-Television

In *Zatarain* the plaintiff, Lynn Gansar Zatarain, a reporter and anchorperson with defendant WDSU-Television since 1983, began fertility treatments in 1992 in an effort to conceive a child.[136] In early November 1992, Zatarain informed WDSU that she intended to follow her physician's recommendation to reduce her work schedule while undertaking fertility treatments.[137] After Zatarain's contract expired in late November 1992, WDSU, which offered Zatarain a new contract prior to her request for reduced hours,[138] refused to renew her employment agreement.[139] Zatarain filed suit in the District Court for the Eastern District of Louisiana, alleging that WDSU discriminatorily discharged her from employment in violation of the ADA.[140] She argued that her reproductive disorder of an undiagnosed nature "substantially limited" the "major life activity" of reproduction. The

[131] *See Bragdon*, 524 U.S. at 638-39.
[132] 29 C.F.R. app. § 1630.2(i) (1999).
[133] *See id.*
[134] Zatarain v. WDSU-Television, Inc., 881 F.Supp. 240 (E.D. La. 1995).
[135] *See Pacourek*, 916 F.Supp. at 804.
[136] *See Zatarian*, 881 F. Supp. at 241.
[137] *See id.* at 242.
[138] On September 30, 1992, WDSU offered Zatarain a new contract worth $168,000 annually. Zatarain refused this offer, requesting more money and a multi-year guarantee. WDSU made her a second offer on October 23, 1992 with a higher salary and a two-year guarantee. The parties disagree on whether Zatarain accepted this offer. *See Zatarain*, 881 F. Supp. at 242.
[139] *See id.*
[140] *See id.*

District Court concluded, however, reproduction failed to constitute a "major life activity" under the ADA for two reasons.[141]

First, the court asserted: "[T]he structure of the ADA and its regulations indicate that the major life activity that is limited is separate and distinct from the impairment that limits it."[142] Therefore, the court maintained "[Zatarain's] argument is faulty because it would allow her to bootstrap a finding of substantial limitation of a major life activity on to a finding of an impairment."[143] To clarify, the court characterized Zatarain's argument as follows: her claimed statutory "impairment" – a reproductive disorder – interfered with the alleged "major life activity" of reproduction, which was purportedly "substantially limited" by her reproductive disorder.[144] Pursuant to this characterization of Zatarain's argument, the court deemed Zatarain's analysis circular and unpersuasive.[145]

Second, the court determined reproduction failed to comport with the illustrative list of "major life activities" provided in the ADA regulations.[146] The majority pointed to the fact that unlike reproduction, a person must "walk, see, learn, speak, breathe, and work throughout the day, day in and day out."[147]

Pacourek v. Inland Steel

Holding conversely to *Zatarain*, the District Court for the Northern District of Illinois in *Pacourek* determined reproduction qualified as an ADA "major life activity."[148] In 1991 plaintiff Charline Pacourek, an employee of Inland Steel, began treatment for an unexplained infertility problem causing her to miss several days of work.[149] Shortly after receiving an ultimatum not to miss any more work without a physician's letter and to simply improve her attendance, Inland Steel

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[141] *See id.* at 243.
[142] *See id.* at 242.
[143] *Zatarain*, 881 F. Supp. at 242.
[144] *See id.*
[145] *See id.*
[146] *See id.*
[147] *See id.*; *see also* Kraul v. Iowa Methodist Medical Center, 95 F 3d 674, 677 (8th Cir. 1996) (relying upon the reproduction/"major life activity" analysis in *Zatarain* to hold that reproduction is not a cognizable "major life activity" under the ADA).
[148] *Pacourek*, 916 F.Supp. at 804.
[149] *See id.* at 799.

terminated Pacourek's employment.[150] Subsequently, Pacourek filed suit under the ADA.[151]

The *Pacourek* court disagreed with the *Zatarain* majority's "bootstrapping" analysis.[152] The *Pacourek* opinion, however, sidestepped the merits of the reasoning process underlying *Zatarain's* "bootstrapping" determination and concluded:

> "[B]ecause the EEOC rulemakers included the reproductive system among body systems that can suffer from an impairment under the ADA, they anticipated that a physiological disorder of the reproductive system may be covered under the ADA.[153] Otherwise, including the reproductive system in the body systems that can be impaired would be superfluous."[154]

Additionally, the *Pacourek* court disagreed with the *Zatarain* majority's dissection of the EEOC's illustrative list of "major life activities," suggesting *Zatarain's* quantitative interpretation unjustifiably narrows the buzz-word.[155] Citing the appendix to the EEOC regulations, the majority first dubbed " '[m]ajor life activities' [as] those basic activities that the average person in the general population can perform with little or no difficulty,"[156]and subsequently noted the EEOC's guidance mentions nothing regarding the frequency with which the basic activities must occur.[157] The *Pacourek* majority defined "major life activity" in terms of quality, considering the infrequent nature of reproduction as failing to relegate its status to a non-major life activity, thereby dismissing the *Zatarian* majority's exegesis.[158] According to Judge Alesia's lugubrious suggestion, none of us would exist without reproduction.[159] Describing childbirth as one

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[150]*See id.*
[151]*See id.*
[152]*See id.*
[153]*Pacourek*, 916 F.Supp. at 801-02.
[154]*See id.*
[155]*See id.* at 804.
[156]*See id., citing* 29 C.F.R. § 1630 app. at 402 (1998).
[157]*See id.*
[158]*Pacourek*, 916 F.Supp. at 804.
[159]*See id.*

of life's most significant moments and greatest achievements, the *Pacourek* court held that reproduction, as an integral part of life, constitutes a statutory "major life activity."[160]

Bragdon's "Major Life Activity" Analysis

Utilizing an approach remarkably similar to the one employed by the Pacourek majority, the Supreme Court in *Bragdon* adopted a "qualitative" rather than a "quantitative" definition of "major life activity."[161] Justice Kennedy embraced the First Circuit's reasoning in *Abbot v. Bragdon* to support this distinction.[162] Because the ADA fails to define "major life activity," the First Circuit construed the term in accordance with its ordinary meaning, as dictated by the Supreme Court in *Bailey v. United States.*[163] Looking to familiar dictionary definitions as taught by *Bailey*, the First Circuit concluded "the plain meaning of the word 'major' denotes comparative importance ... [which] suggest[s] that the touchstone for determining an activity's inclusion under the statutory rubric is its significance...."[164] Embracing this definition, the Supreme Court held reproduction "falls well within the phrase 'major life activity' " and immediately thereafter stated: "Reproduction and the sexual dynamics surrounding it are central to the life process itself."[165] According to Justice Kennedy, nothing in the ADA or the Rehabilitation Act regulations (comprising a list identical to the EEOC's ADA regulations) suggests that "major life activities" must entail a public, economic, or daily dimension.[166] On the contrary, Justice Kennedy stated, "reproduction could not be regarded as any less important than working and learning."[167]

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[160]*See id.*

[161]*Bragdon*, 524 U.S. at 638.

[162]*See id.*

[163]*See Abbot*, 912 F. Supp. at 939, *citing* Bailey v. United States, 116 S. Ct. 501, 506 (1995).

[164]*Abbot*, 912 F.Supp. at 939-40, *citing* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1084 (3d ed. 1992) (listing "greater than others in importance or rank" as the initial definition of "major"); WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 718 (1989) (defining "major" as "greater in dignity, rank, importance, or interest").

[165]*Bragdon*, 524 U.S. at 638.

[166]*See id.*

[167]*See id.*

Chief Justice Rehnquist dissented in *Bragdon.*[168] He argued that in defining the term "major," the majority ignored its alternative definition, "greater in quantity, number, or extent"[169] – a definition the Chief Justice viewed as being more consistent with the EEOC's illustrative list of major life activities.[170] Chief Justice Rehnquist could not deny that reproductive decisions are important in a person's life, but stated repetitive performance and essentiality in a normally functioning individual's day to day existence, not fundamental importance, constitutes the common thread linking the listed activities together.[171]

Further, Chief Justice Rehnquist refuted the argument – relied upon in *Pacourek*, and introduced by both *Abbot* and the United States as amicus curie – proposing that "major life activity" comprises reproduction because the ADA regulations define "physical impairment" to include physiological disorders affecting the reproductive system.[172] To discredit this argument, the Chief Justice recited disorders of the reproductive system such as dysmenorrhea and endometriosis – conditions so painful that they limit a woman's ability to engage in major life activities such as walking and working.[173] Justice Kennedy's definition of "major" obviated a discussion on this issue.[174] Notably, neither Chief Justice Rehnquist, nor the majority, addressed the *Zatarain* majority's bootstrapping analysis.[175]

Despite the *Zatarain* explication and Chief Justice Rehnquist's *Bragdon* dissent, reproduction qualifies as a "major life activity" under the ADA post-*Bragdon.*[176] The Chief Justice's dissent in *Bragdon*, however, raised a pertinent issue not directly addressed in Justice Kennedy's opinion: whether a "disability" determination must comprise an individualized inquiry.[177] The Chief Justice argued "major

[168]*See id.* at 657.

[169]*See id.* at 660 (Rehnquist, C.J., dissenting), *citing* WEBSTER'S COLLEGIATE DICTIONARY 702 (10th ed. 1994).

[170]*Bragdon*, 524 U.S. at 660.

[171]*See id.*

[172]*See id.*

[173]*See id.* (Rehnquist, C.J., dissenting).

[174]*See id.* at 661.

[175]*See generally Bragdon*, 524 U.S. at 624.

[176]*See id.* at 638.

[177]*See id.* at 657.

life activity" decisions require individualization.[178] He cited ADA § 12102(2), which states that a disability determination must be made "with respect to *an individual*," and ADA § 12102(2)(A), which provides that a "disability" includes "a physical or mental impairment that substantially limits one or more of the major life activities *of such individual*."[179] After attacking the majority for neglecting to individualize its "major life activity" analysis, Chief Justice Rehnquist proceeded to suggest that no evidence indicated that Abbot's HIV status precluded her aspirations for reproduction, or that she even planned to bear children.[180] Justice O'Connor, concurring in the judgment and dissenting in part, agreed with the Chief Justice on this issue and proffered that Abbot failed to prove "that her ... HIV status substantially limited one or more of *her* major life activities."[181]

Justice Kennedy, while not directly enunciating his position in the *Bragdon* decision, fully recognized the need for an individualized inquiry regarding disability and based his opinion on a precise individualization understanding, though one different than Chief Justice Rehnquist's construction.[182] Justice Kennedy individualized the "substantially limits" analysis, while indicating a court should draw bright lines when deciding whether the ADA contemplates an activity as a "major life activity."[183] Therefore, the Court's individualization technique for disability determinations does not ask whether the "major life activity" at issue particularly concerns the plaintiff.[184]

Not surprisingly, post-*Bragdon* the Supreme Court in *Sutton v. United Air Lines*[185] and in *Albertsons v. Kirkingburg*[186] followed Justice Kennedy's ADA individualization approach. In these cases, each Court stated: "The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the

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[178]*See id.*

[179]*See id.* at 657, *incorrectly citing* 42 U.S.C. § 12102(3)(A) (1994) *instead of* 42 U.S.C. § 12102(2)(A) (1994) (emphasis added).

[180]*See Bragdon*, 524 U.S. at 659.

[181]*See id.* at 664 (O'Connor, J., concurring in the judgment in part and dissenting in part) (emphasis added).

[182]*See id.* at 641.

[183]*See id.* at 640-41.

[184]*See* Theresa A. Schneider, *Stretching the Limits of the ADA: Asymptotic HIV-Positive Status as a Disability in Bragdon v. Abbot*, NEB. L. REV. 206, 212 (1998).

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

[186]Albertsons v. Kirkingburg, 527 U.S. 555 (1999).

impairment the person has, but rather on the effect of that impairment on the life of the individual."[187] The *Albertsons* Court went further stating, "The determination of whether an individual is substantially limited in *a* major life activity must be made on a case by case basis."[188] In light of the Supreme Court's recent pronouncements on the issue, this article assumes that regardless of the individual in question, reproduction under *Bragdon* constitutes a "major life activity."[189] Courts only need to conduct individualized inquiries as to whether a person's impairment "substantially limits" reproduction.[190]

This individualized methodology obviates an inquiry into whether individuals who cannot reproduce, or choose not to reproduce, satisfy the 'major life activity' prong of the ADA – they do. Individuals benefiting from the *Bragdon* majority's individualization approach include, but are certainly not limited to: individuals choosing to use birth control regularly, surgically sterilized individuals and their partners, homosexual individuals (discounting artificial insemination via a non-partner), menopausal women and their partners, couples with HIV desiring not to infect offspring with the virus, and, certainly, individuals with ED.[191]

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[187]*Sutton*, 527 U.S. at 483 and *Albertsons*, 527 U.S. at 565, *both citing* 29 C.F.R. pt. 1630 App. § 1630.2(j) (1998).

[188]*Albertsons*, 527 U.S. at 565 (emphasis added). *See also* Reeves v. Johnson Controls World Services, Inc., 140 F.3d 144, 151-52 (2d Cir. 1998) ("In deciding whether a particular activity is a 'major life activity,' we ask whether that activity is a significant one within the contemplation of the ADA, rather than whether that activity is important to a particular plaintiff.").

[189]*See Bragdon*, 524 U.S. at 640.

[190]One interesting twist in the individualized inquiry tale arises from Justice O'Connor's majority opinion in Murphy v. United Parcel Service, 527 U.S. 516 (1999), the post-Bragdon companion case to Sutton. Justice O'Connor states, "Petitioner's impairment does not substantially limit one or more of *his* major life activities." *Id.* at 519 (emphasis added). Justice O'Connor's position in *Murphy*, a case decided on the same day as *Sutton* and *Albertsons*, suggesting that courts should address major life activities individually, is not surprising in light of her partial dissent in *Bragdon*. Curiously, however, no member of the *Murphy* Court dissented to Justice O'Connor's phraseology "*his* major life activities."

[191]This list potentially includes individuals already parenting one child and barred from further reproduction pursuant to a statute similar to China's one-child-per-family policy. *See e.g.*, June Preston, *CNN's Turner calls for one child per family*, REUTERS, Sept. 11, 1998.

Sexual Intercourse as a "Major Life Activity"

If a court determines that ED fails to "substantially limit" reproduction – an issue discussed in the next section of this article – an ED victim could construct a strong argument that sexual intercourse constitutes an ADA-permissible "major life activity," which ED "substantially limits." In *Bragdon*, immediately following the majority's determination that reproduction falls well within the phrase "major life activity," Justice Kennedy proffered: "Reproduction and the *sexual dynamics* surrounding it are central to the life process."[192] Pursuant to Webster's definition of dynamics – "[t]he physical, intellectual, or moral forces that produce motion, activity, and change in a given sphere"[193] – the phrase "sexual dynamics" seems to encompass, at the bare minimum, sexual intercourse. While Justice Kennedy's asseveration reads as dictum, the *Bragdon* Court interpreted the term "major" to denote comparative importance and significance. Therefore, similar to reproduction, another activity *central to the life process* – sexual dynamics – presumably rises to the level of comparative significance, and consequently constitutes a "major life activity" under Bragdon.[194]

As noted by the *Bragdon* majority, the ADA derived much of its language from the Rehabilitation Act of 1973, including the term "major life activity."[195] Justice Kennedy remarked, "Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations."[196] To illustrate "major life activities" for ADA purposes, Justice Kennedy relied on the

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[192]*Bragdon*, 524 U.S. at 638 (emphasis added).

[193]WEBSTER'S II, *supra* note 123, at 353.

[194]Would an analysis of intercourse as a major life activity under Justice Rehnquist's dissent in *Bragdon* depend on how often an individual engaged in intercourse? Perhaps Justice Rehnquist also suggests, however, that not only repetitiveness but also essentiality in the day-to-day existence of a normally functioning individual links the EEOC's example "major life activities." While intercourse is generally essential to the existence of the human race by virtue of the need for human reproduction, clearly the Chief Justice was not referring to such an essentiality; otherwise he would have deemed reproduction a "major life activity." Therefore, under Justice Rehnquist's *Bragdon* dissent, qualifying intercourse as a "major life activity" might require a judicial determination of whether intercourse *qua* intercourse is essential in the day-to-day existence of the individual at issue.

[195]*See Bragdon*, 524 U.S at 637-38.

[196]*See id.* at 632.

Rehabilitation Act regulations.[197] Therefore, the *Bragdon* majority opinion indicates that guidance regarding the Rehabilitation Act's term "major life activity" applies to an interpretation of the identical phrase as used in the ADA.

In 1988, the United States Department of Justice (DOJ), empowered with Rehabilitation Act implementation and enforcement capabilities pursuant to a 1980 order from President Carter,[198] issued a memorandum regarding the application of the Rehabilitation Act to HIV-infected individuals.[199] The memorandum asserts that while not affecting any major life activity illustrated in the regulations – which are not exhaustive – the DOJ "believe[s] at least some courts would find a number of other equally important matters to be directly affected." [200] Further, the memo states, "Perhaps the most important such activities are procreation and *intimate personal relations*."[201] If intercourse falls within the domain of "intimate personal relations," then the DOJ evidently considered intercourse to constitute a "major life activity" as of 1988. The DOJ memorandum, however, proceeds to state, "[T]he *life activity* of engaging in *sexual relations* is threatened and substantially limited by the contagiousness of the [HIV] virus."[202] Absence of the word "major" in the DOJ's description of sexual relations is obvious, yet the memo at least ties "sexual relations" to the statutory requirement "substantially limited." In sum, while the DOJ's 1988 memorandum lacks lucidity, at a minimum it connotes the possibility intercourse may qualify as a "major life activity."[203] In light of the Supreme Court's interpretation of the term "major" in *Bragdon* and the DOJ's memorandum, presumably a court would construe sexual intercourse as a "major life activity" under the ADA.

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[197]*See id.* at 638.

[198]*See* Exec. Order No. 12250, 3 C.F.R. 298 (1981).

[199]The DOJ's power applies to Title II of the ADA, not Title I, which applies to employment; however, Justice Kennedy in *Bragdon* states that the Supreme Court draws guidance from the views of the agencies authorized to administer other sections of the ADA. *See Bragdon*, 524 U.S. at 646.

[200]Memorandum from United States Justice Department to Arthur B. Culvahouse, Jr., Counsel to the President, *Justice Department Memorandum on Application of Rehabilitation Act's Section 504 to HIV-Infected Persons*, 195 DAILY LABOR REP. D-1 (Sep. 27, 1988) (emphasis added).

[201]*See id.*

[202]*See id.* (emphasis added).

[203]*See id.*

Substantial Limitation

The third and final element of Justice Kennedy's ADA "disability" test in *Bragdon* compels a judicial determination of whether a claimant's physical impairment "substantially limits" the "major life activity" at issue.[204] A proper analysis of the statutory term "substantially limits" necessarily requires an introduction to the weight judicially due to the EEOC's ADA regulations and guidance provisions – a subject introduced in this section and discussed in greater detail in the third section of this article. Second, this section attempts to glean a suitable and comprehensible definition of "substantially limits" from the amalgamation of interpretations stemming from the EEOC guidelines and from judicial pronouncements regarding this buzz-word. Third, this section will discuss the Supreme Court's holding in *Sutton v. United Air Lines*,[205] which mandates courts to consider mitigating measures to an individual's impairment when determining whether that individual qualifies as "significantly limited" in a "major life activity."[206]

Because the *Sutton* Court's decision entails a question of statutory interpretation and not one of constitutionality, Congress may – in light of overwhelming disagreement with the *Sutton* majority's position by the *Sutton* dissent, by eight of ten courts of appeal, and by all three executive agencies interpreting the ADA – amend the ADA to trump the *Sutto*n majority's conclusion. Therefore, the final segment of this section will analyze an ED sufferer's chances to qualify as "substantially limited" in the "major life activity" of reproduction (and/or sexual intercourse) under *Sutton* as it currently stands and under a rule resulting from a congressional reversal of *Sutton.*

Introduction to the Proper Weight Judicially Due to EEOC Regulations and Interpretive Guidance

Three Government agencies share the authority to promulgate ADA regulations. The EEOC may issue regulations to carry out the employment provisions of Title I.[207] The DOJ possesses the power to

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[204]*See Bragdon*, 524 U.S at 630.
[205]*See Sutton*, 527 U.S. at 474.
[206]*See id.* at 475.
[207]*See* 42 U.S.C. § 12116 (1994).

publish rules relating to public services under Title II.[208] The Department of Transportation (DOT) maintains authority to issue regulations pertaining to the transportation provisions of Titles II and III.[209]

Each of these agencies may proffer technical assistance, such as interpretive guidelines, to aid in the implementation and enforcement of their respective provisions.[210] No agency, however, retains the authority to issue regulations implementing the generally applicable provisions of the ADA, which fall outside of Titles I-IV.[211] Most notably, the ADA delegates no agency the responsibility to interpret the term "disability," which comprises the terms "impairment," "major life activity," and "substantial limitation."[212] The EEOC, nonetheless, issued regulations and interpretive guidance to provide additional direction regarding the proper interpretation of these vague terms.[213] The third section of this exposition will fully discuss the proper weight that a court must grant these agency pronouncements. For now, it will suffice to recognize that courts have granted great weight to the EEOC *regulations* and *appendix* to those regulations,[214]while the EEOC's *interpretive guidance* pertaining to "substantial limitations" garners a questionable, and indeed debated, degree of deference.[215]

The EEOC's *regulations* regarding the ADA language "substantially limits" define the term 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

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[208]*See* 42 U.S.C. § 12134 (1994).

[209]*See* 42 U.S.C. §§ 12149(a), 12164, 12186(a)(1), 12143(b) (1994).

[210]*See* 42 U.S.C. § 12206(c)(1) (1994).

[211]*See* 42 U.S.C. §§ 12101-12102 (1994).

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

[213]*See* 29 C.F.R. § 1630.2 (1998); 29 C.F.R. app. § 1630.2 (1998).

[214]*See, e.g., Kraul*, 95 F.3d at 677; *Pacourek*, 916 F.Supp. at 803; *Bragdon*, 524 U.S at 657 (relying on HEW Rehabilitation Act regulations identical to the EEOC ADA regulations); *Sutton*, 527 U.S. at 478 (both parties accept the EEOC regulations regarding the term "disability").

[215]*Sutton*, 527 U.S. at 479.

> duration under which an individual can perform a 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.[216]

The EEOC *regulations* further recommend consideration of the following factors to determine whether an individual is "substantially limited" in a "major life activity":

> (i) The nature and severity of the impairment;
>
> (ii) The duration or expected duration of the impairment; and
>
> (iii) The permanent or long-term impact, or expected permanent or long-term impact of or resulting from the impairment.[217]

Finally, the EEOC's *interpretive guidance* regarding "substantial limitations," provides 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."[218]

The litigants in *Sutton*, a 1999 Supreme Court case discussed in the "mitigation" subsection below, accepted the EEOC's regulations pertaining to the ADA's "substantial limitation" language, but disputed the persuasive force of the interpretive guidelines.[219] After determining that the outcome of the case failed to hinge on a ruling regarding the weight, if any, that the EEOC's interpretive guidelines hold, the Sutton majority declined to decide the proper degree of deference due to those

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[216]29 C.F.R. § 1630.2(j) (1998).

[217]*See id.*

[218]29 C.F.R. pt. 1630, App § 1630.2(j) (1998). The DOJ proffers a similar guideline: "The question of whether a person with a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids and services." 28 C.F.R. pt. 35, App. A § 35.104 (1998); 28 C.F.R. pt. 36, App. B, § 36.104 (1998). Justice Stevens, dissenting in *Sutton*, suggested that the DOT also assesses disabilities without regard to mitigating measures. *See Sutton*, 527 U.S. at 495-96 (Stevens, J., dissenting).

[219]*See Sutton*, 527 U.S. at 481.

guidelines.[220] Therefore, the question regarding the proper weight commanded by the EEOC's assistance in interpreting the ADA term "substantially limits" remains open. Several United States circuit courts of appeal post-*Sutton* diligently follow the EEOC's *regulations* in conducting "substantial limitation" analyses under the ADA.[221] While declining to address the force of the EEOC's *interpretive guidelines*, the *Sutton* Court held contrary to the guidelines' substantive position regarding the term "substantially limits."[222] Consequently, lower courts post-*Sutton* decline to follow this aspect of the guidelines.

Defining "Substantially Limits"

Deferring a thorough examination of the issue tackled by the EEOC's interpretive guidelines – the "mitigation" question – to the next subsection, this segment attempts to fasten loosely together definitions of the term "substantially limit" that courts may utilize in conducting ADA disability determinations. As noted above, several United States courts of appeal followed the EEOC *regulations'* "substantial limitation" definition, focusing on whether an impaired individual is unable, or is significantly restricted from, performing a "major life activity" that the average person in the general population can perform.[223] In addition to this interpretation, the Supreme Court in both *Bragdon* and *Sutton,* and the Second Circuit in *Colwell v. Suffolk County Police Department*,[224] simultaneously sharpened and confused the search for a coherent definition of this highly contested ADA term.

The Supreme Court majority in *Bragdon* determined Abbot's asymptotic HIV infection "substantially limited" her ability to reproduce in two regards: (1) A woman infected with HIV who tries to conceive a child imposes on her male partner a significant risk of

[220] *See id.* at 462.

[221] *See, e.g.*, Fjellstad v. Pizza Hut of America, Inc., 1999 WL 642958, at *2 (8th Cir.); Taylor v. Phoenixville School District, 1999 WL 649376, at *7 (3d Cir.); Hilburn v. Murata Electronics North America, Inc., 181 F.3d 1220, 1227 (11th Cir. 1999); McClure v. West, *unpublished*, 1999 WL 436104, at *3-4 (4th Cir.).

[222] *Sutton*, 527 U.S. at 462.

[223] *See supra* note 221.

[224] *See Colwell*, 158 F.3d at 635.

becoming infected;[225]and (2) A woman risks infecting her child with HIV during gestation and childbirth.[226] After discussing the applicable percentages of risk, Justice Kennedy stated: "The Act addresses substantial limitations on major life activities, *not utter inabilities*."[227] While Kennedy recognized the physical possibility of conception and childbirth for an HIV victim, he determined that because these activities endanger the public health, Abbot's impairment "substantially limited" the "major life activity" of reproduction.[228] Additionally, Kennedy opined that conception and childbirth by HIV victims required expending additional costs for antiretroviral therapy, supplemental insurance, and long-term health care for the child, and also violates the laws of certain states, which forbid HIV-infected individuals from participating in intercourse.[229]

The Supreme Court in *Sutton* only briefly discussed the term "substantial."[230] Writing for the majority, Justice O'Connor simply referenced the dictionary definition of the word "substantial" in suggesting, without holding, "substantial" implies "considerable" or "specified to a large degree."[231]

In 1998, the Court of Appeals for the Second Circuit followed the EEOC *regulations* implementing the ADA term "substantially limits" in deciding *Colwell*.[232] The court, however, determined that "get[ting]

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[225]Justice Kennedy indicated that 20% of male partners of women with HIV become HIV-positive themselves. *See Bragdon*, 524 U.S. at 639-40, *citing* Osmond & Padian, *Sexual Transmission of HIV*, AIDS KNOWLEDGE BASE, 1.9-8, and tbl. 2 (1994)

[226]*Bragdon* conceded that women infected with HIV face approximately a 25% risk of transmitting the virus to their children. *See Bragdon*, 524 U.S. at 639-40.

[227]*See id.* (emphasis added).

[228]*See id.*

[229]Chief Justice Rehnquist, while dissenting in *Bragdon*, agreed with the majority that the ADA addresses "substantial limitations" on "major life activities," not utter inabilities. Chief Justice Rehnquist, however, maintained that an asymptotic HIV infection "substantially limits" reproduction. He argued that such individuals still may engage in sexual intercourse, give birth to a child, and perform the manual tasks necessary to rear a child to maturity. *See Bragdon*, 524 U.S. at 660-61 (Rehnquist, C.J., dissenting).

[230]*See id.* at 647.

[231]*Sutton*, 527 U.S. at 491, *citing* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (1976) (defining "substantially" as "in a substantial manner" and "substantial" as "considerable in amount, value, or worth" and "being that specified to a large degree or in the main"); 17 OXFORD ENGLISH DICTIONARY 66-67 (2d ed. 1989) ("substantial": "[r]elating to or proceeding from the essence of a thing; essential"; "of ample or considerable amount, quantity or dimensions").

[232]*See Colwell*, 158 F. 3d at 641.

a tough night's sleep" due to a back injury failed to "substantially limit" the "major life activity" of sleeping because "difficulty sleeping is extremely widespread."[233] Further, the court stated: "Colwell failed to show his affliction was any worse than similar afflictions suffered by a large portion of the nation's adult population."[234] Therefore, the *Colwell* court seemed to place a quantitative limit on the EEOC's "substantial limitation" definition.

In sum, because the Supreme Court in neither *Bragdon* nor *Sutton* comprehensively and authoritatively defined "substantial limitation," the term's functional meaning lacks precise boundaries. Based on the judicial and administrative language available, I suggest viewing the term "substantial limitation" on a spectrum. At one end of the scale under Justice Kennedy's *Bragdon* opinion, "utter inabilities" fail to comprise "substantial limitations."[235] At the other end pursuant to the Second Circuit's decision in *Colwell*, "extremely widespread" difficulties flunk the "substantial limitation" test.[236] Lying in between these extremities rest possible "substantial limitation" descriptors such as "significantly restricted from [performing major life activities]" and "considerable [limitation] or [a limitation] specified to a large degree" and the hazy relationship of an individual's limitation to "the average person in the population." Where these interpretive phrases lie on the spectrum lacks clarity, as does the point on the scale where a statutory limitation begins (or ceases) to "substantially limit" a "major life activity."

Mitigating Measures

The dominant question arising in the Supreme Court's 1999 *Sutton* decision is potentially fatal to an ED sufferer's quest for disability discrimination recovery -- Must a court acknowledge mitigating measures (including medication such as Viagra) in the "substantial limitation" analysis of an ADA "disability" claim? Writing for the *Sutton* majority, Justice O'Connor answers this question in the affirmative.[237] After introducing the *Sutton* case and delineating Justice O'Connor's position, this subsection concludes by illustrating the

[233] *See id.* at 644.
[234] *See id.*
[235] *See Bragdon*, 524 U.S. at 661.
[236] *See Colwell*, 158 F.3d at 644.
[237] *See Sutton*, 527 U.S. at 475.

weaknesses in her reasoning in an effort to outline the basis of a congressional amendment to trump the Supreme Court's *Sutton* decision.

Sutton v. United Air Lines

In 1992 the petitioners in *Sutton*, twin sisters, each severely myopic, applied for employment as commercial airline pilots with the respondent United Air Lines (United).[238] Without corrective lenses each petitioner's vision tested poorer than 20/100 in each eye; however, with corrective measures such as glasses or contact lenses, both sisters' vision measured 20/20 or better – a rating comparable to unimpaired individuals.[239] Because the sisters' eyesight in an unmitigated state failed to meet United's minimum vision requirement – uncorrected visual acuity of 20/100 or better – United declined to offer either petitioner a pilot position. The sisters filed suit under the ADA alleging that their severe myopia constituted an "impairment" that "substantially limited" the "major life activity" of seeing.

The United States District Court for the District of Colorado dismissed the sisters' complaint on a motion for summary judgment, concluding their correctable visual impairments rendered the "substantial limitation" prong of the ADA's disability test unfulfilled.[240] Employing similar logic, the United States Court of Appeals for the Tenth Circuit affirmed.[241] The Tenth Circuit's decision comprised the minority opinion on this issue at the time it was decided: eight of the other nine circuit courts of appeal addressing the question[242] and all three executive agencies interpreting the ADA[243]

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[238] *See id.*

[239] *See id.*

[240] *See* Sutton v. United Airlines, Inc., 1996 WL 588917 (D.C. CO. Aug. 28, 1996)

[241] *See* Sutton v. United Airlines, Inc., 130 F.3d 893 (1st Cir. 1998).

[242] *See* Bartlett v. New York State Bd. of Law Examiners, 156 F.3d 321, 329 (2d Cir. 1998); Washington v. HCA Health Servs. of Texas, 152 F.3d 464, 470-71 (5th Cir. 1998); Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 629-630 (7th Cir. 1998); Arnold v. United Parcel Service, 136 F.3d 854, 859-66 (1st Cir. 1998); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937-38 (3d Cir. 1997); Doane v. Omaha, 115 F.3d 624, 627 (8th Cir. 1997); Harris v. H & W Contracting Co., 102 F.3d 516, 520-21 (11th Cir. 1996), Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996). Justice Stevens, dissenting in *Sutton*, states that Gilday v. Mecosta County, 124 F.3d 760, 766-68 (6th Cir. 1997) could be read as expressing doubt about the *Sutton* majority's ruling. *See Sutton*, 527 U.S. at 496 (Stevens, J. dissenting).

construed the ADA's "disability" language as disregarding ameliorative measures.

The Supreme Court in *Sutton* concluded the appellate courts and executive agencies that evaluated persons in their uncorrected state impermissibly interpreted the ADA.[244] Rather, Justice O'Connor's opinion mandated courts to take account of both the positive and negative effects of measures to correct or mitigate a "physical or mental impairment" when judging whether such impairment "substantially limits" a "major life activity."[245] Three provisions of the ADA led the Court to this decision.

First, the ADA defines disability as "a physical or mental impairment that substantially *limits* one or more major life activities...."[246] Because the controlling phrase appears in the present indicative verb form, the Court read the statutory language as "requiring that a person be presently – not potentially or hypothetically – substantially limited in order to demonstrate a disability."[247] According to Justice O'Connor, an ADA "impaired" individual utilizing mitigating measures still qualifies as statutorily "impaired," but a corrected "impairment" fails to "substantially limit" a "major life activity."[248]

The second ADA provision relied on by the *Sutton* majority comports with Justice Kennedy's holding in *Bragdon:* courts must evaluate "substantial limitations" on an individualized basis.[249] Consequently, the *Sutton* Court asserted that judging an individual's disabled status in his or her uncorrected or unmitigated state requires speculation about the individual's condition by courts and employers. Justice O'Connor claimed such speculations will lead to undesirable disability determinations based on "general information about how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition."[250]

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[243]*See* 29 C.F.R. pt. 1630, App. § 1630.2(j) (1998); 28 C.F.R. pt. 35, App. § 25.104 (1998); 49 C.F.R. pt. 37.3 (1998).

[244]*See Sutton*, 527 U.S. at 500.

[245]*See id.*

[246]42 U.S.C. § 12102(2)(A) (1994). (emphasis added).

[247]*Sutton*, 527 U.S. at 481-82.

[248]*See id* at 481.

[249]*See id., citing* 42 U.S.C. § 12102(2) (1994).

[250]*See id.* at 483.

Finally – and critically – based on findings enacted as part of the ADA, the *Sutton* majority concluded Congress designed the term "disability" without correctable conditions in mind.[251] Congress found that some 43 million Americans have one or more physical or mental disabilities.[252] While the Court acknowledges its lack of an exact source for the 43 million figure, the majority pointed to the ADA's 1988 precursor, which drew a corresponding figure directly from a 1986 report prepared by the National Council on Disability.[253] This critical report recognized the difficulty of estimating a precise and reliable overall figure due to differing operational definitions of the term "disability."[254] The most commonly-quoted estimates of the 1986 report approximated the number of disabled Americans at 35 to 36 million.[255] The report, however, estimated ranges from 22.7 million under a "work disability" definition, which focuses on individuals' reported ability to work,[256] to 160 million pursuant to a "health condition" definition, which includes all conditions impairing the health or normal functional abilities of an individual.[257] The *Sutton* Court determined that the 36 million figure included in the 1988 bill's findings reflected an approach to defining disabilities closer to the "work disability" approach than to the "health condition" approach.[258] Two years after issuing its 1986 report, the National Council on Disability issued an updated report[259] settling on a more concrete definition of disability.[260] According to the 1988 report, 37.3 million Americans have "difficulty performing one or more basic physical activities" including "seeing (even with the aid of glasses or contact lenses), hearing, speaking, walking, using stairs, lifting or carrying, getting around outside, and getting into or out of bed."[261] Justice

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[251] *See id.* at 493.

[252] *See* 42 U.S.C. § 12101(a)(1) (1994).

[253] *See* National Council on Disability, *Toward Independence* (February 1986), *available at* http://www.ncd.gov/newsroompublications/toward.html.

[254] *See id.* at 10.

[255] *See id.*

[256] *See id.* at 10-11.

[257] *See id.*

[258] *Sutton*, 527 U.S. at 485.

[259] *See* NATIONAL COUNCIL ON DISABILITY, *On the Threshold of Independence* (January 1988), *available at* http://www.ncd.gov/newsroompublications/threshold.html.

[260] *See id.*

[261] *See id.*

O'Connor reconciled the difference between the ADA's 43 million figure and the 1988 report's 37.3 million figure by speculating that in drafting the ADA Congress included individuals explicitly excluded in the National Council's report.[262] The most notable groups included individuals who are under the age of fifteen and those in mental institutions.[263]

Following its extensive study to confirm that 43 million individuals were "disabled" at the time of the ADA's enactment, the *Sutton* majority cited a finding that more than 100 million Americans need corrective lenses (or glasses) to see properly.[264] Therefore, the Court concluded that individuals with correctable vision impairments and largely correctable impairments fail to constitute a portion of the 43 million Americans that the ADA sought to help.[265]

Shortcomings of the Sutton Majority's Rationale

Each of Justice O'Connor's bases for decision rests on arguably tenuous grounds. After outlining the apparent shortcomings in each of the *Sutton* majority's three determinative premises, I will pose a hypothetical situation to illustrate the perverseness of the Supreme Court's rule.

In Justice O'Connor's determination, because the statutory phrase "substantially limits" appears in the present indicative verb form, the ADA requires courts and employers to analyze individuals in their

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[262]Sutton, 527 U.S. at 485.

[263]While not wholly certain of the source of the ADA's 43 million figure, the Court grounds the approximate accuracy of the number by citing a surveys performed by the Mathematica Policy Research Inc. This group estimated that 31.4 million civilian non-institutionalized Americans possessed "chronic activity limitation status" in 1979 and 32.7 such individuals existed in 1985. In both reports, individuals with "activity limitations" comprised people who could not conduct "usual" activities, *e.g.*, attending pre-school, keeping house, or living independently. *See* NATIONAL CENTER FOR HEALTH STATISTICS, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, *Vital Health Statistics, Current Estimates from the National Health Interview Survey, 1989*, Series 10, at 7-8 (1990).

[264]*See* NATIONAL ADVISORY EYE COUNCIL, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, *Vision Research – A National Plan: 1999-2003*, at 7 (1998).

[265]The majority notes that use of a corrective device or medicine does not, by itself, relieve one's disability; individuals taking corrective measures to lessen the symptoms of an impairment so that they can function may nevertheless remain substantially limited. For example, individuals who use prosthetic limbs or wheelchairs, while mobile and capable of functioning in society, may still be disabled because of a substantial limitation on their ability to walk or run. *See Sutton*, 527 U. S. at 487.

present state when drawing "disability" conclusions.[266] Dissenting in *Sutton*, Justice Stevens suggested if a disability only exists where a person's present condition is actually impaired, "there would be no reason to include in the protected class those who were once disabled but who are now fully recovered as in subsection (B) of the disability definition."[267] Because subsection (B) of the ADA disability definition clearly covers individuals not presently disabled, the Sutton majority's grammatical basis for its holding seems insubstantial.

The *Sutton* majority's second foundational rung hinged on a desire to eliminate speculation about an individual's unmitigated condition. Justice Stevens countered this argument by suggesting that viewing a person in his or her unmitigated state simply requires examining that individual's abilities in a different state.[268] He proffered: "[I]t is just as easy individually to test [a person's] eyesight with their glasses on as with their glasses off."[269] One might argue that Justice Stevens' point ignores situations where an unmitigated "check-up" poses serious health risks; take, for example, shutting off a respirator to determine the unmitigated status of an individual with collapsed lungs. This argument generally fails, however, because a condition so serious as to necessitate ongoing respiration or similar treatment will presumably even in its mitigated state substantially limit some "major life activity," for example, the ability to walk or lift.[270]

Finally, the *Sutton* majority made its decision pursuant to the finding codified in the ADA that 43 million disabled individuals inhabit the United States.[271] Justice Stevens suggested that despite the 43 million figure the Act's legislative background promotes granting a generous, rather than a miserly, ADA construction.[272] The *Sutton* dissent cited the Committee reports on the bill preceding the ADA, which clearly indicate that Congress intended the ADA to cover individuals who require ameliorative measures to perform "major life

[266]*Sutton*, 527 U.S. at 481.
[267]*See id.* at 499 (Stevens J., dissenting).
[268]*See id.* at 509 (Stevens, J., dissenting).
[269]*See id.*
[270]"[O]ne has a disability...if, notwithstanding the use of a corrective device, that individual is substantially limited in *a* major life activity." *Sutton*, 527 U.S at 488 (emphasis added).
[271]*Sutton*, 527 U.S. at 488.
[272]*See id.* at 493-94.

activities."[273] Indeed, the Senate report directly antecedent to the ADA states, "whether a person has a disability should be assessed without regard to the availability of mitigating measures...."[274] The House of Representatives' reviewing committees slightly modified the Senate's proposal and clarified the disability definition as covering "correctable" or "controllable" disabilities. The Report of the House Committee on the Judiciary states, "The impairment should be assessed without considering whether mitigating measures...would result in a less-than-substantial limitation."[275] The report continues, proffering this test covers, for example, a person stricken with poor hearing, "even if the hearing loss is corrected by the use of a hearing aid."[276] The Report of the House Committee on Education and Labor likewise determined that disability analyses should disregard the aid of mitigating measures; for example, "persons with impairments such as epilepsy or diabetes, which substantially limit a major life activity are covered ... even if the effects of the impairment are controlled by medication."[277] Consequently, the ADA's precursor Senate and House reports indicate that Justice O'Connor's third basis for decision, even if statistically grounded, fails to comport with the legislative history undergirding the ADA.

Each of the *Sutton* majority's bases for decision lacks overwhelming vigor. Further, the resulting outcome – that courts and employers must acknowledge mitigating and corrective measures when conducting disability determinations – undesirably skews fundamental fairness ideals. As suggested by Justice Stevens, "if United regards petitioners as unqualified because they cannot see well without glasses, it seems eminently fair for a court also to use uncorrected vision as the basis for evaluating petitioners' life activity of seeing."[278]

The following hypothetical scenario further illustrates the perverse result stemming from the *Sutton* majority's ADA construction. Steve and Art are brothers from Michigan. Their local fire station employs both dedicated young men as firemen. Each passed a hearing test prior

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[273] *See id.* at 498.
[274] S. REP. No. 101-116, at 23 (1989).
[275] H.R. REP. No. 101-485, pt. III, at 28 (1990).
[276] *See id.* at 29.
[277] H.R. REP. No. 101-485, pt. II, at 52 (1990).
[278] *Sutton*, 527 U.S. at 511 (Stevens, J., dissenting).

to employment at the station. One night, in the course of the brothers' duty, a gas stove explodes from the heat of a surrounding fire and severely impairs the brothers' hearing. Several days after the explosion, Steve worries that his reduced hearing capacity will diminish his ability to hear trapped victims and purchases a hearing aid that fully restores his hearing.[279] Art has a large family and cannot afford a hearing-restoration device. A few weeks later, the fire department re-tests the hearing of both men; Steve is tested without his hearing aid. Both men fail to reach the standard set by the department for adequate hearing in an unaided state, even though Steve would have passed the test had he used his hearing aid. Subsequently, the fire department terminates the employment of both men. Each files a suit under the ADA claiming disability discrimination. Under the *Sutton* majority's decision, Art qualifies as a disabled individual under the ADA because his "physical impairment" "substantially limits" the "major life activity" of hearing.[280] Steve, however, may not file suit pursuant to the ADA; he corrected his impairment and therefore fails to qualify as statutorily "disabled" post-*Sutton*. Steve attempted to better qualify himself to perform an essential function of his vocation; upon termination, *Sutton* restricts him from filing suit under the ADA. Had Steve, like Art, not taken remedial measures, *Sutton* would allow him to file suit under the ADA. Such a result is mystifying.

The Supreme Court decided *Sutton* strictly on a statutory interpretation of the ADA; constitutional considerations ground no portion of the opinion. Therefore, Congress possesses the authority to amend the ADA in a fashion that supersedes the Sutton decision.[281] In light of the tenuous grounds relied upon by the majority and the inequitable consequences of the holding's result, Congress, which prior

[279]This hypothetical situation assumes that the fire station provides neither Steve nor Art with disability insurance.

[280]To recover against his employer under the ADA, Art would have to prove that he can perform the essential functions of his job with or without reasonable accommodations and prove that the fire station impermissibly discriminated against him based upon his disability. *See* 42 U.S.C. § 12111(8) (1994). Additionally, Art's employer could avoid liability if the employer shows that the hearing-level criteria is job-related and consistent with business necessity or shows that hearing at a level poorer than its standard poses a health or safety hazard. *See* 42 U.S.C. §§ 12113 (a) and (b), respectively, (1994). This example simply aspires to indicate *Sutton*'s impact on qualification as "disabled" under the ADA.

[281]U.S. CONST. Art I.

to the ADA's enactment recommended disregarding mitigating measures in a disability analysis, may explicitly amend the ADA to mandate such action.

Putting It All Together

Assume for the moment that a court concludes that ED qualifies as a statutory "impairment." To recover for disability discrimination under the ADA, an ED-stricken individual must prove that his ED "substantially limits" reproduction, or alternatively, "substantially limits" intercourse if a court deems such activity a "major life activity."[282] I will first discuss the factors that a court making this "disability" determination will likely view as important under the *Sutton* decision as it currently stands. Subsequently, I present a similar analysis under an assumption, arguendo, that a congressional amendment to the ADA supersedes *Sutton* and forces courts to disregard mitigating measures when conducting disability determinations.

Under Sutton

Post-*Sutton*, of men successfully responding to Viagra,[283]most will fail the "substantial limitation" prong of the ADA's "disability" test. Economic impact of Viagra purchases or negative side effects caused by the wonder-drug, however, may "substantially limit" some ED sufferers despite the *Sutton* holding.[284]

In *Bragdon*, the majority determined although an HIV victim possesses the physical capacity to conceive and bear a child, the dangerous implications of such a birth to the public health "substantially limit" reproduction.[285] After pronouncing this conclusion, the Court immediately stated the decision of an HIV-positive individual to reproduce also carries economic consequences such as added costs for antiretroviral therapy, supplemental insurance,

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[282]*See Bragdon*, 524 U.S. at 626.

[283]For examples of the percentage of men successfully responding to Viagra, see Pfizer's clinical study results. *See* PINK SHEET, *supra* note 20.

[284]*See* Diane Levick, *supra* note 33.

[285]*Bragdon*, 524 U.S. at 637-42.

and long-term health care for the child.[286] This dictum suggests the cost of drugs such as Viagra used to mitigate an impairment like ED potentially "substantially limits" the "major life activity" of reproduction (or intercourse if judicially deemed a "major life activity"). To decide a claim proffered solely under this line of Justice Kennedy's *Bragdon* dictum, a court presumably must answer three questions: (1) How much weight does Justice Kennedy's statement hold?; (2) Can cost alone "substantially limit" a "major life activity"?; and (3) If the answer to question (2) is yes, how great a cost constitutes a "substantial limitation"? Of course, the answer to question (3) necessarily depends on an individual's financial situation since the *Bragdon/Sutton/Albertsons* ADA disability approach mandates an individualized inquiry into the "substantial limitation" question. The notion that one's disability status hinges on the amount of money an individual possesses will disappear if Congress supplants the *Sutton* ruling via an ADA amendment.

Alternatively, in light of the *Sutton* majority's ruling that "disability" assessors acknowledge both positive and negative effects of mitigating measures, adverse effects of Viagra consumption may lead to a finding that ED "substantially limits" certain individuals from the "major life activity" of reproduction (or intercourse if judicially deemed a "major life activity"). Men consuming Viagra risk suffering from any of the wonder-drug's documented adverse side effects. Serious heart problems have garnered the media spotlight, and for good reason: heart-related deaths accounted for seventy-seven of the 130 Viagra-related deaths in the United States reported to the FDA prior to December of 1998.[287] Additionally, Viagra may induce non-fatal but serious heart conditions such as monomorphic ventricular tachycardia, a condition identifiable by a heartbeat so increased that it rises to dangerous levels.[288] Besides heart problems, Pfizer lists in its package

[286]Justice Kennedy also states that the decision to reproduce carries legal consequences. For example, the laws of some states forbid persons with HIV from having sexual intercourse with others, regardless of consent. *See Bragdon*, 524 U.S. at 639-40.

[287]*See Viagra User Sues for Heart Problems*, 17 No. 9 PROD. LIAB. L. & STRATEGY 1 (March 1999).

[288]Most, but not all, patients reporting heart difficulties had pre-existing cardiovascular risk factors. *See* Package Insert, *supra* note 21. Pfizer's product label, updated on November 24, 1998, indicates that Viagra can cause transient decreases in blood pressure in patients with

insert several adverse effects recognized in its clinical trials. Pfizer breaks the side effects into three categories:

> (1) Adverse effects reported by greater than 2% of patients treated with Viagra, but more frequently reported by individuals on the drug than on a placebo: headache, flushing, dyspepsia, nasal congestion, urinary tract infection, abnormal vision (transient in all but one of 734 subjects tested), diarrhea, dizziness, rash.
>
> (2) Adverse reactions occurring in greater than 2% of patients treated with Viagra, but equally common on the drug or a placebo: respiratory tract infection, back pain, flu syndrome, and arthralgia.
>
> (3) Events occurring in less than 2% of patients treated with Viagra, but for which any causal relationship to Viagra remains uncertain: shock, allergic reaction, chest pain, tachycardia, hypotension, cardiac arrest, heart failure, colitis, gastroenteritis, esophagitis, abnormal liver function tests, rectal hemorrhage, anemia, gout, hyperglycemia, arthritis, vertigo, depression, laryngitis, herpes simplex, deafness, eye hemorrhage, and urinary incontinence.[289]

Further, after marketing Viagra, Pfizer observed physical effects associated with the drug, including myocardial infarction, sudden cardiac death, ventricular arrhythmia, cerebrovascular hemorrhage, transient ischemic attack and hypertension, seizure, priapism, ocular blurring, ocular swelling/pressure, and retinal vascular disease or bleeding. Pursuant to the *Bragdon/Sutton/Albertsons* decision to perform "substantial limitation" analyses on an individualized basis, most ED sufferers able to prove that Viagra causally adversely affected

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heart disease. *See Pfizer Updates Viagra Warning*, 14 NO. 7 ANDREWS PHARMACEUTICAL LITIG. REP. 15 (December 1998).

[289]*See* Package Insert, *supra* note 21.

them may plausibly argue that negative effects related to the ingestion of this ED mitigating drug "substantially limit" a "major life activity."

Negative side effects caused by Viagra intake generally will not afflict reproduction or intercourse but other "major life activities." In *Sutton*, however, Justice O'Connor never suggested that negative side effects caused by a mitigating measure must adversely affect the major life activity for which an individual takes the measure.[290] Therefore, hypothetically, an ED victim inflicted with retinal vascular disease due to Viagra ingestion could argue his physical impairment, ED, substantially limits the major life activity of seeing.[291]

Arguendo: A Congressional Amendment to the ADA Supersedes Sutton

If, arguendo, a congressional amendment to the ADA supplants the *Sutton* ruling, an ED-stricken individual maintains an excellent probability of qualifying as statutorily "disabled." Regardless of the precise language relied upon to interpret "substantial limitation," it seems quite clear that without Viagra or a similar drug ED "substantially limits" reproduction.[292] Some might argue unmitigated ED fails to eliminate reproduction for some ED sufferers due to the availability of assisted reproductive technologies (ARTs) such as intrauterine insemination. According to the *Bragdon* majority, however, the ADA addresses "substantial limitations, not inabilities"[293] and the *Sutton* Court suggested that "substantial" implies "considerable."[294] Further, in the language of the EEOC regulations,

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[290] Examples cited in *Sutton* bolster the veracity of this observation. *See Sutton*, 527 U.S. at 484, *citing* Johnson, *Antipsychotics: Pros and Cons of Antipsychotics*, RN (Aug. 1997) (antipsychotic drugs can cause painful seizures); *Liver Risk Warning Added to Parkinson's Drug*, FDA CONSUMER (Mar. 1, 1999) (drug for treating Parkinson's disease can cause liver damage).

[291] At first blush it seems plausible that if neither Viagra cost or Viagra-induced negative side effects alone "substantially limits" a "major life activity," the combination of cost and adverse effect could statutorily qualify an individual as "disabled." Unless, however, each of these two consequences of Viagra ingestion affects the *same* major life activity, and the compounded effects "substantially limited" *that* major life activity, a disability finding post Sutton appears unlikely.

[292] This article leaves discussion pertaining to individuals possessing "partial" ED for another day.

[293] *See Bragdon*, 524 U.S. at 641.

[294] *See Sutton*, 527 U.S. at 491.

"substantial limitations" "significantly restrict...[the] manner...under which an individual can perform a major life activity as compared to the...manner...under which the average person in the general population can perform that same major life activity."[295] In light of the physical and mental trauma, time spent, and the substantial cost of reproduction via medical techniques, it seems likely under my proposed congressional amendment that courts would find ED "substantially limits" reproduction for many ED sufferers, regardless of which "substantial limitation" definition they use.[296]

In light of available ARTs, a court could determine that ED fails to "substantially limit" reproduction, but still deem sexual intercourse a "major life activity." In this situation, without Viagra or a similar drug, ED undeniably "substantially limits" sexual intercourse.

Congress could amend the ADA to only partially supersede *Sutton*; that is, Congress could state that courts must acknowledge mitigating or corrective measures only for trivial "impairments" when performing "disability" determinations. Justice Stevens' dissent in *Sutton* suggests that even if the Court disregarded mitigating measures as a general rule, "it would still be necessary to decide whether that general rule should be applied to what might be characterized as a minor, trivial impairment."[297] Justice Stevens cited the First Circuit's decision in *Arnold v. United Parcel Service*, which held an unmitigated state determinative, but he suggested that the Court might reach a different result in a case where "a simple inexpensive remedy" such as eyeglasses exists and "can provide total and relatively permanent control of all symptoms."[298] Under this proffered limited amendment it seems unclear whether Viagra falls within the "general rule" or not. Depending on the quantity ingested, several years' supply of Viagra

[295]29 C.F.R. § 1630.2 (j) (1998).

[296]One possible note of trouble for ED-stricken individuals in the context of a congressional amendment supplanting the *Sutton* decision, however, arises from *Colwell v. Suffolk County*. *See* Colwell v. Suffolk County, 158 F.3d 635, 644 (2d Cir. 1998). In *Colwell*, the Second Circuit, determined that a "tough night's sleep," fails to "substantially limit" the major life activity of sleeping because "difficulty sleeping is extremely widespread." Depending on the proper weight garnered by the Second Circuit's pre-*Sutton* opinion and on further judicial interpretation of "widespread," ED – afflicting an estimated ten to thirty million Americans – may or may not constitute a "widespread" hardship. *See id.*

[297]*Sutton*, 527 U.S at 497 (Stevens, J., dissenting).

[298]Arnold v. United Parcel Service, 136 F.3d 854, 866 n. 10 (1st Cir. 1998), *cited in Sutton*, 497 U.S. at 496.

likely costs more than a pair of eyeglasses. Further, the phrase "total and permanent control" with regard to ED solicits debate.

APPLICATION OF THE ADA TO HEALTH INSURANCE

This section discusses whether an employer invokes ADA discrimination liability by refusing to self-cover Viagra or to purchase sufficient optional Viagra coverage for an employee suffering from ED. The entirety of this section assumes, arguendo, the ED-stricken individual in question qualifies as "disabled" under the ADA.[299] As stated above, the ADA prohibits discrimination in employer-provided health benefit plans, offered either via self-insurance or by way of insurance company, HMO, or any other similar entity.[300] Upon an allegation that an employer-provided health insurance plan violates the ADA, the EEOC, charged with enforcement of the ADA, must first determine whether the claimant qualifies as statutorily "disabled," and then whether the challenged plan constitutes a disability-based distinction.[301] Even if disability grounds undergird a plan's distinction, however, a statutory escape hatch – § 501(c) of the ADA, better known as "the safe harbor provision" – may rescue an employer from liability.[302] Congress included the safe harbor provision in the ADA to assuage insurers concerned that the elimination of disability-based discrimination would undermine traditional risk assessment techniques via applicant distinction determinations.[303] The portion of § 501(c) salient to employer-provided insurance plans states:

> [Titles I through IV] of this Act shall not be construed to prohibit or restrict:
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> (2) a person or organization covered by this chapter from establishing, sponsoring, observing or

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[299]This analysis applies to claims against employers who either refuse to pay for an employee's Viagra prescription or allegedly do not provide "enough" Viagra. This article leaves the question of how much Viagra is "enough" for another day.

[300]*See* 42 U.S.C. § 12201(c) (1994).

[301]*See* Interim Guidance, *supra* note 80.

[302]*See* 42 U.S.C. § 12201(c)(1994).

[303]*See id.*

> administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.
>
> Paragraphs (2), (3) shall not be used as a subterfuge to evade the purposes of [Titles] I and III of this [Act].[304]

Section 501(c)(2) relates to employer-provided insurance plans under contract with an insurance company, HMO, or the like, otherwise known as "traditional insurance."[305] Section 501(c)(3) concerns employer-provided self-insurance plans where employers generally expend insurance costs from their own holdings. To secure protection from the safe harbor provision and thus constitute a permissible health insurance plan under the ADA, § 501(c)(2) requires an employer's traditional insurance plan that maintains a disability-based distinction to qualify as: (1) "bona fide"; (2) not inconsistent with state law; and (3) "non-subterfuge."[306] Under § 501(c)(3), an employer providing a self-insurance plan with a disability-based distinction need only offer its employees a benefit plan that is (1) "bona-fide" and (2) not used as "subterfuge" to constitute an ADA permissible health insurance plan.[307]

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[304]*See id.* Paragraph (1) of ADA §501(c), not cited in the text of this article, relates to underwriting, classifying, and administering risks by insurance companies, hospital or medical service companies, health maintenance organizations, and other similar entities that administer benefit plans. *See* 42 U.S.C. § 12201(c)(1) (1994).

[305]*See* Robert E. Keeton & Alan I. Widiss, *Insurance Law: A Guide to Fundamental Principles, Legal Doctrines and Commercial Practices*, § 1.3(b)(2) (student ed. 1988); *cited in* H. Miriam Farber, *Subterfuge: Do Coverage Limitations and Exclusions in Employer-Provided Health Care Plans Violate the Americans With Disabilities Act?*, 69 N.Y.U. L. Rev. 850, 863 (1994).

[306]*See* 42 U.S.C. §12202(c) (1994).

[307]The Employee Retirement Income Security Act of 1974 ("ERISA") preempts state regulation of health insurance with respect to self-insurers. 42 U.S.C. §12202(c); *see also*, FMC v. Holliday, 498 U.S. 52, 61-65 (1990).

After discussing the weight of the EEOC Interim Guidance regarding the ADA's application to health insurance, this section addresses disability-based distinctions, the definition of "bona-fide," state law provisions (or the lack thereof), and finally, a source of great debate – the proper definition of "subterfuge."

The Proper Weight to Grant Agency Guidelines in General and the EEOC Interim Guidance in Particular

In 1993, Congress permitted the EEOC to issue regulations to implement the ADA.[308] The EEOC promulgated guidance provisions[309] dubbed "Interim Guidance on Application of ADA to Health Insurance" (Interim Guidance) relating to disability-based distinctions and to the safe-harbor provisions of the ADA.[310] The Interim Guidance discusses in great detail issues that rest at the core of this article, such as disability-based distinctions and "subterfuge."[311] Therefore, this subsection will attempt to illustrate coherently the current status of an incoherent issue: the proper degree of judicial deference to accord to agency guidelines in general and to the EEOC Interpretive Guidance in particular, after the Supreme Court's landmark decision in *Chevron v. Natural Resources Defense Council.*[312]

Administrative agencies formulate both "legislative rules" such as regulations, and "non-legislative" rules or "guidelines" such as agency policy statements and interpretive rules.[313] Regulations generally fill in statutory gaps. Güidance documents typically enhance the consistency and accountability of agency decisions by explaining the regulating agency's perspective regarding the manner in which regulated

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[308] *See* 42 U.S.C. § 12116 (1994).

[309] The EEOC enacted its Interim Guidance as a response to the Fifth Circuit's decision in McGann v. H & H Music Co., 946 F.2d 401 (5th Cir. 1991), which held that ERISA failed to prohibit employers from modifying benefits and from placing coverage limits on conditions such as AIDS. *See* Eric Mills Holmes, *Solving the Insurance/Genetic Fair/Unfair Discrimination Dilemma in Light of the Human Genome Project*, 85 KY. L.J. 503, 619 n 375 (Spring 1996-1997).

[310] *See* Interim Guidance, *supra* note 80.

[311] *See id.*

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

[313] *See, e.g.*, John P.C. Duncan, *The Course of Federal Pre-Emption of State Banking Law*, 18 ANN. REV. BANKING L. 221, 265-66 (1999); KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE, at § 6.3 (3d. ed. 1994)

industries should comply with the applicable statutes and regulations.[314] Unlike regulations, "non-legislative" rules do not require an agency to conduct "notice and comment" proceedings[315] – a time-consuming process that mandates an agency to solicit public opinion regarding the agency's proposal.

Chevron v. Natural Resources Defense Council

In 1984, the Supreme Court in *Chevron* addressed the proper weight that courts must impart to agency regulations, and arguably, to agency guidelines.[316] With an agency regulation at issue, the *Chevron* majority promulgated a two-step test for courts to conduct when evaluating an agency's interpretation of a statute.[317] First, if the statute is clear, the agency "must give effect to the unambiguously expressed intent of Congress."[318] Second, if the statute is silent or ambiguous, the court must defer to the agency interpretation if it "is based on a permissible construction of the statute."[319]

While an agency regulation was at stake in *Chevron*, the Supreme Court failed to contrast "legislative" and "non-legislative" rules.[320] In fact, the Court made no mention of the formal rule-making process undergirding a regulation.[321] Because the *Chevron* case concerned a "legislative" rule, however, courts and commentators debate whether interpretive rules and guidelines garner "full Chevron deference."[322] To date, the Supreme Court has not directly addressed *Chevron*'s applicability to agency guidance.[323] Inter-circuit and intra-circuit splits regarding the proper deference to confer upon agency guidelines, due to

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[314]*See, e.g.*, George B. Wyeth, *The "Regulation by Guidance" Debate: An Agency Perspective*, 9 NAT. RESOURCES & ENV. 52, 52 (Spring 1995); Marianna E. Beem, *Good Guidance Improves Regulation: A Case Study with the FDA*, 15 No. 4 ALA. NEWS 23, 23 (1996).

[315]*See* 5 U.S.C. § 553 (b) (1994).

[316]*Chevron*, 467 U.S. at 842.

[317]*See id.*

[318]*See id.* at 843.

[319]*See id.*

[320]*See generally Chevron*, 467 U.S. at 837.

[321]*See id.*

[322]Duncan, *supra* note 313, at 266.

[323]For an excellent discussion on the Supreme Court's muddled doctrine on this issue, *see* Britt E. Idle, *To Defer or Not to Defer? The Circuit Split Over Chevron Deference to Agency Interpretations: Southern Ute Indian Tribe v. Amoco Production Co.*, 1998 UTAH L. REV. 397, 400-02.

the absence of an explicit Supreme Court pronouncement on this issue, generate great confusion among lower courts, agencies, and regulated industries.[324]

Several circuits, including the Second, Fifth, Tenth, Eleventh, District of Columbia, and Federal, grant *Chevron* deference to "legislative rules" but not to agency interpretations and guidelines.[325] On the other hand, the Fourth Circuit furnishes *Chevron* deference to "non-legislative" rules.[326] Judicial splits pervade the First, Third and Sixth Circuits regarding the question of *Chevron* deference to agency interpretations and guidelines.[327]

Strong policy justifications support both granting deference to *Chevron* and to rendering *Chevron* inapposite, with respect to agency guidelines. On one hand, restraining the judiciary, which has no constituency, from substituting its policy preferences for those of the executive branch, with a constituency via the President, supports judicial deference to all agency promulgations. Consistency norms among federal courts also entreat judicial deference to agency interpretations. Finally, agency expertise providing experienced insight

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[324]*See id.*

[325]*See* Southern Ute Indian Tribe v. Amoco Prod. Co., 119 F.3d 816, 832-33 (10th Cir. 1997), *citing* Motor Vehicle Mfrs. Ass'n. v. New York State Dep't of Envtl. Conservation, 17 F.3d 521, 534-35 (2d Cir. 1994) (agency advisory circular does not command *Chevron* deference); Dalheim v. KDFW-TV, 918 F.2d 1220, 1228 (5th Cir. 1990) (agency interpretations are persuasive, but not controlling); Satellite Broad. & Comm. Ass'n v. Oman, 17 F.3d 344, 346-47 (11th Cir. 1994) (granting *Chevron* deference to agency rule, after previously rejecting similar policy decision); Travelstead v. Derwinski, 978 F.2d 1244, 1250 (Fed. Cir. 1992) ("[A]gency pronouncements that are merely interpretive are given lesser deference...."); Vietnam Veterans v. Secretary of the Navy, 843 F.2d 528, 537 (D.C. Cir. 1988) (agency interpretations or policies do not bind the court).

[326]*See* Warren v. N. C. Dept. of Human Resources, 65 F.3d 385, 391 (4th Cir. 1995) (deference accorded to the Secretary of Agriculture's interpretation of the Food Stamp Act)

[327]*See* United States v. LaBonte, 70 F.3d 1396, 1404 (1st Cir. 1995) ("*Chevron* deference is the proper criterion for determining whether a guideline. . .contravenes a statute"); Massachusetts v. FDIC, 102 F.3d 615, 621 (1st Cir. 1996) ("policy statements, guidelines, staff instructions, and litigation positions" are not accorded full *Chevron* deference), Elizabeth Blackwell Health Center for Women v. Knoll, 61 F.3d 170, 182 (3d Cir. 1995) ("deference is appropriate here even though the Secretary's interpretation is not contained in a 'legislative rule' "); Limerick Ecology Action, Inc. v. U. S. Nuc. Reg. Com'n., 869 F.2d 719, 736 (3d Cir. 1989) ("NRC Final Policy Statement is entitled to no greater deference than any other policy statement, i.e. none"); Garcia v. Secretary of Health and Human Services, 46 F.3d 552, 557 (6th Cir. 1995) (deferring to the Secretary's statutory interpretation); Kelley v. E.I. Dupont De Nemours & Co., 17 F.3d 836, 841-42 (6th Cir. 1994) (distinguishing deference owed agency rulemaking from agency policies).

into the statute at issue implores courts to dance the *Chevron* two-step with "non-legislative" rules.[328]

On the other hand, several commentators suggest that agency interpretations and guidelines, which are not required to follow notice-and-comment procedures, should not garner complete judicial deference.[329] This justification demands attention because if "permissible statutory constructions" pursuant to *Chevron* – by way of agency guidelines – surmount judicial review, agencies would lack the incentive to conduct notice and comment procedures, which account for public perspectives.[330] Further, the Tenth Circuit in *Southern Ute v. Amoco* argued that systematic deference to agency interpretations would relinquish a court's duty of judicial review and, concurrently, undesirably tilt the constitutional separation of powers toward the executive branch.[331]

In sum, if *Chevron* applies to agency interpretations and guidelines that have not gone through notice and comment proceedings, then agency guidance interpreting unclear statutes will harness controlling weight if a court deems the agency's statutory construction "permissible." If, however, a reviewing court renders *Chevron* inapposite with respect to "non-legislative" rules, the Supreme Court's 1944 pre-*Chevron* decision in *Skidmore v. Swift* will likely apply.[332] The *Skidmore* majority stated that administrative "rulings, interpretations and opinions...while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[333] Therefore, even if a reviewing court denies *Chevron* deference to an agency's guidance, pursuant to *Skidmore* the court may at least "resort" to the pronouncement.

[328]*See* Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking under Chevron*, 6 ADMIN. L.J. AM. U. 187, 194 (1992).

[329]*See id.* at 189; Davis & Pierce, *supra* note 313, at § 3.5.

[330]*See Elizabeth Blackwell*, 61 F.3d at 189 (Nygaard, J., dissenting).

[331]*See Southern Ute*, 119 F.3d at 833, *cited in* Idle, *supra* note 323.

[332]Skidmore v. Swift & Co., 323 U.S. 134 (1944).

[333]*Id.* at 140.

Chevron Applied to the EEOC Interim Guidance

The primary policy driving disallowance of *Chevron* deference to agency interpretations rests on the basis that such agency guidelines have not been proffered after consideration of the regulated public's viewpoints pursuant to notice and comment procedures.[334] This policy, however, generally fails to adhere to non-regulatory guidelines extended by the EEOC because since the mid-1970s the EEOC has issued several of its interpretive guidance pronouncements only after conducting notice and comment procedures.[335] For example the EEOC issued its Interpretive Appendix to the ADA – discussing, *inter alia*, "major life activity" status – only after the EEOC conducted notice and comment activity.[336] The EEOC's notice and comment standards regarding interpretive guidance abrogate the chief concern cited by courts and commentators reluctant to grant *Chevron* deference to such pronouncements.[337] Consequently, one may plausibly argue that EEOC guidelines issued after notice and comment proceedings, unlike guidelines proffered by many other agencies, should impart substantial

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[334]*See supra* note 312 and accompanying text.

[335]The EEOC's conduct is in response to Justice Blackmun's concurrence in *Albermarle Paper Co. v. Moody*, noting that the EEOC interpretation at issue garnered less deference than a regulation because the "[g]uidelines in question have never been subjected to the test of adversary comment" Albermarle Paper Co. v. Moody, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring). *See also* Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 103.

[336]*See* 42 U.S.C. §§ 12101-12213 (1994).

[337]If the EEOC follows notice and comment proceedings prior to promulgating many of its guidance provisions, why not issue regulations, with guaranteed *Chevron* deference, rather than guidance provisions with questionable *Chevron* deference? Christopher Kuczynski, Director of the ADA Division of the EEOC, suggested that guidance provisions facially differ from regulations; that is, in guidance provisions, unlike in regulations, the EEOC provides large amounts of specific information and explains in great detail the logic behind the EEOC's pronouncements. Further, Mr. Kuczynski suggested that EEOC investigators and regulated industry members form the primary audience for guidance provisions, though he does recognize that the guidance provisions are helpful tools for courts and the public at large. Finally, Mr. Kuczynski suggested that, as I argue above, regardless of whether an agency entitles a proclamation "guidance" or "regulation," if notice and comment proceedings have been conducted, the amount of deference a court grants the document should not vary greatly Telephone interview with Christopher Kuczynski, EEOC Division Director of the Americans with Disabilities Act (Nov. 15, 1999).

weight on courts. Indeed, many courts have followed the EEOC's Interpretive Appendix position regarding "major life activity."[338]

Unlike many EEOC guidelines, however, the EEOC's Interim Guidance, which tackles several key issues at stake in an ED-sufferers quest for Viagra coverage – including disability-based distinctions and "subterfuge" – has not gone through notice and comment proceedings.[339] Indeed, the EEOC intends the Interim Guidance to provide rough guidance to regulated entities until it issues a final guidance after publication for notice and comment.[340]

As discussed above, the Supreme Court's *Sutton* decision obviated consideration of the weight of the EEOC's Interim Guidance via its "mitigating measures" determination.[341] Currently, the EEOC's Interim Guidance rests in the same position as other guidance provisions that have not undergone notice and comment proceedings - waiting for a Supreme Court pronouncement on the level of *Chevron* applicability. Agencies, regulated industries, and courts craving a comprehensive *Chevron* doctrine also seek Supreme Court direction regarding *Chevron's* applicability to agency guidance provisions that have not weathered notice and comment activity. Because the proper deference due to the EEOC's Interim Guidance lacks clarity, this section will, *inter alia*, illustrate the positions proffered by this pronouncement to provide a comprehensive view of the issues at stake.

Disability-Based Distinctions

Whenever a statutorily "disabled" claimant alleges that a provision of an employer-provided health benefit plan violates the ADA, the EEOC (and a reviewing court) must first determine whether the challenged provision amounts to a disability-based distinction.[342] An employer-provided plan not resting on a disability-based distinction fails to violate the ADA.[343] Therefore, this subsection outlines the measures a

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[338] *See, e.g.*, Hilburn v. Murata Electronics North America, Inc., 181 F.3d 1220, 1227 (11th Cir. 1999); Gonzales v. City of New Braunfels, Texas, 176 F.3d 834, 836 (5th Cir. 1999).

[339] *See generally* Interim Guidance, *supra* note 80.

[340] As early as May 8, 1995, the EEOC proposed to issue final guidelines, updating the Interim Guidance. *See* 60 Fed. Reg. 24,040 (1995). On August 12, 1997, however, the EEOC withdrew the proposal from consideration. *See* 62 Fed. Reg. 58,201 (1997).

[341] *See supra* notes 237-280 and accompanying text.

[342] 42 U.S.C. §§ 12101-12213 (1994).

[343] *Id.*

court presumably will undergo in determining whether an employer's non-Viagra coverage policy constitutes a disability-based distinction.

The EEOC guidance provides a comprehensive mapping of insurance distinctions that it deems "not based on disability."[344] This blueprint includes plans applied equally to all insured employees, even if they may have a greater impact on some people with disabilities.[345] For example, the EEOC's guidance proffers that a health insurance plan providing fewer benefits for "eye care" than for other physical conditions fails to qualify as a disability-based distinction because such a broad distinction applies to the treatment of "a multitude of dissimilar conditions ... which constrain individuals both with and without disabilities."[346] The EEOC subsequently contrasts such non disability-based distinctions with distinctions it deems disability-based, proposing "[a] term or provision is 'disability-based' if it singles out a particular disability (*e.g.*, deafness, AIDS, schizophrenia), a discrete group of disabilities (*e.g.*, cancers, muscular dystrophies, kidney diseases) or a disability in general (*e.g.*, non-coverage of all conditions that substantially limit a major life activity)."[347] Presumably a court following the EEOC guidance will deem ED more similar to deafness or kidney diseases than to the broad category of general eye care. Therefore, an employer-provided health insurance plan failing to cover ED remedies such as Viagra likely constitutes a disability-based distinction pursuant to the EEOC's guidance.

Rather than explicitly precluding Viagra, or ED aids in general, many health plans may exclude coverage for "infertility" assistance as a whole.[348] In mandating state Medicaid programs to provide Viagra for qualified applicants, the HCFA determined that Viagra does not qualify as a fertility-promoting drug.[349] A court following the HCFA's

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[344]*See* Interim Guidance, *supra* note 80.

[345]*See* Interim Guidance, *supra* note 80, at 405:7117. The EEOC Interim Guidance also states that disability-based distinctions do not include: blanket pre-existing condition clauses, universal limits or exclusions from coverage of all experimental drugs and treatments, or all "elective surgery;" and coverage limits on medical procedures that are not exclusively, or nearly exclusively, utilized for the treatment of a particular disability, such as a limit on X-rays *See id.* at 405:7118.

[346]The EEOC suggests, however, that an employer selectively applying a universal non-disability based distinction only to individuals with disabilities violates the ADA. *See id.*

[347]*See id.*

[348]42 U.S.C. §§ 12101-12213 (1994).

[349]*Id.*

determination likely would conclude that, since infertility drugs fail to comprise Viagra, an employer must cover the wonder-drug. In contradistinction, a reviewing court not aligning its judgment to adhere to the HCFA's intuition but rather determining that "infertility" comprises ED, must decide whether the broad category of "infertility" more closely mirrors eye care or kidney diseases.[350] Certainly, heated debate will surround resolution of this question.[351]

Bona Fide Benefit Plan

An employer-provided health benefit plan deemed to comprise a disability-based distinction must fall within the protective ambit of the ADA's safe harbor provision; otherwise it violates the ADA.[352] The first prong of the safe harbor test requires an employer-provided benefit plan (traditional or via self-insurance) to meet the statutory standard - "bona fide."

The ADA fails to define the term "bona fide."[353] An age non-discrimination statute preceding the ADA, the Age Discrimination in Employment Act of 1967 (ADEA),[354]similarly employed (and failed to

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[350]*See* WEBSTER'S II, *supra* note 123.

[351]The Eighth Circuit's 1996 decision in *Kraul v. Iowa Methodist Medical Center* considered the disability-based distinction status of a benefit plan's broad infertility exclusion. Mary Jo Kraul's employer-provided medical benefit plan excluded coverage for the treatment of male or female infertility problems. Denied coverage for her fertility treatments, Kraul brought suit under the ADA. The Eighth Circuit, before the Supreme Court's *Bragdon* decision, determined that reproduction failed to qualify as a statutory "major life activity," and therefore concluded that the ADA term "disability" did not comprise infertility, and consequently, an insurance provision denying fertility treatment coverage was deemed not a disability-based distinction. Clearly, by stating that infertility fails to constitute an ADA "disability," a plan denying coverage for infertility lacks the precursor to a disability-based distinction decision – the disability – relegating any discussion pertaining to a fertility-non-coverage clause's status as a disability-based distinction to dicta. Notably, however, the Eighth Circuit followed the EEOC's guidance, and stated that the plan's infertility exclusion "does not single out a particular group of disabilities, allowing coverage for some individuals with infertility problems, while denying coverage to other individuals with infertility problems." Yet, it seems that the court unexplainably applied a discrimination analysis by looking at numbers within a categorically excluded group of disabilities, rather than determining whether the discrete group itself is distinguished as a plain reading of the EEOC guidance suggests. Regardless, *Bragdon* renders *Kraul* practically inapposite. *See* Kraul v. Iowa Methodist Medical Center, 95 F.3d 674 (8th Cir. 1996).

[352]42 U.S.C. §§ 12101-12213 (1994).

[353]*Id.*

[354]29 U.S.C. §§ 621-634 (1994).

define) the term "bona fide employee benefit plan."[355] EEOC regulations interpreting the ADEA state: "[a] plan is considered 'bona fide' if its terms . . . have been accurately described in writing to all employees and if it actually provides the benefits in accordance with the terms of the plan."[356] The Supreme Court, in two ADEA cases – *United Airlines v. McMann*[357] and *Public Employees Retirement v. Betts*[358] – suggested a statutorily qualified "bona fide" benefit plan "[is one that] exists and pays benefits." While the *McMann* and *Betts* decisions form the root from which great controversy stems in the "subterfuge" debate (discussed later in this section of the article), the Courts' definition of "bona fide" generates little discussion. Unlike in the "subterfuge" context, courts deciding cases have embraced the *McMann/Betts'* definition of ADEA term "bona fide" for ADA purposes.[359] Further, the EEOC's ADA guidance qualifies a health insurance plan as bona fide if "it exists and pays benefits, and its terms have been accurately communicated to eligible employees."[360] In sum, the "bona fide" prong of the § 501(c) safe harbor provision lacks bite; at most, to satisfy this requirement an employer-provided health plan need only actually exist, have been accurately communicated to beneficiaries, and pay benefits to plan members.

Not Inconsistent with State Law

Only employers purchasing traditional insurance plans that encompass a disability-based distinction must satisfy the "not inconsistent with state law" prong of ADA § 501(c). The Employee Retirement Income Security Act of 1974 (ERISA) preempts state regulation of health insurance with respect to self-insurers.[361]

While varying in substance, all states require that employers provide certain benefits for employees. For example, Kansas state law mandates coverage for services performed by optometrists, dentists,

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[355] *See* 29 U.S.C. § 623(f)(2)(B) (1994).

[356] *See* 29 C.F.R. § 1625.10(b) (1998).

[357] United Airlines v. McMann, 434 U.S. 192, 194 (1977).

[358] Ohio Pub. Employees Retirement Sys. v. Betts, 492 U.S. 158, 166 (1989)

[359] *See, e.g.*, Kraul, 95 F. 3d at 678; Conner v. Colony Lake Lure, 1997 WL 816511, at *9 (W.D. N.C.); Piquard v. City of East Peoria, 887 F. Supp. 1106, 1120 (C.D. Ill. 1995)

[360] Interim Guidance, *supra* note 80, at 405:7120.

[361] 42 U.S.C. §§ 12101-12213 (1994).

and podiatrists.[362] Several states obligate insurers to cover, or to offer employers the option of covering, infertility diagnoses and treatments such as in vitro fertilization and artificial insemination.[363] Additionally, several states recently enacted legislation mandating insurance coverage for contraceptives: Maryland in 1998, and Connecticut, Georgia, Hawaii, Maine, Nevada, New Hampshire, North Carolina, and Vermont in 1999.[364] As of this article's writing, however, no state law positively requires private employers to purchase Viagra for employees.[365]

Subterfuge

The final prong of the ADA's safe harbor provision – that an employer offering its employees an insurance plan with a disability-based distinction must meet to avoid liability under the ADA – musters a tremendous amount of controversy.[366] Applicable to both traditional and self-provided coverage, this prong mandates that a disability-based distinction "shall not be used as a subterfuge to evade the purposes of [the ADA.]"[367] Two distinct lines of thought dominate case law, agency regulations, and commentary regarding the proper interpretation of the term "subterfuge." One group of "subterfuge" analysts suggests that "subterfuge" under the ADA appropriates the definition of "subterfuge" under the ADEA that the Supreme Court adopted in *Public Employees Retirement System of Ohio v. Betts*.[368] Others

[362] *See* Kan. Stat. Ann. § 40-2,100 (1998).

[363] The state laws of Arkansas, California, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Montana, New York, Ohio, Rhode Island, and Texas provide widely varying mandates to cover or to offer to cover services such as infertility diagnoses and certain infertility treatments. For a comprehensive delineation of each aforementioned state's requirements, *see Insurance Laws by State*, *at* http://www.poetsrx.com/insurance/state.htm (last modified May 5, 1999).

[364] *See* Richard Wolf, *Legislatures in 45 States Saw Abortion Bills in '99*, USA TODAY, July 6, 1999, at 10A.

[365] In September 1998, the Florida Division of State Employee Insurance decided that Florida's state insurance plan will cover eight Viagra pills per month for state employees if deemed medically necessary. *See* Bill Cotterell, *Florida State Workers' Insurance Limited to Eight Viagra Pills Per Month*, KNIGHT-RIDDER TRIB. BUS. NEWS: TALLAHASSEE DEMOCRAT, September 15, 1998.

[366] One commentator has dubbed "subterfuge" as "one of the thorniest issues presented by the ADA." *See* Farber, *supra* note 305, at 915.

[367] 42 U.S.C. § 12201(c) (1994).

[368] *See Betts*, 492 U.S. 158.

believe that the EEOC's Interim Guidance definition of "subterfuge" controls. The dispute over the governing definition of "subterfuge" as used in the ADA remains unsettled. Because this debate heavily impacts an analysis regarding the refusal of employers to provide Viagra for employees, this subsection delineates each position thoroughly.

Public Employees Retirement System of Ohio v. Betts

The ADEA prohibits arbitrary discrimination by public and private employers against employees on account of age.[369] Specifically, ADEA § 4(f)(2) only permits age-based employment decisions made pursuant to the terms of "any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a *subterfuge* to evade the purposes of [the ADEA]."[370] In *Betts*, the State of Ohio established a retirement benefits program for state and local government employees titled the Public Employees Retirement System of Ohio (PERS).[371] The appellee Betts, a 61-year-old county-employed speech pathologist suffered severe medical conditions after 17 years of employment, which necessitated her retirement.[372] PERS allocated greater benefits to disabled retirees than to non-disabled retirees.[373] Only individuals under the age of 60, however, qualified for disability retirement benefits.[374] Because of Betts' age at retirement, PERS denied Betts disability retirement benefits despite her medical condition.[375] Consequently, PERS allocated Betts $158.50 per month, $196.50 per month less than she would have received under a disability retirement scheme.[376] Betts filed suit, claiming that PERS' refusal to grant her application for disability retirement benefits violated the ADEA.[377] Upon reaching the Supreme Court, the Betts decision hinged on the Courts' construction of the statutory term "subterfuge."[378]

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[369] 29 U.S.C. § 621 (1982).
[370] 29 U.S.C. § 623(f)(2) (1994) (emphasis added).
[371] *Betts*, 492 U.S. at 162.
[372] *See id.* at 163.
[373] *See id.*
[374] *See id.*
[375] *See id.*
[376] *Betts*, 492 U.S. at 163.
[377] *See id.* at 164.
[378] *See id.* at 166.

The *Betts* Court initially looked to the Supreme Court's first construal of "subterfuge" under the ADEA.[379] While validating a mandatory retirement provision on the basis of age in *United Air Lines v. McMann*, the Supreme Court discussed the ADEA's "subterfuge" provision.[380] After rejecting an assertion that only a business or economic basis for an age based distinction justifies a "no subterfuge" determination, the *McMann* Court held subterfuge entails "a scheme, plan, stratagem, or artifice of evasion," which connotes a specific "*intent* ... to evade a statutory requirement."[381] Pursuant to this definition, the *McMann* Court characterized the plan at issue as "not a subterfuge" to evade the purposes of the Act, since the plan's enactment predated the ADEA.[382] In 1978, one year after the *McMann* decision, Congress amended the ADEA to nullify the *McMann* Court's validation of mandatory retirement based on age.[383] Congress, however, chose not to amend the ADEA's "subterfuge" language. [384] Therefore, the *Betts* Court determined that *McMann* Court's "subterfuge" definition under the ADEA remained good law.

Further, the *Betts* majority concluded that to constitute a statutorily-prohibited "subterfuge," an ADEA claimant must prove that an age-based distinction intentionally discriminates in a *non-fringe benefit* aspect of the employment relation.[385] The Court rationalized this holding in the following manner: ADEA § 4(a)(1) prohibits discrimination by employers with respect to, *inter alia*, compensation, terms, conditions, or privileges of employment;[386] ADEA § 4(f)(2) only permits age-based employment decisions made pursuant to a bona fide employee [fringe] benefit plan, which is not a subterfuge to evade the purposes of the ADEA;[387] construing the term "compensation, terms, conditions, or privileges of employment" of § 4(a)(1) to encompass employee benefit plans of the type covered by § 4(f)(2), renders §

[379] *See id.*
[380] *See McMann*, 434 U.S. at 192.
[381] *See id.* at 203 (emphasis added).
[382] *See id.*
[383] *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 95-256, §2(a), 92 Stat. 189 (1978).
[384] *See Betts*, 492 U.S. at 176.
[385] *See id.* at 176, 181.
[386] 29 U.S.C. § 623(a)(1) (1994).
[387] 29 U.S.C. § 623(f)(2) (1994).

4(f)(2) nugatory with respect to post-ADEA plans. Therefore, writing for the majority in *Betts*, Justice Kennedy concluded ADEA § 4(f)(2) exempts all age-related policies other than ones that intentionally discriminate in a non-fringe benefit manner.[388]

Employer-provided health insurance plans constitute fringe benefits.[389] Therefore, if the *Betts'* "subterfuge" decision applies with equal force to the "subterfuge" provision of the ADA, an employer-provided plan refusing to supply Viagra to employees will fall within the safe harbor provision of the ADA. Congressional action and several cases suggest *Betts'* "subterfuge" decision fully applies to the ADA.

Congress overruled *Betts* one year after its decision by amending § 4(f)(2) of the ADEA in the course of passing the Older Workers Benefit Protection Act (OWBPA) of 1990.[390] The OWBPA clarified the ADEA's proscription against age discrimination by stating that "compensation, terms, conditions, or privileges of employment" comprise all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.[391] This Act unmistakably overturns the Supreme Court's reasoning and holding in *Betts* and revives the ADEA's original purpose – to eliminate arbitrary age discrimination in all facets of the workplace.[392] To further that purpose, the OWBPA eliminated the employee benefit plan exemption under § 4(f)(2), thereby removing the term "subterfuge."

One could contend that Congress understood the *Betts* Court's interpretation of "subterfuge" because it removed the poisonous term upon enactment of the OWBPA.[393] Therefore, arguably, by including "subterfuge" in the ADA – a statute enacted at almost precisely the same time as the OWBPA's passage – Congress intended the ADA term "subterfuge" to imitate the Betts definition.[394] Some

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[388]*See Betts*, 492 U.S. at 174.

[389]29 C.F.R. § 1625.10 (b)(1988).

[390]Older Workers Benefit Protection Act of 1990, Pub.L. 101-433, 104 Stat. 978 (1990) [hereinafter OWBPA].

[391]29 U.S.C. § 630(1) (1994).

[392]*See* S. REP. No.101-263, at 16-17 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1521-1522.

[393]*See generally* OWBPA, *supra* note 390.

[394]*See* Farber, *supra* note 305, at 896-97 ("The OWBPA bills, removing the 'subterfuge' terminology, were introduced in Congress on August 3 and 4, 1989, only two days after the 'subterfuge' language was added to the Senate Labor Committee's draft [of the ADA].").

commentators, however, indicated one could argue that Congress, by rejecting Betts' "subterfuge" definition for ADEA purposes, effectively rejected an identical definition as applied to the ADA.[395] Further, it seems probable that if the Supreme Court ever interprets the ADA's "subterfuge" provision, with Congress' OWBPA reprimand in mind, it will not make the same mistake twice. Further yet, even if the Supreme Court determines that the *Betts'* "subterfuge" decision applies to the ADA, Congress could subsequently supersede such a rule, so as to revive the ADA's original purpose – to eliminate arbitrary disability discrimination.

Notwithstanding the OWBPA's admonishment, three United States courts of appeal to date have determined that the Betts interpretation of "subterfuge" applies to the ADA.[396] The Third Circuit in *Ford v. Schering Plough* determined that because Congress passed § 501(c) of the ADA in 1990 and the Supreme Court decided *Betts* in 1989, Congress, in enacting the ADA, presumptively adopted the Supreme Court's ADEA interpretation of "subterfuge."[397] The *Ford* majority stated: "[w]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."[398] Similarly, in *Modderno v. King*, the D.C. Circuit held that the Betts definition of subterfuge applies to § 501(c) of the ADA.[399] The court reasoned, "when Congress chose the term 'subterfuge' for the insurance safe harbor of the ADA, it was on full alert as to what the Court understood the word to mean...."[400] The Eighth Circuit in *Kraul*

[395]*See* Linda M. Laarman, *The Effect of the Americans With Disabilities Act on Health and Other Employee Benefit Plans*, 50 SUPPLEMENT INST. ON FED. TAX'N, at 1.25 (1992); Lawrence O. Gostin & Alan I. Widiss, *What's Wrong With the ERISA Vacuum? Employers' Freedom to Limit Health Care Coverage Provided by Risk Retention Plans*, 269 JAMA 2527, 2531 (1993).

[396]*See infra* notes 399-401 and accompanying text.

[397]Ford v. Schering-Plough Corporation, 145 F.3d 601, 611 (3d Cir. 1998).

[398]*Id.*, *citing*, Lorillard v. Pons, 434 U.S. 575, 581 (1978). *See also* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 59 (1911) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary.").

[399]Modderno v. King, 82 F.3d 1059, 1065 (D.C. Cir. 1996).

[400]*See id.*

v. Iowa Methodist Medical Center adopted *Modderno's* reasoning and followed *Betts* in an ADA construction.[401]

The EEOC's Position

Adopted in 1993, the EEOC's Interim Guidance (construing the ADA) rejects the *Betts* Court's ADEA interpretation of "subterfuge."[402] The EEOC distinguishes the *Betts* majority's "non-fringe benefits" holding by stating that, unlike the ADEA, the language of the ADA covers "fringe benefits."[403] The EEOC Interim Guidance then proceeds to define "subterfuge" as "disability-based disparate treatment that is not justified by the risks or costs associated with the disability ... [as] determined on a case-by-case basis."[404]

The EEOC Interim Guidance outlines a non-exhaustive list of potential "business/insurance" justifications, regardless of intent to discriminate, that save a disability-based distinction from acquiring the designation "subterfuge."[405] The EEOC proffers that a plan fails to reach the level of "subterfuge" if an employer proves any of the following:[406]

(a) that it has not engaged in the disability-based disparate treatment alleged because it actually treats

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[401] *See Kraul*, 95 F.3d at 679.

[402] *See* Interim Guidance, *supra* note 80, at 405:7119.

[403] *See id.* at 405:7119 n.10.

[404] *See id.* at 405:7120.

[405] *See id.*

[406] The EEOC places the burden on the defendant-employer to prove that a disability-based distinction in an employer-provided health insurance plan is not a "subterfuge." *See* Interim Guidance, *supra* note 80, at 405:7119. The EEOC suggests that placing the burden on the employer comports with "the well established principle that the burden of proof should rest with the party who has the greatest access to the relevant facts." *See id.* The Eighth Circuit in *Henderson v. Bodine Aluminum* implicitly endorses this position. *See* Henderson v. Bodine Aluminum, Inc., 70 F.3d 958, 961 (8th Cir. 1995). In *Betts*, however, the Supreme Court held that a plaintiff filing an action under the ADEA bears the burden of proving that an age-based distinction in an employer-provided benefit plan constitutes a "subterfuge." *See Betts*, 492 U.S. at 162. The *Betts* Court made this decision by analogizing § 4(f)(2) of the ADEA to § 703(h) of Title VII, the statute from which the prohibitions of the ADEA were derived. Because the Supreme Court held that the Title VII plaintiffs bear the burden of proving discrimination pursuant to § 703(h), *see* Lorance v. AT & T Technologies, Inc., 490 U.S. 900, 908 (1989), the *Betts* Court likewise determined that ADEA plaintiffs bear the burden of proving that employer-provided benefit plans amount to a "subterfuge." The Third Circuit has applied the *Betts* burden of proof conclusion to the ADA. *See Ford*, 145 F.3d at 615.

all similarly catastrophic conditions in the same way;

(b) that the disability-based disparate impact is justified by legitimate actuarial data, or by actual or reasonably anticipated experience, *and* that conditions with comparable actuarial data and/or experience are treated in the same fashion, in other words, the disability-based disparate impact is based on legitimate risk classification and underwriting;[407]

(c) that the disparate treatment is necessary to ensure that the health plan is fiscally sound, that is, continued unlimited coverage would be so expensive as to cause the health insurance plan to become financially insolvent;

(d) that the challenged insurance plan is necessary to prevent an unacceptable change in plan coverage or plan premiums – such a change is a drastic increase in premium payments (or in co-payments or deductibles), or a drastic alteration to the scope or level of benefits provided that would: 1) make the insurance plan effectively unavailable to a significant number of other employees, 2) make the plan so unattractive as to result in adverse selection,[408] or 3) make the plan so unattractive that the employer cannot compete in recruiting and maintaining qualified workers due to the superiority

[407] "Risk classification refers to the identification of risk factors and the grouping of those factors that pose similar risks. Risk factors may include characteristics such as age, occupation, personal habits (*e.g.* smoking), and medical history. Underwriting refers to the application of the various risk factors or risk classes to a particular individual or group (usually only if the group is small) for the purpose of determining whether to provide insurance." *See* Interim Guidance, *supra* note 80, at 405:7121 n.15.

[408] "Adverse selection is the tendency of people who represent poorer-than-average health risks to apply for and retain health insurance to a greater extent than people who represent average or above average health risks." *See id.* at 405:7121 n.16.

of plans offered by other employers in the community; [or]

(e) that the treatment desired has no benefit (*e.g.*, no medical value).[409]

If an ED-stricken individual qualifies as ADA "disabled," if his employer's health policy refusing to cover Viagra comprises a disability-based distinction,[410] and if a court deems that the EEOC guidance applies, then an ED sufferer's final obstacle impeding recovery – the "subterfuge" decision – will likely turn on a test similar to one delineated in example (b).[411] For sake of completeness, however, each example will be briefly discussed.

A plan that "treats all similarly catastrophic conditions in the same way" fails to comprise a disability-based distinction. Therefore, example (a) is superfluous since the safe harbor provision, including its "subterfuge" prong, need only rescue plans embracing disability-based distinctions.[412]

Example (b) closely aligns with Justice Marshall's dissent in *Betts*:[413] it propounds a "business purpose" interpretation of "subterfuge."[414] Example (b) also mirrors the district court cases detailed below that reject *Betts*' "subterfuge" definition in an ADA context. By virtue of states' widespread adoption of mandated coverage of specified health benefits, the "business purpose" test for "subterfuge" favors employees. State-required coverage of any health benefits as expensive as, or more expensive than, Viagra eliminates an employer's saving grace – that "conditions with comparable actuarial

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[409]*See id.* at 405:7120-7121 (emphasis added).

[410]This argument assumes that the plan qualifies as both bona fide (for both traditional and self-insurance plans) and not inconsistent with state law (for traditional insurance plans only).

[411]*See* Interim Guidance, *supra* note 80, at 405:7121 n.16.

[412]*See Managed Care Financial Incentives to Withhold or Delay Treatment May Violate Americans With Disabilities Act and Rehabilitation Act*, 21 NO. 2 INS. LITIG. REP. 55 (1999) [hereinafter *Financial Incentives*].

[413]Justice Marshalls' dissent in *Betts* comports with several pre-*Betts* circuit courts of appeal decisions. *See e.g.*, EEOC v. Mt. Lebanon, 842 F.2d 1480, 1489 (3d Cir. 1988); Karlen v. City Colleges, 837 F.2d 314, 319 (7th Cir. 1988); Cipriano v. Board of Education of North Tonawanda School District, 785 F.2d 51, 57-58 (2d Cir. 1986).

[414]*See Betts*, 492 U.S. at 185.

data and/or experience are treated in the same fashion."[415] Therefore, under the Interim Guidance, if an employer's benefit plan covers conditions with comparable actuarial data as ED, but not ED-aiding medicine such as Viagra, then the policy constitutes a "subterfuge" under EEOC example (b) and consequently falls outside of the ADA's safe harbor provision.[416] For example, commentators examining this issue suggest that plans covering heart disease treatment, but not care for mental disabilities with a proven biological basis,[417] or plans providing pacemakers, but not furnishing cochlear implants for the hearing impaired,[418]falter under an actuarial comparison test such as the one illustrated in EEOC example (b).

It seems highly unlikely that Viagra coverage could lead to a situation similar to one illustrated in EEOC example (c). Employers may alter plans to prevent insolvency, either by increasing co-payments or deductibles or by capping benefits.[419]

At first blush, example (d) seems to present some concern to an ED-stricken individual attempting to reach a judicial determination that his employer's non-Viagra-coverage health plan constitutes an ADA "subterfuge." In light of the financials cited by Aetna as disclosed above, however, example (d) appears quite impertinent. Under the Aetna plan, employer costs depend on the number of Viagra pills provided monthly, as well as the level of co-payment required. Aetna estimates that with a 50% co-pay an Aetna-insured employer with one hundred workers spends $1,884 per year to cover six Viagra pills every thirty-four days, that is, $18.84 per worker, annually.[420] Assuming the worst from an employee's perspective – that an employer reduced each

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[415]*See Financial Incentives*, *supra* note 412.

[416]Does "comparable" actuarial data regard total or individual costs? That is, does an illness with a lifetime treatment cost of $18,000 per individual, and a prevalence rate of one in twenty-five individuals "compare" with an illness with an individual lifetime cost of $120,000 and a three out of 500 prevalence rate? *See* Steven Eisenstat, *Capping Health Insurance Benefits for AIDS: An Analysis of Disability-Based Distinctions under the Americans with Disabilities Act*, 10 J.L. & POL. 1, 35-36 (1993).

[417]*See* Christopher Aaron Jones, *Legislative "Subterfuge"?: Failing to Insure Persons with Mental Illness under the Mental Health Parity Act and the Americans with Disabilities Act*, 50 VAND. L. REV. 753, 781 (1997)

[418]*See* Bonnie Poitras Tucker, *Insurance and the ADA*, 46 DEPAUL L. REV. 915, 939, n.171 (1997).

[419]*See id.*

[420]*See* Levick, *supra* note 33.

employee's annual salary by $18.84 to offset Viagra coverage – it seems highly implausible that such a change could make a health plan effectively unavailable, or so unattractive as to result in adverse selection or in a recruitment disaster. Further, if a court determines that one employer must cover Viagra, then other employers if pushed by ED-stricken claimants may follow suit, further rendering example (d) inapposite.[421]

Example (e) appears quite immaterial. Few plaintiffs will seek coverage for treatment providing no benefit.

Pursuant to a judicial determination that the EEOC Interim Guidance controls a "subterfuge" analysis, an ED sufferer maintains very strong arguments that his employer's non-Viagra-coverage plan fails to fall within any of the business/insurance justifications illustrated by the EEOC. While three United States courts of appeal construe "subterfuge" under the ADA in a manner identical to the *Betts* interpretation under the ADEA, several lower courts have taken an approach closer to the EEOC's reading of "subterfuge." Additionally, the Supreme Court's decision in *Chevron*, as discussed above, may provide the EEOC's Interim Guidance substantial weight.[422]

In *Cloutier v. Prudential Insurance Company of America*, the District Court for the Northern District of California determined: (1) subterfuge does not require malicious intent; and (2) similar to EEOC example (b), to avoid subterfuge an insurer's underwriting decisions must be in accord with either sound actuarial principles or actual or reasonably anticipated experience.[423] The court based these determinations on statements supporting the ADA made by senior members of the House and Senate Judiciary Committees.[424] Such remarks noted "subterfuge" does not imply that a court must find "malicious intent" on the part of the insurer to make the latter liable

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[421]Because EEOC example (d) suggests that unacceptable alterations to coverage plans include ones making the health insurance plan effectively unavailable to a significant number of *other* employees, I assume that requiring co-payments by Viagra users fails to place such a plan within the ambit of example (d).

[422]Chevron U.S.A., Inc. v. Natural Defense Res. Defense Council, 467 U.S. 837 (1984)

[423]Cloutier v. Prudential Insurance Company of America, 964 F Supp 299, 304 (N.D. Cal. 1997).

[424]*Id.*

under the ADA,[425] and the subterfuge provision assures an insurer's "refusal, limitation [of coverage], or rate differential is based on sound actuarial principles, or is related to actual or reasonable anticipated experience."[426] Pursuant to its "subterfuge" interpretation, the court denied Prudential's summary judgment motion based on the ADA's safe harbor provision because Prudential offered no actuarial or other data to justify its outright rejection of the plaintiff's policy application.[427]

In *Doukas v. Met Life*, the District Court for the District of New Hampshire distinguished "subterfuge" under the ADA from "subterfuge" as defined by the *Betts* majority's interpretation of the ADEA.[428] The Doukas opinion quotes a pre-ADA House Committee report to illustrate Congressional intent regarding the ADA term "subterfuge": "[W]hile a plan which limits certain kinds of coverage based on classification of risk would be allowed ... the plan may not refuse to insure, or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principals or is related to actual or reasonably anticipated experience."[429] Based on this legislative history, in spite of *Betts*, the court concluded that while insurers retain the ability to follow practices consistent with insurance risk classification accepted under state law, these methods must stand on sound actuarial principles or must relate to actual or reasonably anticipated experience.[430] Further, because the legislative history indicates nothing necessitating a finding of conscious intent to discriminate, the court deemed such a showing unnecessary.[431]

[425] *See id., citing* 136 CONG. REC. H4624 (daily ed. May 17, 1990) (statement of Rep. Edwards); 136 CONG. REC. S9697 (daily ed. July 13, 1990) (statement of Sen. Kennedy).

[426] *Cloutier*, 964 F.Supp. at 304, *citing* H.R. REP. NO. 485, pt. 3 at 70, *reprinted in* 1990 U.S.C.C.A.N. 267, 493.

[427] *See id.*

[428] Doukas v. Metropolitan Life Insurance Company, 950 F. Supp. 422, 430-32 (D. N.H. 1996).

[429] *See id.* at 431, *citing* H.R. REP. NO. 485, pt. 3 at 136-137, *reprinted in* 1990 U.S.C.C.A.N. 267, 419-20.

[430] *See id.*

[431] *See also* Zamora-Quezada v. HealthTexas Medical Group of San Antonio, 34 F.Supp.2d 433, 442-44 (W.D. Tex. 1998) (seeking guidance from the EEOC Interim Guidance

Besides the general legislative history substantiating a "business-based" interpretation of the ADA's "subterfuge" language, several members of Congress specifically discounted the Supreme Court's "subterfuge" definition in *Betts* for ADA purposes. For example, Representative Henry Waxman of California stated, "the term 'subterfuge' in the ADA should not be read as the Supreme Court read that term in *Betts*."[432] The courts of appeal adopting the *Betts*' "subterfuge" definition for ADA determinations, however, deemed the legislative history unpersuasive because the Congress failed to explicitly reject the *Betts* interpretation in the language of the ADA.[433]

In addition to a debatable legislative history argument regarding whether to apply a "business-based" approach to a working definition of "subterfuge," the Supreme Court's decision in *Chevron* debatably lends credence to an adoption of the EEOC's guidance.[434] Until the clamoring of *Chevron*'s progeny succeeds in obtaining a Supreme Court decision directly addressing the proper role of guidance provisions to fill out the *Chevron* doctrine, the EEOC Interim Guidance in general, and the Guidance's "subterfuge" language in particular, harness an unsettled degree of judicial deference.

Even if a court, perhaps following a Supreme Court decision in the future, decides to grant "non-legislative" agency guidance *Chevron* deference, the D.C. Circuit in *Modderno* suggested that the Interim Guidance's "business purpose" construction of the ADA should not amass any weight.[435] The *Modderno* court cited the Supreme Court's discussion in *Betts* regarding provisions proffered by the Department of

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on Application of ADA to interpret "underwriting" and "classifying risks," and suggesting that a proper subterfuge analysis necessitates actuarial, statistical, and empirical data); Anderson v. Gus Mayer Boston Store of Delaware, 924 F. Supp. 763, 772 (E.D. Tex. 1996) (giving the EEOC guidance controlling weight).

[432]*See* 136 CONG. REC. H4626 (daily ed. July 12, 1990). *See also* 136 CONG. REC. S9697 (daily ed. July 13, 1990) (statement of Sen. Kennedy); 136 CONG. REC. H4624 (daily ed. July 12, 1990) (statement of Rep. Edwards); 136 CONG. REC. H4623 (daily ed. July 12, 1990) (statement of Rep. Owens).

[433]*See, e.g., Kraul*, 95 F.3d at 679 ("Had Congress intended to reject the Betts interpretation of subterfuge when it enacted the ADA, it could have done so expressly by incorporating language for that purpose into the bill that Congress voted on and the President signed.").

[434]*See Chevron*, 467 U.S. at 843 (noting that if a statute is ambiguous with respect to the specific issue, the question for the Court is whether an agency answer is based on a permissible construction of the statute.)

[435]*See Modderno*, 82 F.3d at 1065.

Labor (DOL).[436] The DOL took a position in the context of the ADEA similar to the EEOC's cost-related definition of "subterfuge" for ADA purposes.[437] The DOL suggested "a plan or plan provision which prescribes lower benefits for older employees on account of age is not a 'subterfuge' within the meaning of [29 U.S.C. § 623(f)(2)] provided that the lower level of benefits is justified by age-related cost considerations."[438] The DOL's position, however, even assuming agency deference post-*Chevron*, failed to garner any weight from the Supreme Court because the *Betts* majority deemed a cost-justification requirement "at odds with the plain language of the statute itself."[439] The D.C. Circuit held, in ordinary parlance and in dictionary definitions, "subterfuge" refers to a "scheme, plan, stratagem, or artifice of evasion," not "an economic or business purpose."[440]

Because the "subterfuge" provision of the ADA essentially imitates the analogous ADEA phraseology, the D.C. Circuit in *Modderno* concluded that the cases appear identical.[441] Consequently, as the *Betts* Court discounted the DOL's cost-justification requirement, the *Modderno* majority discredited the EEOC's business justification approach.[442]

By not defining the ADA term "subterfuge," Congress clearly left the term's interpretation to the judicial system. If applied to the ADA, the *Betts* interpretation of "subterfuge" in the ADEA context strongly favors employers in disability discrimination suits stemming from non-Viagra-coverage benefit plans. The *Betts* definition provides employers a safe harbor from ADA liability as long they eschew intentional discrimination on the basis of disability with respect to non-fringe-benefit provisions. On the other hand, the EEOC guidance tasks employers to maintain a legitimate "business" justification to exonerate

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436 *See id.*

437 *See id.*

438 29 C.F.R. 1625.10(d) (1998).

439 *Betts*, 492 U.S. at 171, *citing McMann*, 434 U.S. at 202. Presumably Justice Kennedy determined that an interpretation "at odds with the plain language of the statute itself" fails *Chevron's* second step.

440 *McMann*, 434 U.S. at 202.

441 The court's sole distinction cut even more against agency interpretation under the ADA. The court speculated that a useful actuarial calculation for physical and mental disability is more difficult to perform than a comparable computation based on age.

442 *See Modderno*, 82 F.3d at 1065.

their non-Viagra-coverage plans. Until the Supreme Court definitively promulgates a firm definition of "subterfuge" in the ADA context, or at least determines the proper weight to afford the EEOC Interpretive Guidance (or similar agency guidance provisions), "subterfuge" will continue to lie at the center of many ADA debates, including the one illustrated in this article.

CONCLUSION

Employer-provided health insurance plans became a prominent and important provision in employee compensation contracts immediately after World War II in response to wage restrictions imposed by the federal government.[443] These plans still maintain critical importance in efforts to obtain and retain employees. Whether furnished via self-insurance or through outside insurers, employers risk liability by providing plans that fail to cover certain treatments or medications in a manner potentially constituting disability discrimination under the ADA. Viagra, a tremendously successful ED combatant, is one such medication that demands the attention of employers concerned about ADA liability in the context of employee health plans. Yet, under current case law an ED-stricken man attempting to recover Viagra costs from his employer faces a difficult battle.

Post-*Bragdon*, ED presumably qualifies as an ADA "impairment" that affects the major life activity of reproduction, or alternatively, sexual intercourse. The Supreme Court majority's position in *Sutton* regarding "mitigating measures," however, suggests that many ED sufferers must foot their own Viagra bills. Negative side effects and, arguably, economic impact may free some ED victims from paying for Pfizer's wonder-drug. With the absence of a congressional amendment to the ADA that effectively disarms the *Sutton* ruling, however, most Viagra users will fail the "substantial limitation" prong of the three-part disability test under the ADA, and consequently will be precluded from ADA recovery. Further, no post-*Chevron* Supreme Court decision directly addresses the proper weight to grant agency guidelines in general or the EEOC's Interim Guidance in particular. Therefore, even

[443] *See* Charles B. Lynch, *The Americans with Disabilities Act on Health and Other Employee Benefit Plans*, 50 SETON HALL LEGIS. J. 561, 569 (1998).

if an ED-stricken individual qualifies as "disabled" under the ADA, both employers and employees remain in the dark with respect to the ADA's "subterfuge" language, a term on which liability for an employer's refusal to cover Viagra presumably hinges. As an alternative to filling out the *Chevron* doctrine, a Supreme Court discourse on the applicability of *Betts* to the ADA would clarify the current confusion surrounding the term "subterfuge" as applied in the disability discrimination realm. Until the Supreme Court tackles the "subterfuge" conundrum in the context of the ADA, lower courts, administrative agencies, employers, and employees will disagree about the buzz-word's proper definition and about the applicability of the ADA's safe harbor provision to ED-plagued individuals, if they are judicially deemed statutorily "disabled."

This article does not propose to predict an outcome to a suit similar to the one I have described, which I envision arriving in a courtroom sometime soon. Instead, I offer insight to the potential path and its obstacles that the plaintiff in such a suit will presumably encounter. If, at the end of this rocky road, a court determines that employers must purchase Viagra for their ED-stricken employees to avoid ADA liability, then a new question arises: How many pills must employers provide? I leave this question for another day.