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Defining Disability in the ADA: Sutton v. United Airlines, Inc.

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Defining Disability in the ADA: *Sutton v. United Airlines, Inc.*

I. INTRODUCTION

During its 1999 term, the United States Supreme Court made a significant interpretation of the word "disability" as used in the Americans with Disabilities Act of 1990 (ADA).[1] Satisfying the definition is critical to qualifing as a disabled person under the ADA and thereby having recourse against disability discrimination. This note will examine *Sutton v. United Airlines, Inc.*[2] as well as its two companion cases, *Murphy v. United Parcel Service, Inc.*[3] and *Albertson's, Inc. v. Kirkingburg.*[4] In each of these cases, the Supreme Court found that the petitioner was not disabled when his impairment was considered with corrective measures. These cases shift the definition of disability in an employment discrimination context from a consideration of disabilities without corrective or mitigating measures to a consideration of disabilities after corrective measures.[5] The cases following *Sutton*, with a focus on those in the Fifth Circuit, will be examined to show how courts are dealing with this change in the law. Alternatives such as state law remedies and the possibilities for distinguishing these cases will also be considered. A brief history of disability legislation and the interpretation of the definition of disability will provide a background to understanding the significance of these new cases.

II. THE HISTORY OF DISABILITY DISCRIMINATION LEGISLATION

The disabled have been unsuccessful in fighting discrimination through means available to other protected groups. The Fourteenth Amendment's Equal Protection Clause which provides protection for other classes has generally been defined very narrowly in the realm of disability discrimination.[6] The Civil Rights Act of 1964 has afforded little assistance as well.[7] The Rehabilitation Act of 1973

1. 42 U.S.C. § 12101-12213 (1995). The ADA is a comprehensive anti-discrimination act enacted "for the elimination of discrimination against individuals with disabilities...." ADA: Findings and purpose, 42 U.S.C. § 12101(b)(1) (1995).

2. 119 S. Ct. 2139 (1999).

3. 119 S. Ct. 2133 (1999).

4. 119 S. Ct. 2162 (1999).

5. Mitigating or corrective measures can be "medicines, or assistive or prosthetic devices" that assist the disabled in overcoming their particular disability. 29 C.F.R. App. § 1630.2(h) (1999).

6. Brian Doyle, Disability, Discrimination and Equal Opportunities: A Comparative Study of the Employment Rights of Disabled Persons 79 (1995).

7. *Id.* at 80.

was the first comprehensive national legislation targeting disability discrimination.[8] The Rehabilitation Act first defined "individual with a disability" as a person who:

(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities,

(ii) has a record of such impairment, or

(iii) is regarded as having such an impairment.[9]

The Code of Federal Regulations under the Rehabilitation Act used this same definition for "handicapped person."[10] Although this was significant legislation, the Rehabilitation Act did not reach private employment discrimination, because it only applied to federal government agencies and businesses either holding government contracts or receiving federal financial assistance.[11] In 1990, Congress enacted the ADA to provide a comprehensive method to eradicate private discrimination against disabled persons. The ADA applies not only to employment but to other areas of discrimination as well.[12]

The Americans with Disabilities Act of 1990 was intended to broaden the effects of the Rehabilitation Act of 1973 and extend protection against disability discrimination to the private sector. Both of these acts "are remedial in nature—they are designed to respond to the problem of discrimination."[13] The ADA could possibly be read to place disabled persons in a protected group with heightened scrutiny under the Equal Protection Clause, however, the Supreme Court has held otherwise.[14] In *City of Cleburne v. Cleburne Living Center*, the Supreme Court held that the mentally ill were not a suspect class and that government objectives only need to be rationally related to the discrimination.[15]

When defining the term "disabled" in the ADA, Congress adopted almost the exact definition from the Rehabilitation Act and, importantly, provided that previous cases interpreting the Rehabilitation Act would apply to the ADA.[16] The

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8. Section 794 provides, in pertinent part, as follows:

No otherwise qualified individual with a disability in the United States, as defined in section 706(20) of this title, shall solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. . . .

29 U.S.C. § 794(a) (1995).

9. 29 U.S.C. § 706(8)(B) (1995).

10. 34 C.F.R. § 104.3(j) (1999).

11. Doyle, *supra* note 6, at 81.

12. Title I covers employment discrimination; Title II applies to state and local governments; Title III governs public accommodations and commercial facilities; Title IV applies to telecommunications for hearing and speech impaired; and Title V covers miscellaneous topics. ADA Handbook: Disability Discrimination (Anderson Publishing Co. 1995).

13. Robert L. Burgdorf, Jr., Disability Discrimination in Employment Law 9 (1995).

14. *Id.* at 11.

15. The Court did hold that denial of a special use permit for a group home was not rationally related to a legitimate state interest. 473 U.S. 432, 105 S. Ct. 3249 (1985).

16. The ADA provides for its construction in Title V. The pertinent provision reads: "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 (29 U.S.C. § 790 et seq.) or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201(a) (1995).

only change made to the definition in the ADA was changing the term "handicapped person" to "disability."[17] Congress delegated the power to create regulations to enforce the ADA to the Equal Employment Opportunity Commission (EEOC), the Department of Transportation (DOT) and the Department of Justice (DOJ). In their respective Interpretive Guidelines, each agency separately defined "disability" as the individual's impairment without corrective measures.[18] Eight United States Court of Appeals circuits agreed with this definition.[19] However, Congress did not delegate to any of these agencies the power to define "disability" as found in the first chapter of the ADA, which applies to the entire ADA.

The first cases under the ADA were not concerned with the problem of corrective measures. In fact, the definition of "handicap" under the Rehabilitation Act was rarely litigated. Those early cases decided whether plaintiffs had disabilities without consideration of mitigating measures.[20] There were only ten reported cases that even dealt with a condition controllable by medication.[21] For example, one case concerned a manic-depressive (bi-polar) employee who was on stabilizing medication. The court did not consider how the medicine affected her condition.[22] However, in the last few years, the plaintiff's disabled status has become the main issue in more than half of the claims filed under the ADA.[23] Mitigating measures are in fact discussed in the legislative history and in the EEOC Interpretive Guidance to the EEOC regulations enforcing the ADA.[24]

The employment provisions of the ADA are found in Title I. In order to sue under the ADA, employees have to meet several burdens. A plaintiff must prove that he is disabled, that he is a qualified individual for the job and that he suffered an adverse employment decision because of the disability.[25]

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17. 42 U.S.C. § 12102(2) (1995).

18. The EEOC provisions will be emphasized in this note, as they are applicable to employment discrimination. The EEOC serves as a clearinghouse for discrimination claims. All complaints are to be filed with the EEOC, which then investigates and decides whether to sue or give the claimant a right to sue letter. 29 C.F.R. § 1601.6 (1999).

19. Sutton v. United Airlines, Inc., 119 S. Ct. 2139, 2144 (1999). These circuits are: First (Arnold v. United Parcel Serv., Inc., 136 F.3d 854 (1st Cir. 1998)), Second (Bartlett v. New York State Bd. of Law Examiners, 156 F.3d 321 (2d Cir. 1998)), Third (Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933 (3d Cir. 1997)), Fifth (Washington v. HCA Health Servs. of Texas, 152 F.3d 464 (5th Cir. 1998)), Seventh (Baert v. Euclid Beverage, Ltd., 149 F.3d 626 (7th Cir. 1997)), Eighth (Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997)), Ninth (Holihan v. Lucky Stores, Inc., 87 F.3d 362 (9th Cir. 1996)), and Eleventh (Harris v. H & W Contracting Co., 102 F.3d 516 (11th Cir. 1996)).

20. *E.g.*, Davis v. Meese, 692 F. Supp. 505, 517 (E.D. Pa. 1988) ("insulin-dependent diabetic is clearly a 'handicapped person'" under the Rehabilitation Act). For other cases, see Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 Harv. C.R.-C.L. L. Rev. 99, 154 n.295 (1999).

21. *See, e.g.*, Scanlon v. Atascadero State Hospital, 677 F.2d 1271 (9th Cir. 1982) (diabetes); Davis v. United Air Lines, Inc., 662 F.2d 120 (2d Cir. 1981) (epilepsy).

22. The court did not decide the case on the issue of mitigating measures. The court held that she was not disabled because she was not "substantially limited" in working. The plaintiff did not prove that she was precluded from a class of jobs. Mackie v. Runyon, 804 F. Supp. 1508 (M.D. Fl. 1992).

23. Mary Crossley, *The Disability Kaleidoscope*, 74 Notre Dame L. Rev. 621 (1999).

24. Colker, *supra* note 20, at 139.

25. E.E.O.C. v. HBH Inc., No. Civ. A. 98-2632, 1999 WL 1138533 (E.D. La. Dec. 9, 1999).

The threshold question is whether an employee can prove that he is "disabled." The ADA's definition of "disability" consists of three-prongs identical to those in the Rehabilitation Act. The first prong is considered "actual" disability and includes three major elements. The petitioner must prove that he (1) has a "physical or mental impairment" (2) that "substantially limits" (3) a "major life activity."[26] As will be discussed below, the courts have strongly emphasized the "substantially limits" element. Such disabilities would include those in which a person is confined to a wheelchair as a result of birth defects.

The second prong extends protection to those with a record of impairment.[27] This applies to people with a prior disability that has been corrected or persons wrongly diagnosed. This would include someone with a history of cancer.[28] The reasoning behind this policy is the belief that a person with a record of an illness now corrected should not be discriminated against because of this previous condition. The third prong extends protection to those whose employer incorrectly regards them as having an impairment that substantially limits a major life activity by the employer. This would include a person whose employer believes he is substantially limited by high blood pressure, when in fact it is controlled by medication. Another example would be a person falsely accused of being HIV positive. This person would be considered disabled because he was perceived as disabled even though he did not have HIV.[29]

The definition of disability in the ADA, as well as its prongs and elements, have been the main subject of ADA litigation and commentary in recent months. There is a multitude of views on how the disability definition should be interpreted, rewritten or amended.[30] There are also varying degrees of disabilities and a wide range of consequential limitations. The Supreme Court has only recently begun to acknowledge this problem,[31] and even more recently actually handed down an opinion that specifically affects the definition.

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26. 42 U.S.C. § 12102(2)(A) (1995).

27. 42 U.S.C. § 12102(2)(B) (1995).

28. EEOC Title I Interpretive Guidance 29 C.F.R. § 1630.2(k) (1999). *See* U.S. EEOC Technical Assistance Program, Disability Discrimination B-14 (1998).

29. 29 C.F.R. § 1630.2(l) (1999).

30. *See, e.g.*, Isaac S. Greaney, Note, *The Practical Impossibility of Considering the Effect of Mitigating Measures Under the Americans with Disabilities Act of 1990*, 26 Fordham Urb. L.J. 1267 (1999) (advocating *per se* rule against considering mitigating measures to allow broader coverage of the ADA); Michael J. Puma, *Respecting the Plain Language of the ADA: A Textualist Argument Rejecting the EEOC's Analysis of Controlled Disabilities*, 67 Geo. Wash. L. Rev. 123 (1998) (urging Congress to amend the ADA to require individual inquiry in medicated state); Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. Rev. 1405 (1999) (urging amendment to ADA changing prohibition based on discrimination against a qualified individual with disability to one based on discrimination because of the disability).

31. *E.g.*, HIV positive woman proved substantial limitation of major life activity of reproduction. The Supreme Court acknowledged the mitigating measure problem without discussion or resolution. Bragdon v. Abbott, 524 U.S. 624, 118 S. Ct. 2196 (1998).

III. THE 1999 CASES: *SUTTON, MURPHY* AND *ALBERTSON'S*

In 1999, the United States Supreme Court announced a significant change in the definition of "disability" through its holdings in three cases: *Sutton, Murphy* and *Albertson's*. In these cases, the Court held that disabilities must be considered not only on a case-by-case basis but also in light of any corrective or mitigating measures. This is significant not only because it makes proving disability status more difficult but also for the reason that it contradicts the more commonly held view that disabilities should be determined without considering corrective or mitigating measures.[32]

A. Sutton v. United Airlines, Inc.

In *Sutton v. United Airlines, Inc.*,[33] the petitioners, Karen Sutton and Kimberly Hinton, were twin sisters rejected for positions as pilots with United Airlines. Sutton and Hinton did not meet the uncorrected vision standards set by the airline. Both sisters suffered from severe myopia,[34] causing their uncorrected vision to be 20/200 or worse in one eye and 20/400 or worse in the other. United's policy required pilots to have 20/100 or better uncorrected vision.[35]

Petitioners claimed they were discriminated against because of their disability and subsequently brought this action under the ADA. The United States Court of Appeals for the Tenth Circuit held that petitioners were not disabled under the ADA because the women are not substantially limited in the major life activity of working if they wear glasses.[36] The Supreme Court affirmed this decision by a 7-2 vote. The Court also held that the sisters were not regarded as disabled by United Airlines.[37]

Justice O'Connor's majority opinion rested on three grounds. The first involved the "substantially limits" wording of the disability definition. The Court held that because this language is in the present indicative sense, it requires that the person be "presently" substantially limited. Therefore, if the person uses mitigating measures to correct her disability, then at "present" she is not "substantially limited." So Sutton and Hinton are not disabled because with glasses their vision is corrected at present.[38]

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32. Eight U.S. appellate courts, the EEOC, the Department of Justice and the Department of Transportation all defined disability without corrective measures. Sutton v. United Airlines, Inc., 119 S. Ct. 2139, 2153 (1999).

33. 119 S. Ct. 2139 (1999).

34. Myopia is an eye condition commonly known as nearsightedness. Common measures to correct this problem are glasses and contact lenses. Medical Dictionary (visited Mar. 10, 2000) <http://www.medicinenet.com>.

35. *Sutton*, 119 S. Ct. at 2143.

36. Sutton v. United Airlines, Inc., 130 F.3d 893 (10th Cir.1997).

37. Sutton v. United Airlines, Inc., 119 S. Ct. 2139 (1999). Justice O'Connor wrote the majority opinion, with Justice Ginsburg concurring and Justices Stevens and Breyer dissenting.

38. *Id.* at 2146.

The second aspect of the decision focused on the necessity of an individualized inquiry. The Court thought it would require reliance on general medical information and speculation to decide if a person has a disability without mitigating measures while the person is actually using mitigating measures. The Court found that this would cause erosion of the individualized inquiry standard.

Finally, the Court was concerned that a lower threshold would bring too many people under ADA protection.[39] The ADA findings note that there are 43,000,000 Americans with disabilities.[40] The Court decided it was impossible to include all people who use mitigating measures into this category, because if that were done, the number of disabled persons would increase to well over 100 million. Justice O'Connor relied on a law review article which discussed figures used to draft a similar 1988 ADA bill.[41] This article considered the approximate number of disabled Americans taken from different sources and defining disability in different ways.[42] The Court found that if Congress had intended to include disabled people whose impairments were corrected by mitigating measures, the number quoted in the findings of the ADA would be much higher.[43] The majority then tried to soften its opinion by promoting alternate routes for people who may not fit into the first prong of the disability definition. Instead, the Court suggested that one could still use the "regarded as" or "record of" prongs of the definition.[44]

The Supreme Court noted in *Sutton* that some people are disabled even after considering corrective measures. For example, a person confined to a wheelchair will still be substantially limited in several major life activities, including walking, even if the person is capable of doing the job at issue.[45] The Court claimed its reading will focus on the intended beneficiaries of the ADA: those who are disabled but capable of performing the job.

The Court then focused on the petitioners' claim that they were discriminated against because United "regarded" them as disabled by requiring a certain vision standard. Because the Court focused on the fact that petitioners claimed to be substantially limited in "working," they had to prove that United regarded them as substantially limited in a "broad class of jobs." The Court looked at several factors listed in EEOC regulations including "the number and types of jobs utilizing similar training, knowledge, skills or abilities, within the geographical area, from which the individual is also disqualified."[46] In *Sutton*, the Court found that petitioners were not regarded as disabled because they were only precluded from one type of job, that of "global airline pilot." Other jobs related to aviation, such

39. *Id.* at 2147.

40. 42 U.S.C. § 12101(a)(1) (1995).

41. *Sutton*, 119 S. Ct. at 2147. *See* Robert Burgdorf, *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 Harv. C. R.-C.L. L. Rev. 413, 434 n.117 (1991).

42. *See* Burgdorf, *supra* note 41.

43. *Sutton*, 119 S. Ct. at 2149.

44. *Id.*

45. *Id.* at 2148.

46. *Id.* at 2151.

as regional airline pilot (the job petitioners previously held) were still available.[47] The Court hinted that if petitioners had claimed that they were regarded as substantially limited in the major activity of seeing, they might have had a better case.[48]

There were several issues that the Court brought up but did not resolve in the case. The Court mentioned the EEOC's definition of "major life activities," but declined to discuss whether it ought to give deference to the agency since the parties agreed upon the definition. The Court also pointed out that "working" may not really be a major life activity.[49] Further, the Court did not resolve the issue of what deference is due to the Interpretive Guidelines of the EEOC and Department of Justice. These issues are likely to appear in future cases.

Justice Ginsburg's concurring opinion focused on the legislative findings that "individuals with disabilities are a discrete and insular minority" and "subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society. . . ."[50] She understood the findings to encompass a smaller group than the Equal Employment Opportunity Commission (EEOC) has defined. Therefore, people with common disabilities such as the petitioners should not be covered under the ADA.

The dissent argued that the ADA should be given a "generous, rather than miserly, construction."[51] Justice Stevens traced the legislative history of the ADA and its precursor, the Rehabilitation Act. He contrasted the majority's narrow treatment of the ADA with the broad treatment given to other remedial acts promulgated to fight discrimination against other groups. The dissent contended that the Court should not restrict the ADA just because more people may be eligible for the ADA's protection than Congress first envisioned. Justice Breyer wrote in a separate dissenting opinion that Congress did not intend to exclude the power to interpret the definition of disability from the EEOC. Rather, he wrote that "only drafting or stylistic, not substantive, objectives" put the definition in the first section of the ADA which no agency was delegated the power to define.[52] Therefore, the dissent would have given more deference to the EEOC.[53]

B. Murphy v. United Parcel Service, Inc.

In *Murphy v. United Parcel Service, Inc.*,[54] UPS fired the petitioner, a mechanic, because his blood pressure was higher than the maximum allowed for certification by the Department of Transportation (DOT). The Supreme Court held that with mitigating measures, namely blood pressure medication, Murphy was

47. *Id.*
48. *Id.* at 2150.
49. *Id.* at 2151.
50. 42 U.S.C. § 12101(a)(7) (1995).
51. *Sutton*, 119 S. Ct. at 2152.
52. *Id.* at 2162.
53. *Id.*
54. 119 S. Ct. 2133 (1999).

neither substantially limited in the major life activity of working, nor was he regarded as substantially limited. Murphy was not precluded from working generally; he was only precluded from jobs that required certification. Therefore, Murphy was not substantially limited from working. His supervisors did not think he could not perform the job, rather they merely followed a set standard. Therefore, Murphy was not "regarded as" disabled. Consequently, Murphy's medical condition did not qualify as a disability under the ADA.[55]

C. Albertson's, Inc. v. Kirkingburg

In *Albertson's, Inc. v. Kirkingburg*,[56] a grocery store fired Kirkingburg, a truck driver, because he did not meet the basic vision standards set by the Department of Transportation (DOT). Kirkingburg only had vision in one eye. The Supreme Court held that Kirkingburg was not disabled because he was not limited in the major life activity of working. In order to be designated as disabled, Kirkingburg would have to be prohibited from a class of jobs, not just one specific job or the job he most liked. The Court held that because he was qualified to work in other jobs, he was not substantially limited from working. The Court also held that the employer could use DOT safety regulations to justify visual-acuity job qualification standards. Title I of the ADA allows employers to use qualification standards as long as they are "job-related and consistent with business necessity."[57]

IV. CONCERNS WITH REASONING AND FUTURE IMPACT

Justice O'Connor's resolution of *Sutton* raises several concerns. The majority dismissed the need to look at the legislative history on the basis that the ADA provisions are unambiguous, while basing a large part of the decision on the congressional finding that "some 43,000,000 Americans have one or more physical or mental disabilities. . . ."[58] A problem ensues because it is not apparent from the ADA where this figure was derived. Therefore, the Court had to examine where this figure originated. The majority opinion relied heavily on a law review article written by one of the drafters of a similar bill attempted in 1988 and ignored the more pertinent legislative history that supports the definition of impairment before corrective measures.[59] If the Court is willing to examine this law review article, there does not seem to be a good reason to disregard the legislative history which also helps determine who Congress intended to include under the ADA. If there is a reason, the Court did not state what that reason may be.

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55. *Id.* at 2134.

56. 119 S. Ct. 2162 (1999).

57. 42 U.S.C. § 12113(a) (1995).

58. 42 U.S.C. § 12101(a)(1) (1995).

59. Sutton v. United Airlines, Inc., 119 S. Ct. 2139, 2147 (1999). *See* Robert L. Burgdorf, *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 Harv. C.R.-C. L. L. Rev. 413, 434 n.117 (1991).

The "present indicative tense" argument is not thoroughly persuasive either. It is very easy to remove glasses for a vision test, which is obviously what happened in Sutton's case. Therefore, Sutton's vision problem was not hypothetical. In addition, doctors know the effects of diseases that occur at different stages. Someone on medication for diabetes cannot stop taking medicine for a period of time in order to prove that he will go into a diabetic coma, but doctors can give medically accepted information on the effects of the disease without the medication. This does not make the individual inquiry less important as O'Connor suggests.[60]

Another concern is the Court's treatment of agency deference. Most of the federal appellate courts have given deference to the EEOC regulations as well as the Interpretive Guidelines based on the two part test developed in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[61] Under *Chevron*, courts are to assess first whether Congress's intent has been "unambiguously expressed."[62] If intent has not been expressed, the courts are to defer to the agency regulations unless they violate "permissible construction of the statute."[63] In *Sutton*, however, the Court reasoned that the EEOC Interpretive Guidance was not binding and that the EEOC did not have the authority to define disability. Therefore, the Court was not bound by the definition as interpreted by these agencies.[64] However, the ADA is supposed to follow legislative history from the Rehabilitation Act.[65] Under the Rehabilitation Act, deference to agency regulations was very strong.[66] Following this reasoning, the Court should be bound by agency deference and would be required to give stronger weight to the EEOC Interpretive Guidelines.

These recent decisions will not reduce the number of frivolous suits or the number of legitimate claims. Disability claims can still be filed, but the decision in *Sutton* will just make it harder to prove a disability. The emphasis will simply shift to more litigation and debate concerning questions basically ignored or previously uncontroversial such as the "substantially limits" factor and claims of "regarded as" discrimination.

Furthermore, employers do not seem to need much help in this area. Employers already win 92% of the ADA claims filed against them.[67] Even the

60. *Sutton*, 119 S. Ct. at 2146.

61. 467 U.S. 837, 104 S. Ct. 2778 (1984).

62. *Id.* at 843, 104 S. Ct. at 2781.

63. *Id.*, 104 S. Ct. at 2782. For more discussion of the *Chevron* doctrine as applied to the EEOC and ADA, *see* Jonathan Bridges, Note, *Mitigating Measures Under the Americans with Disabilities Act: Interpretation and Deference in the Judicial Process*, 74 Notre Dame L. Rev. 1061 (1999).

64. *Sutton*, 119 S. Ct. at 2144.

65. *See* Bragdon v. Abbott, 524 U.S. 624, 631, 118 S. Ct. 2196, 2202 (1998) (interpreting 42 U.S.C. § 12201).

66. Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 104 S. Ct. 1248 (1984) (agency deference particularly appropriate for section 504); School Bd. Of Nassau County, Fla. v. Arline, 480 U.S. 273, 107 S. Ct. 1123 (1987) (Court relied heavily on HHS position that tuberculosis was a disability); *see* Colker, *supra* note 20, at 138.

67. This rate is from a study of more than 1,200 cases decided under Title I. Adin C. Goldberg, *Supreme Court Sends Mixed Signals in ADA Employment Cases*, 7 Metro. Corp. Couns. 7 (1999). The

EEOC rejects 86% of the charges filed with it to investigate discrimination claims.[68] The courts are not allowing frivolous claimants to prevail. If someone claims disability on the basis of a sore finger, no reasonable court will allow this claim to go forward. However, if someone is truly disabled, he now has to provide stronger evidence to prove his disability just to get in the door of the courthouse. This seems to be defeating the purposes of the ADA.

V. IMPACT: DESPAIR OR ELATION?

A. Initial Reaction

There have been mixed reviews of the recent ADA cases.[69] Disability advocates are upset about the narrowing of the term disability. When referring to the Court's treatment of the ADA, a disability discrimination lawyer exclaimed "[t]hey gutted it."[70] She points out that although the Court requires corrective measures to be considered, the discrimination in *Sutton* occurred without the correcting measures.[71] Although with glasses the petitioners' impairments were fully corrected, the discrimination was based on their vision before the glasses were used. The same attorney also stated that "the Court's acceptance of second class rights and protections for people with disabilities" is "the saddest thing."[72] She thinks this "illogical reading of the ADA essentially eviscerates protection for the vast number of people with disabilities who are able to mitigate their disabilities so that it hardly affects their lives or their ability to do their job."[73]

However, others, especially rejoicing employers, strongly support the Court's decisions, claiming that the rulings provide them much needed guidance in the area of disability discrimination.[74] One defense attorney remarked that the ADA has been abused and that the Court was correct in limiting its scope.[75] Employers also hope that the narrower definition will reduce the number of frivolous suits being filed.[76] Others have been more moderate. An editorial in the New Jersey Law Journal noted that the Court, "faced with an inadequate statute, strained to reach

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American Bar Association reported the same percentage of the 700 cases resolved from 1992-97. Justices Limit Claims Under Disabilities Act, 221 N.Y.L.J. 119 (1999).

68. Goldberg, *supra* note 67.

69. Defense labor and employment attorneys like the narrowed definition, while some disability advocates claim *Sutton* a "death knell." Robert T. Zielinski, *The Pendulum Swings: 1999 In Review—A Defense Lawyer's Perspective*, 614 PLI/Lit 193, 195 (1999).

70. Shannon P. Duffy, *U.S. Supreme Court's ADA Rulings Shake Plaintiff's Employment Bar*, 220 The Legal Intelligencer 121 (1999).

71. *Id.*

72. Lisa Rau, *From the Plaintiff Perspective: Shift in Strategy May Salvage Cases*, 22 Pa. L. Wkly. 32 (1999).

73. *Id.*

74. *See* Donna R. Sandoval, *Recent Developments in Employment Law*, 3 J. Small & Emerging Bus. L. 451 (1999).

75. *See* Duffy, *supra* note 70.

76. Lisa I. Fried, *Parsing Disability Law: Court's ADA Rulings are Tough on Plaintiffs*, 222 N.Y.L.J. 1, 5 (July 1, 1999).

a sensible result."[77] The writer recognized that the discrimination facing nearsighted people is much different than that facing paralyzed people.[78]

B. Cases Following the Sutton *Reasoning*

In the six months after *Sutton* was decided, there were over 100 reported cases announced citing *Sutton*. Immediately after *Sutton*, the Supreme Court vacated and remanded several cases to be reconsidered in light of this decision, including several from the U.S. Fifth Circuit Court of Appeals. That court has evaluated uncorrected or unmitigated disabilities before, both following and criticizing this reasoning. Before *Sutton*, the Fifth Circuit developed a compromise position by only looking at *serious* impairments in the unmitigated state.[79] *HCA Health Services of Texas, Inc. v. Washington*[80] was a Fifth Circuit case remanded by the Court after *Sutton*. In that case the Fifth Circuit reasoned that only serious impairments could be considered without mitigating measures.[81] Washington was an accountant with Adult Stills Disease[82] which is controlled by daily medication. He was fired shortly after requesting to limit his working hours to ten a day (fifty hours a week). The Fifth Circuit held that the ADA definition of "disabled" was not "unambiguously clear" so the EEOC's Interpretive Guidance and legislative history of the ADA needed to be considered. After a close reading of these sources, the court held that only serious impairments analogous to those mentioned in the guidelines and legislative history could be considered without mitigating measures.

The court divided impairments into two groups: continuous and permanent. The court of appeals reasoned that those impairments which are continuous and recurring should be considered without mitigating measures, while permanent corrections should be considered with mitigating measures.[83] The court reasoned that Adult Stills Disease is like diabetes. Both are serious diseases that require daily medication. Diabetes is discussed in the Interpretive Guidance as substantially limiting "because the individual cannot perform major life activities without the aid of medication."[84] Therefore, Washington's impairment could be considered without mitigating measures.

However, the United States Supreme Court vacated the Fifth Circuit's judgment and remanded *Washington* to be resolved in light of *Sutton* and *Murphy*. The Fifth Circuit likewise vacated its judgment and remanded the case to the

77. Editorial, *Redefining Disability*, 157 N.J.L.J. 446 (Aug. 2, 1999).

78. *Id.*

79. Lionel M. Schooler, *A Big Year for the ADA: New Rulings Affect Disability and Discrimination Claims*, 15 Tex. Law. 19, 36 (July 19, 1999).

80. 119 S. Ct. 2388 (1999).

81. 152 F.3d 464 (5th Cir. 1998).

82. A degenerative rheumatoid condition, a form of arthritis with systematic illness. Medical Dictionary (visited Mar. 10, 2000) <http://www.medicinenet.com>.

83. *Washington*, 152 F.3d 464, 470-71.

84. EEOC Title I Interpretive Guidance § 1630.2(j). *See* U.S. EEOC Technical Assistance Program, Disability Discrimination App. 10-B (1998).

district court. Now that deference to the EEOC is not necessary, the two-tiered distinction between serious and less serious impairments will probably be abandoned.[85] If the district court follows the other federal courts, it will consider Washington in his mitigated state and probably find that he is not substantially limited and therefore not disabled.

In *Deas v. River West, L.P.*,[86] the Fifth Circuit held that although Deas suffered from epileptic seizures, she was not disabled under the ADA. Even though this case was decided before *Sutton*, the United States Supreme Court denied certiorari after *Sutton* was announced. A substance abuse clinic terminated Deas from her employment as an Addiction Technician when the doctor in charge noticed that Deas had petit mal seizures[87] that caused her temporary lack of awareness while at work. The court held that seizures were not a *per se* disability because there are many variations of symptoms and causes. Therefore, any determination must be made on a case-by-case basis. Deas failed to produce evidence sufficient to prove her individual disability. The court also rejected "awareness" as a major life activity. In addition, Deas was not substantially limited in working because it was only this particular job at the substance abuse clinic that she could not perform, due to her lack of the required heightened awareness.

In *Equal Employment Opportunity Commission v. R.J. Gallagher Co.*,[88] the Fifth Circuit held that an employee's myelodysplastic syndrome (MDS), a form of blood cancer,[89] was not a substantial limitation on his major life activity of working. After being treated for his cancer, the doctors declared Boyle to be in remission and informed Boyle that he could go back to work. Boyle was President of R. J. Gallagher Company, but the CEO and Chairman of the Board wanted him to resign. Subsequently, Gallagher Company demoted Boyle; in response, Boyle filed an action against the company. The court followed *Sutton*, holding that Boyle's condition must be considered with mitigating measures. According to Boyle and his doctors, he was able to work in spite of his illness. Therefore, Boyle did not qualify as "disabled." However, the court did find that there were questions of fact concerning whether he had a record of impairment or whether he was regarded as disabled. Due to these questions the court remanded the case.

In *Adams v. Autozoners, Inc.*,[90] a court in the Eastern District of Louisiana held that the petitioner did not prove that his Post Traumatic Stress Disorder (PTSD) substantially limited a major life activity. Autozoners' managers had documented more than thirty infractions during Adams's almost five years of employment. He was eventually fired for insubordination. Adams subsquently filed suit under the ADA. The court found that he did not satisfy any of the three prongs of the disability definition. Following *Sutton*, the court found that Adams did not prove

85. Washington v. HCA Health Services of Texas, Inc., 199 F.3d 192 (5th Cir. 1999).

86. 152 F.3d 471 (5th Cir. 1998).

87. A form of epilepsy with brief lapses in consciousness, also known as absence seizures. Medical Dictionary (visited Mar. 10, 2000) <http://www.medicinenet.com>.

88. 181 F.3d 645 (5th Cir. 1999).

89. Medical Dictionary (visited Mar. 10, 2000) <http://www.medicinenet.com>.

90. No. Civ. A. 98-2336, 1999 WL 744039 (E.D. La. Sept. 23, 1999).

he was substantially limited in a major life activity. The court also held that he was not "regarded as" disabled nor did he have a record of impairment. Adams neither told his employer about his condition nor asked for any accommodation for his PTSD. Therefore, Adams could not prove that he was regarded as disabled or that he had a record of impairment.[91]

In *Todd v. Academy Corp.*,[92] the district court held that although epilepsy is a physical impairment under the ADA, with medication it did not substantially limit Todd's major life activity. Academy fired Todd for purportedly missing too many consecutive days of work. Todd claimed that he was fired because of his disability. The court held that although Todd had epilepsy, he was not disabled under the ADA. The court noted that, before *Sutton*, "epilepsy would, without question, be considered a substantial limitation on several major life activities, and a person suffering from epilepsy would receive nearly automatic ADA protection."[93] However, following *Sutton*, the court reasoned that Todd had to be considered with the mitigating measures of medication and self-help. Todd is aware of oncoming seizures, has time to remove himself to a safer place and is only temporarily affected. These seizures occur for about fifteen seconds at a maximum of once per week. The court did not feel that this was a substantial limitation on any life activity and therefore held that Todd was not disabled.

In *Taylor v. Blue Cross and Blue Shield of Texas, Inc.*,[94] the plaintiff suffered from sleep apnea[95] that was corrected with the use of a Constant Positive Air Pressure (CPAP) machine.[96] However, Taylor was not diagnosed until after he was fired for poor work performance. Taylor asked his employer to reconsider his termination based on the new diagnosis but was denied. Following *Sutton*, the court held that Taylor should be assessed using the CPAP machine. With the CPAP machine, Taylor's condition is fully corrected and he is not substantially limited in any major life activity. Taylor could not claim "record of" or "regarded as" discrimination because he did not inform his employer of his problem until after he was terminated. Therefore, the employer could not have discriminated against him under these prongs because it was not even aware that Taylor suffered from sleep apnea.[97]

C. *Cases Distinguishing* Sutton*'s Reasoning*

Although most of the ADA cases since the rulings have followed *Sutton*, *Murphy*, and *Albertson's*, a few cases have tried to narrow their effect. One federal

91. *Id.*

92. 57 F. Supp. 2d 448, 449 (S.D. Tex. 1999).

93. *Id.* at 452.

94. 55 F. Supp. 2d 604, (N.D. Tex. 1999).

95. Sleep apnea stops breathing temporarily during sleep causing daytime sleepiness. Medical Dictionary (visited Mar. 10, 2000) <http://www.medicinenet.com>.

96. CPAP bedside machines send a flow of air into the nose and throat through a nasal mask during sleep. The 'Lectric Law Library *Lawcopedia's* Law & Medicine Medical Malpractice Topic Area (visited Mar. 10, 2000) <http://192.41.4.29/med/med20.htm>.

97. *Taylor*, 55 F. Supp. 2d 604, 611-12.

judge narrowed the impact of *Sutton* by only applying it to cases in which the disability was fully corrected. In *Menkowitz v. Pottsdown Memorial Medical Center*,[98] a surgeon with Attention Deficit Disorder (ADD)[99] could not fully correct his condition because he had to take lower dosages of medication so that he could still perform his job duties.[100] Therefore, his disability was not fully controlled and he still suffered from the effects of the ADD. A similar reasoning was used in *Belk v. Southwestern Bell Telephone Co.*[101] in which the court found that a polio victim's leg brace did not allow him to function as he could had he not had polio, therefore he was found to be "clearly" disabled.

Another case has narrowed the Supreme Court's meaning of "substantially limited in the major life activity of working." In *Fjellestad v. Pizza Hut of America, Inc.*,[102] an employee who was unable to go back to her normal work hours after a severe car accident claimed discrimination based on her disability, which substantially limited her work. In *Sutton*, the court said that one was substantially limited if precluded from a broad range of jobs.[103] However, in *Fjellestad*, the Eighth Circuit held that the employee had proven that she was substantially limited when factoring in training, geographical area, and similar jobs. The employee was not required to prove that she was limited from any other jobs.[104]

VI. APPLYING *SUTTON'S* ANALYSIS

Before *Sutton*, there were certain conditions that were thought to be almost *per se* disabilities. This class included those with blindness, mental retardation, and insulin-dependent diabetes. Other conditions and diseases were thought to be disabilities as long as the condition was severe enough. Examples include epilepsy, hypertension, and learning disabilities.[105] Of course, there always had to be an individual determination for each case.

After *Sutton*, no one can be reasonably certain whether one particular disease or condition will or will not be considered a disability. In the three Supreme Court decisions discussed in this note, one concerned a plaintiff with hypertension, and another plaintiff had the use of only one eye. Both of these seem to be disabilities, but the Court held otherwise. Of the Fifth Circuit cases discussed, mild epilepsy, sleep apnea, PTSD and blood cancer were all declared not to be disabilities. Now, looking at these classifications may be too general, and there must be an individualized inquiry for each claimed disability. Perhaps the "truly" disabled will not make it to trial. On the other hand, sympathetic plaintiffs with real disabilities

98. No. Civ. A. 97-2669, 1999 WL 410362 (E.D. Pa. June 21, 1999).

99. Inability to control behavior as a result of difficulty in processing neural stimuli. Medical Dictionary (visited Mar. 10, 2000) <http://www.medicinenet.com>.

100. *Federal Judge: Jury Should Decide Some ADA Cases if Disability Not Fully Controlled*, 22 Pa. L. Wkly. 872 (1999).

101. 194 F.3d 946, 950 (8th Cir. 1999).

102. 188 F.3d 944 (8th Cir. 1999).

103. Sutton v. United Airlines, Inc., 119 S. Ct. 2139, 2151 (1999).

104. *Fjellestad*, 188 F.3d at 955.

105. Karen H. Henry, ADA 10 Steps to Compliance (1999).

may be prevailing in settlement. It is possible that the only cases making it to court are more on the frivolous side. This may explain why the courts' decisions appear harsh to plaintiffs. However, now that employers are more aware of the standard, maybe it will be easier for them to make correct decisions and more likely that they will lose cases where they in fact discriminated.

The statistics show that few cases that make it to federal appellate court are decided in favor of the plaintiff. In a study of federal appellate cases, it was found that nationally about 6% of the cases that are appealed were decided in favor of the plaintiff in district court.[106] On appeal, about half of those are affirmed. In the Fifth Circuit, only five of the thirty cases appealed were decided in favor of the plaintiff in district court. The Fifth Circuit affirmed only one of these cases. To make the plight of the plaintiff even worse, the Fifth Circuit's affirmances for the defendant are hard to gauge and could be really as high as 104 (rather than 23 as stated in this report).[107] Even considering possible error, these statistics show the pro-employer stance of the courts.

Other statistics about the effects of the ADA are even less promising for the disabled. Between 1992 and 1997, 90,000 discrimination complaints were filed with the EEOC. Of these, 63% were for wrongful termination, 10% for hiring violations, and 29% for failure to provide reasonable accommodations. Over $174 million has been paid in settlements. However, one study has found that since the ADA was passed employment rates for the disabled have actually dropped. It claims that "[t]his decline represents a clear break from past trends for both disabled and non-disabled workers, and therefore seems likely to have been caused by the ADA."[108] The authors claim that fear and concern about costs related to ADA provisions have kept mid-sized companies from hiring disabled employees. They found that the biggest effect of the ADA is on reduced hiring, not termination.[109] These statistics once again show that the disabled are not receiving a huge windfall from the ADA. The United States Commission on Civil Rights reports that media portrayal of the ADA has misled people and caused a negative view and misunderstanding of the law. This negative portrayal has contributed to the tension between disabled employees and employers.[110]

106. This study considered all decisions available on Westlaw from 1992 through July 1998 as well as other cases that could be obtained. Other studies have proven that plaintiffs are more successful in published opinions than in unpublished opinions. Therefore, the unpublished opinions should only strengthen Colker's position. *See* Colker, *supra* note 20, at 104.

107. *Id.*

108. Les Picker, *Consequences of the Americans With Disabilities Act*, (visited Mar. 10, 2000) <http://www.nber.org/digest/dec98/w6670.html> (reviewing Daron Acemoglu and Joshua Angrist, *Consequences of Employment Protection? The Case of The Americans With Disabilities Act*, NBER Working Paper No. 6670).

109. *Id.*

110. Colker, *supra* note 20, at 99.

VII. A STATE LAW SOLUTION FOR THE DISABLED?

A. *State Disability Discrimination Laws*

Claimants may now turn to state courts more often for relief as a result of this heightened threshold under the ADA.[111] The viability of state court relief will turn on how closely state disability laws track the federal ADA. In states that do not closely follow the ADA, there is a better chance for relief. In some states that closely mirror the ADA this will not prove very helpful. For instance, the Arkansas Civil Rights Act (ACRA) closely parallels the language of the ADA as evidenced in the definition of disability, "a physical or mental impairment that substantially limits a major life function."[112] The Eighth Circuit has already ruled that the ACRA definition of disability is in "all relevant respects the same" as the ADA.[113] Although this case was decided before Sutton, it is to be expected that ACRA claims will suffer the same fate as ADA claims. Therefore, the citizens of Arkansas will find no greater relief in state court. States with broader definitions of disability, such as New Jersey, should provide more relief than the federal ADA. The New Jersey Law Against Discrimination (LAD) has a broad definition of "handicapped" which includes epilepsy and visual impediment.[114] The courts have already held that the LAD definition differs from the ADA with respect to the "major life activity component."[115] It has also been held that LAD is a remedial statute and should be construed liberally.[116] Therefore, New Jersey plaintiffs may be more successful filing a state law claim for discrimination.

B. *Louisiana Law on Disability Discrimination*

In Louisiana, state remedies may not prove to be any more favorable than the ADA because Louisiana law closely follows the ADA wording and jurisprudence. However, at least one author argues that there are enough differences in language between the federal and Louisiana statutes that Louisiana courts can choose a different interpretation than the federal courts.[117] In addition, Louisiana has its own employment discrimination statutes and constitutional protections. The Louisiana Constitution of 1974 expressly provides the "Right to Individual Dignity." It specifically prohibits discrimination based on birth and physical condition.[118] The

111. Marcia Coyle, *ADA: Clarified or Ruined?*, Nat'l L. J., July 5, 1999, at A1.

112. Ark. Code Ann. § 16-123-102(3) (Michie Supp. 1999); *see* Theresa M. Beiner, *An Overview of the Arkansas Civil Rights Act of 1993*, 50 Ark. L. Rev. 165 (1997).

113. The Arkansas Supreme Court had not yet decided whether food allergies are disabilities, so the Eighth Circuit panel decided what it "would probably hold." Land v. Baptist Medical Center, 164 F.3d 423, 425 (8th Cir. 1999).

114. N.J. Stat. Ann. § 10:5-5(q) (West 1993 & West Supp. 1999).

115. Failla v. City of Passaic, 146 F.3d 149, 154 (3d Cir. 1998).

116. Nieves v. Individualized Shirts, 961 F. Supp. 782 (D.N.J. 1997).

117. Gerald J. "Jerry" Huffman, Jr., *The New Louisiana Employment Statutes: What Hath the Legislature Wrought*, 58 La. L. Rev. 1033 (1998).

118. La. Const. art. I, § 3.

Louisiana Civil Rights Act for Handicapped Persons (LCRAHP) also protects the disabled from discrimination.[119] The Louisiana Employment Discrimination Law, which covers private discrimination, was promulgated in 1997 to "consolidate employment discrimination provisions of law into one Chapter."[120] This Act defines "disabled person," "impairment," and "major life activities" almost exactly as in the ADA.[121]

However, there is an "adaptive devices" measure in Louisiana Revised Statutes 23:323 (the Louisiana Employment Discrimination Law) that might help potential plaintiffs. Under this provision, one of the prohibited discriminatory practices is not hiring a potential employee because he/she would need to provide his/her own "adaptive devices" in order to perform the job. "Adaptive measures" is defined as "any items utilized to compensate for a physical or mental impairment, *including but not limited to* braces or other supports, wheelchairs, talking boards, hearing aids, corrective devices, corrective lenses, or seeing eye dogs."[122] In Sutton's case, her corrective lenses would have been considered adaptive devices. According to the statute, she would be protected from discrimination based on this. United would still have defenses, but the plaintiff's burden would be reduced initially, making it easier to prove the threshold definition of disability.

VIII. CONCLUSION

Sutton will not kill the ADA as some advocates for the disabled fear. As one writer states, "[f]ar from closing the floodgates on claims brought under the ADA, the new decisions may merely redraw the battle lines between employers and their employees claiming disability discrimination."[123] It will be harder for plaintiffs to prove that they are disabled. The decision will cause a shift in ADA cases to a focus on proving a "substantial limitation of a major life activity." Almost all of the cases following *Sutton* have focused on this aspect of the definition. In addition, more claims will be filed focusing on the "regarded as" prong of disability.

There will probably be fewer cases that are truly affected by this decision than some fear. Most frivolous cases do not get past the EEOC and most truly legitimate claims probably end in settlement. In addition, the courts will find a way around *Sutton* when the facts are such that they want to allow recovery. This maneuvering is demonstrated in the *Menkowitz, Belk* and *Fjellestad* cases.[124] In addition, state laws may help disabled in some states. State legislators could also be encouraged to pass more favorable legislation for their constituents.

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119. LCRAHP only applies to education facilities, real estate transactions and programs that receive financial assistance from the state or its subdivisions. La. R.S. 46:2254(A) (1999).

120. La. R.S. 23:301 (1998).

121. La. R.S. 23:322(3), (6), and (7) (1998).

122. La. R.S. 23:322(1) (1998) (emphasis added).

123. Anthony B. Haller, *From the Defense Perspective: There's More Than Meets the Eye in Supreme Court's ADA Cases*, 22 Pa. L. Wkly. 32 (1999).

124. *See supra* notes 98, 101-104 and accompanying text.

Perhaps the definition of disability should be rewritten to be less ambiguous and to create a more specific protected class. One possibility is to re-write the ADA in a way that allows people to claim disability by satisfying a lesser threshold requirement. The burden will then shift to the employer to show why certain standards are needed because of a job related activity as is already provided. The focus of the ADA dispute should be less concerned about whether the person is "disabled" and more about whether the person was discriminated against. The ADA was passed to prevent discrimination against persons with impairments, not to create litigation over *who* is "disabled."

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