University of Arkansas at Little Rock Law Review

Volume 22 | Issue 2 Article 3

2000

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I. INTRODUCTION

Periodically, the United States Supreme Court focuses on a particular aspect of labor relations or employment law and issues a spate of opinions redefining that area. In 1960, it focused on the Labor Management Relations Act of 1947[1] and the role of grievance arbitration in labor relations when it decided the Steelworkers Trilogy—*United Steelworkers of America v. American Manufacturing Co.*,[2] *United Steelworkers of America v. Warrior & Gulf Navigation Co.*,[3] and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*[4] In 1977 it focused on the role of statistics in cases brought pursuant to Title VII of the Civil Rights Act of 1964[5] in deciding *International Brotherhood of Teamsters v. United States*,[6] *Hazelwood School District v. United States*,[7] and *Dothard v. Rawlinson*.[8] In 1998, its attention was on sexual harassment in *Oncale v. Sundowner Offshore Services, Inc.*,[9] *Burlington Industries, Inc. v. Ellerth*,[10] and *Faragher v. City of Boca Raton*.[11] Now the Court has turned its focus to the Americans with Disabilities Act[12] (hereinafter referred to as "ADA" or "the Act"), in still another trilogy of cases where it has narrowly defined the term "disability" and, thereby, significantly limited the scope and application of the Act.

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1. 29 U.S.C. §§ 141-197 (1994).
2. 363 U.S. 564 (1960).
3. 363 U.S. 574 (1960).
4. 363 U.S. 593 (1960).
5. 42 U.S.C. §§ 2000e–1 to –17 (1994).
6. 431 U.S. 324 (1977).
7. 433 U.S. 299 (1977).
8. 433 U.S. 321 (1977).
9. 523 U.S. 75 (1998).
10. 524 U.S. 742 (1998).
11. 524 U.S. 775 (1998).
12. 42 U.S.C. §§ 12101-12213 (1994).

II. AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act of 1990 is divided into three primary Titles: Title I prohibits employment discrimination,[13] Title II covers discrimination in the delivery of governmental services,[14] and Title III covers discrimination in access to public accommodations.[15]

While each of the foregoing Titles has the common thread of relating to individuals with a "disability," none of them separately defines it. Rather, the definition is found at 42 U.S.C. § 12102(2), which precedes the separate Titles discussed above: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. Thus, to understand and apply the Act's provisions to real-life circumstances, one must determine what is meant by: (1) "physical or mental impairment," (2) "substantially limits," and (3) "major life activities of such individual." Unfortunately, the Act itself provides no definitions of these terms. However, the Equal Employment Opportunity Commission (hereinafter "EEOC") has attempted to address this omission by way of regulation.[16]

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13. *See* 42 U.S.C. §§ 12111-12117 (1994). Title I's prohibition against employment discrimination states: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (1994).

14. *See* 42 U.S.C. §§ 12131-12165 (1994). Title II states: "Subject to the provisions of this sub-chapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §12132 (1994).

15. *See* 42 U.S.C. §§ 12181-12189 (1994). Title III provides: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a) (1994).

16. The EEOC's "Regulations to Implement the Equal Employment provisions of the Americans with Disabilities Act" are found at 29 C.F.R. § 1630.2 (1998). They provide, in pertinent part:

> (h) *Physical or mental impairment* means:
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> (1) 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
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> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Against this statutory and regulatory back drop, the Supreme Court was asked to address the meaning of "disability" and, correspondingly, the scope and breadth of the ADA's application in *Sutton v. United Air Lines, Inc.*[17] and

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(i) *Major Life Activities* means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
(j) *Substantially limits*—
(1) The term *substantially limits* means:
(i) Unable to perform a major life activity that the average person in the general population can perform; or
(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.
(2) The following factors should be considered in determining 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 the expected permanent or long term impact of or resulting from the impairment.
(3) With respect to the major life activity of *working*—
(i) The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.
(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":
(A) The geographical area to which the individual has reasonable access;
(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2 (1998).

17. 119 S. Ct. 2139 (1999).

its two ancillary cases:[18] *Albertsons, Inc. v. Kirkingburg*[19] and *Murphy v. United Parcel Service*.[20]

III. THE ROLE OF CORRECTIVE DEVICES IN DETERMINING DISABILITY

In the leading case, *Sutton v. United Air Lines, Inc.*,[21] the Court was asked to address whether the determination of an individual's disability was made with or without consideration of the impact of corrective devices or other mitigating measures which would ameliorate the consequences of an impairment.[22] *Sutton* involved twin sisters both of whom sought to be global airline pilots with United Air Lines.[23] Both sisters had identical vision; uncorrected, their vision was 20/200 in the better eye and 20/400 in the lesser eye.[24] However, in both cases, their vision was correctable to 20/20 with the use of eyeglasses or contact lenses.[25] United Air Lines, however, would not accept any global pilot whose uncorrected vision in either eye was worse than 20/100, and, therefore, the plaintiffs were denied employment as global pilots because of their visual impairment.[26]

The sisters sued under the ADA alleging they had the physical impairment of restricted vision which substantially limited the major life activity of working since they were prohibited by United Air Lines from serving in the capacity of global pilot.[27] The plaintiffs contended they were qualified individuals with a disability because they could perform the essential functions of the job of global airline pilot with the reasonable accommodation of using eyeglasses or contact lenses to correct their vision to satisfy the vision requirements of the employer.[28]

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18. While these cases involve employment discrimination under Title I of the ADA, the Court's holdings on the scope of disability would apply to the other Titles as well. *See, e.g.*, Gonzalez v. National Board of Med. Examiners, No. 99-CV-72190-OT, 1999 U.S. Dist. LEXIS 12341, at *1 (S.D. Tex. Aug. 10, 1999) (applying *Sutton* to action under Title III).

19. 119 S. Ct. 2162 (1999).

20. 119 S. Ct. 2133 (1999).

21. 119 S. Ct. 2139 (1999).

22. *See id.* at 2143.

23. *See id.*

24. *See id.*

25. *See id.*

26. *See id.*

27. *See Sutton*, 119 S. Ct. at 2144.

28. *See id.* at 2141. The ADA prohibits discrimination in employment "against a qualified individual with a disability because of the disability of such individual . . . ." 42 U.S.C. § 12112(a) (1994). The term "qualified individual with a disability" is defined as "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." 42 U.S.C. § 12111 (8) (1994).

The implications of the issue raised in *Sutton*, however, go far beyond the limited issue of whether measures that mitigate the effects of an impairment should be considered in determining whether an impairment rises to the level of a disability. Rather, the *Sutton* plaintiffs raised the specter of a definition of disability which would cover the vast majority of working Americans within its embrace. As the Court noted, "the number of people with vision impairments alone is 100 million" and "more than 28 million Americans have impaired hearing."[29] Another 50 million have high blood pressure.[30] And the list could go on. How many Americans have bad backs? Arthritic knees? Migraine headaches? The list is virtually endless.

The dilemma facing the Court was only exacerbated if working was considered a major life activity as it is in the EEOC Guidelines.[31] It is akin to defining a term with itself to argue that one has been denied a position because of a disability while establishing the existence of a disability by the denial of the job. The Supreme Court recognized this somewhat disquieting logic in *Sutton:*

> We note, however, that there may be some conceptual difficulty in defining 'major life activities' to include work, for it seems 'to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others] . . . . then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap.' Indeed, even the EEOC has expressed reluctance to define 'major life activities' to include working and has suggested that working be viewed as a residual life activity, considered, as a last resort, *only* 'if an individual is not substantially limited with respect to *any other* major life activity.'[32]

These reservations are well-founded. If working is a major life activity and disability is defined without regard to mitigating or corrective measures, then almost every American worker is disabled if any adverse employment decision can be characterized as related in any way to a physical or mental impairment. Since each ADA claim must be decided on a case-by-case basis which is dependent on the unique facts of that claim, it would enable most employees to state a claim which would require trial to resolve. Such an interpretation of the statute would place employers in an impossibly precarious position.

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29. *See Sutton*, 119 S. Ct. at 2149.

30. *See id.*

31. *See* 29 C.F.R. § 1630.2(i) (1998), which provides: "Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."

32. *See Sutton*, 119 S. Ct. at 2151 (citations omitted) (emphasis added).

The major purpose of employment discrimination statutes is to compel employers to change their practices to conform with the expressed public policy set forth in those statutes, specifically, not to discriminate on the basis of some prohibited factor. In this author's experience, this motivation succeeds more through the employer's fear of the cost of litigation than through its fear of an adverse judgment. Defense costs in employment cases are frighteningly high. What is being litigated is motivation and that is never simply done. Unlike personal injury cases which may involve an issue as simple as whether the stoplight was red or green, employment cases involve testing the underlying motivation of the employer. Practically, the employer is faced with the daunting task of negative proof, *i.e.*, improper motive was not a factor. Rarely is there direct, express evidence setting forth that motivation. Rather, it must be inferred from a variety of sources. Thus, in defending these actions, the employer finds itself looking at how other employees were treated in similar situations, which compels the review of a large number of employment actions involving a large number of employees. The employer must first determine which other employment decisions were sufficiently similar such that an inference of motivation in the present action could be drawn from those past actions. Ultimately, the employer finds itself pouring through literally thousands of pages of personnel files and other records and interviewing tens and sometimes scores of employees. It is not a simple process, and it is very time consuming. Unfortunately, time equates to legal fees.

Furthermore, employers do not face unbiased juries. The vast majority of jurors are themselves employees or are related to an employee. Few jurors have a background in management and those that do usually are eliminated by peremptory challenge. Therefore, it is a naive employer who believes it can successfully defend any employment discrimination claim by simply challenging the plaintiff's ability to carry his burden of proving the employer's motivation was improper. The smart employer knows it must carry the responsibility of proving its actual motivation. This, too, multiplies legal fees.

Therefore, even though an employer may feel it has a legitimate operation and is not discriminating, it, nonetheless, fears litigation, even when it believes it can prevail, because the cost of successfully defending an action can be almost as damaging as the cost of unsuccessfully defending one (although the former is certainly more psychologically satisfying). In the context of the ADA, if disability is so broadly defined that virtually every employee who is subject to an adverse employment action can, at least, articulate an argument that the action was based on his or her mental or physical impairment, then he or she can state a cause of action under the

ADA. Granted, he or she may not prevail, but that is little solace to the employer whose concern is avoiding the lawsuit in the first place.

Within this larger context, the Supreme Court in *Sutton* turned to deciding the more narrow issue of whether the existence of a disability under the ADA would be determined with or without consideration of corrective or mitigating measures.[33] It concluded that the mitigating effect of corrective devices and other treatment must be considered in determining whether a particular impairment substantially limited the major life activity of an individual and, thus, whether an individual met the statutory definition of disabled.[34]

It is especially noteworthy that in order to reach this conclusion, the majority ignored the ADA's legislative history. As Justice Stevens, writing for the dissent, noted:

> The ADA originated in the Senate. The Senate Report states that "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." S. Rep. No. 101-116, p. 23 (1989).
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> The report of the House Committee on the Judiciary states, in discussing the first prong, that, when determining whether an individual's impairment substantially limits a major life activity, "[t]he impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation." H.R. Rep. No. 101-485, pt. III, p. 28 (1990). The Report continues that "a person with epilepsy, an impairment which substantially limits a major life activity, is covered under this test," *ibid*, as is a person with poor hearing, "even if the hearing loss is corrected by the use of a hearing aid."
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> The Report of the House Committee on Education and Labor likewise states that, "[w]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." *Id.* pt. II, at 52. To make matters perfectly plain the Report adds: "For example, a person who is hard of hearing is substantially limited in the major life activity of hearing *even though the loss may be corrected through the use of a hearing aid.* Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, *even if the effects of the impairment are controlled by medication.*"[35]

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33. *See id.* at 2143.
34. *See id.*
35. *Sutton*, 119 S. Ct. at 2154-55 (Stevens, J., dissenting) (emphasis added).

The majority,[36] however, rejected this approach, holding, "[b]ecause we decide that, by its terms, the ADA cannot be read in this manner, we have no reason to consider the ADA's legislative history."[37] The Court found that three separate provisions of the ADA, when read in concert, compelled this conclusion.[38] First, it noted that the definition of disability as "a physical or mental impairment that *substantially limits* one or more of the major life activities of an individual" uses the present indicative verb form which the majority concluded required that:

> a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability. A 'disability' exists only where an impairment 'substantially limits' a major life activity, not where it 'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not 'substantially limits' a major life activity.[39]

Second, the Court noted that the definition of "disability" required an evaluation "with respect to an individual" and the determination of whether a particular impairment substantially limited the "major life activities of such individual."[40] Thus, whether an individual has a disability is an individualized inquiry that must be made on a case-by-case basis and requires an analysis of the specific effect of that individual's impairment on the life of that specific individual.[41] The majority noted that to make the determination of disability based on the nature of the impairment, rather than upon the effect of the impairment on the life of the individual,

> would often require courts and employers to speculate about a person's condition and would, in many cases, force them to make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition .... Thus, the guidelines approach would create a system in which persons often must be treated as members of a group of people with similar impairments, rather than as individuals. This is contrary to both the letter and the spirit of the ADA.[42]

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36. Justice O'Connor authored the majority opinion, joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, Souter, Thomas, and Ginsburg.

37. *See Sutton*, 119 S. Ct. at 2146.

38. *See id.* at 2146-47.

39. *Id.*

40. *Id.* at 2147.

41. *See id.*

42. *Id.*

The Court also noted that such an approach would fail to take into account the negative affects of the mitigating measures themselves.[43] For example, several medications have side effects which could contribute to a limitation on major life activities.[44]

Finally, and perhaps most important, the Court found it impossible to harmonize the Act's specific reference to 43 million disabled Americans[45] with the potential of "160 million under a 'health conditions approach,' which looks at all conditions that impair the health or normal functional abilities of an individual."[46] Likewise, the Court noted that there were more than 100 million Americans with vision impairments, 28 million with impaired hearing, and 50 million with high blood pressure.[47] It found these numbers far larger than the 43 million specifically articulated by Congress in the Act.[48] Therefore, the Court concluded that any legislative history was irrelevant and the intent of the Act, as written, required consideration of mitigating and corrective measures in determining whether an individual was "disabled" for purposes of the Act.[49]

IV. REGARDED AS DISABLED

As the Court observed, however, its inquiry in *Sutton* did not end simply because it had concluded that the plaintiffs could not establish that they were, in fact, "disabled" within the meaning of the ADA.[50] The Act also prohibits discrimination against individuals who are regarded as having a disability.[51] Such a misperception can occur in one of two ways. The employer "must believe either that one has a substantially limiting impairment that one does

43. *See Sutton*, 119 S. Ct. at 2147.
44. *See id.*
45. *See* 42 U.S.C. § 12101(a)(1) (1994).
46. *Sutton*, 119 S. Ct. at 2148.
47. *See id.* at 2149.
48. *See id.*
49. *See id.* While not discussed by the Court, further support for this conclusion is found in the congressional findings incorporated into the Act. For example, 42 U.S.C. § 12101(a)(6) states, "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally." This description hardly seems applicable to the plaintiffs in *Sutton* who admittedly, like tens of millions of other Americans, have normal vision with the use of eyeglasses or contact lenses, and who are trained as commercial pilots. Further, § 12101(a)(7) describes individuals with disabilities as "a discreet and insular minority who have been . . . relegated to a position of political powerlessness in our society . . . ." Again, this description hardly fits the plaintiffs in *Sutton*.
50. *See Sutton*, 119 S. Ct. at 2149.
51. *See id.*; 42 U.S.C. § 12102(2)(C) (1994).

not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting."[52]

While there was no dispute that the plaintiffs were physically impaired in light of their uncorrected vision, they contended "only that respondent mistakenly believes their physical impairment substantially limits them in the major life activity of working."[53] The plaintiffs contended that United Air Lines' 20/100 uncorrected vision requirement precluded them from serving as global airline pilots and, therefore, created a substantial limitation on the major life activity of working.[54] The Court rejected this argument.[55]

First, the Court noted that the mere existence of a vision requirement neither established a substantial limitation nor otherwise violated the ADA.[56]

> By its terms, the ADA allows employers to prefer some physical attributes over others and to establish physical criteria . . . . [A]n employer is free to decide what physical characteristics or medical conditions that do not rise to the level of impairment—such as one's height, build or singing voice—are preferable to others, just as it is free to decide that some limiting, but not *substantially* limiting, impairments make individuals less than ideally suited for a job.[57]

Second, the Court held that, for there to be a substantial limitation on working, the plaintiffs must be prohibited from performing far more than the single job of global airline pilot.[58] Citing the EEOC's regulations[59] on this issue with approval, it held, "When the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, the plaintiffs allege they are unable to work in a broad class of jobs."[60] In applying this principle to the *Sutton* plaintiffs, it was noted that the position of global airline pilot is a single job, not a class of jobs.[61] Further,

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52. *Sutton*, 119 S. Ct. at 2150.

53. *Id.* The Court's language at this juncture is provocative. The Court observed, "Petitioners do not make the *obvious argument* that they are regarded due to their impairment as substantially limited in the major life activity of *seeing*. They contend only that respondent mistakenly believes their physical impairment substantially limits them in the major life activity of working." *Id.* (emphasis added). This language suggests the possibility of a different result had the plaintiffs alleged they were limited in or regarded as substantially limited in the major life activity of seeing. Their failure to do so, however, resulted in the Court limiting its analysis to whether they were substantially limited in the major life activity of working.

54. *See id.*

55. *See id.*

56. *See id.* at 2150.

57. *Id.* (emphasis in original).

58. *See Sutton*, 119 S. Ct. at 2151.

59. *See* 29 C.F.R. § 1630.2(j)(3)(i) (1998).

60. *Sutton*, 119 S. Ct. at 2151.

61. *See id.*

there was no indication that being disqualified from a global pilot's position disqualified the plaintiffs from other pilot positions.[62] As the Court noted, even the EEOC in its Interpretative Guidance observed, "[a]n individual who can not be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working."[63]

Finally, the Court rejected plaintiffs' contention that, if United's vision requirement were imputed to other airlines, they would then be restricted from being able to perform a broad class of jobs.[64] The Court held that "[a]n otherwise valid job requirement, such as a height requirement, does not become invalid simply because it *would* limit a person's employment opportunities in a substantial way *if* it were adopted by a substantial number of employers."[65]

V. *MURPHY* AND *KIRKINGBURG*

The principles enunciated in *Sutton* were reinforced by *Sutton's* companion cases, *Murphy v. United Parcel Service*[66] and *Albertsons, Inc. v. Kirkingburg*.[67]

Murphy involved a mechanic who was required to drive commercial motor vehicles as part of his job responsibilities.[68] As a result, he was required to have a commercial driver's license which can be acquired only by the satisfaction of certain Department of Transportation (hereinafter "DOT") regulations.[69] One of those regulations requires that a driver candidate have "no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial vehicle safely."[70] At the time he was hired by U.P.S., the plaintiff's blood pressure exceeded that permissible under the DOT regulations.[71] However, he was erroneously hired and allowed to work.[72] Subsequently, a review of his medical files disclosed this error and he was directed to be retested for hypertension.[73] When his blood pressure

62. *See id.*
63. *Id.* (quoting 29 C.F.R. app. § 1630.2 (1998)).
64. *See id.* at 2152.
65. *Id.* at 2152 (emphasis in original).
66. 119 S. Ct. 2133 (1999).
67. 119 S. Ct. 2162 (1999).
68. *See Murphy*, 119 S. Ct. at 2133.
69. *See id.* at 2136.
70. *Id.* at 2136 (quoting 49 C.F.R. § 391.41(b)(6) (1998)).
71. *See id.*
72. *See id.*
73. *See id.*

still exceeded the permissible limits, he was terminated because he could not possess the required commercial driver's license.[74]

The district court determined that, when he was on medication, he was not substantially limited in any major life activity,[75] and the Court of Appeals for the Tenth Circuit affirmed.[76] Certiorari was neither sought nor granted with respect to the validity of this determination, and it was, therefore, binding on appeal. As a result, in light of the Court's decision in *Sutton*, Murphy was not "disabled" within the meaning of the ADA, since it had already been decided that he was not substantially limited in any major life activity when he was taking his medication.[77]

Plaintiff alternatively argued, however, that if he was not disabled within the meaning of the statute, then he was *regarded* as being disabled because of his high blood pressure.[78] Like the *Sutton* plaintiffs, the *Murphy* plaintiff argued that his hypertension was regarded as substantially limiting him in the major life activity of working.[79]

In also rejecting this claim, the Court reiterated the principle it first enunciated in *Sutton*, that "substantially limited" means "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities."[80] The Court emphasized that a plaintiff has the burden of demonstrating that he was "substantially limited in the major life activity of working" which correspondingly required that he demonstrate he was unable to work in either a class of jobs or in a broad range of jobs.[81]

> Petitioner has put forward no evidence that he is regarded as unable to perform any mechanic job that does not call for driving a commercial motor vehicle and thus does not require DOT certification. Indeed, it is undisputed that petitioner is generally employable as a mechanic. Petitioner has 'performed mechanic jobs that did not require DOT certification' for 'over 22 years,' and he secured another job as a mechanic shortly after leaving UPS. Moreover, respondent presented uncontroverted evidence that petitioner could perform jobs such as diesel mechanic, automotive mechanic, gas-engine repairer, and gas-welding equipment mechanic, all of which utilize petitioner's mechanical skills.[82]

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74. *See Murphy*, 119 S. Ct. at 2136.
75. *See* Murphy v. United Parcel Serv., 946 F. Supp. 872, 881-82 (D. Kan. 1996).
76. *See* Murphy v. United Parcel Serv., 141 F.3d 1185 (10th Cir. 1998).
77. *See Murphy*, 946 F. Supp. at 875.
78. *See id.* at 882.
79. *See id.*
80. *Murphy*, 119 S. Ct. at 2138 (quoting 29 C.F.R. § 1630(j)(3)(i) (1998)).
81. *See id.*
82. *Id.* at 2139 (citations omitted).

The Court determined that the plaintiff had failed to meet his burden of presenting evidence sufficient to permit the conclusion that he was substantially limited in the major life activity of working.[83]

In *Kirkingburg*, the plaintiff was a truck driver with a visual impairment which left him with an uncorrectable visual acuity of 20/200 in his left eye.[84] As a result, he effectively had monocular vision and, as such, could not satisfy the DOT visual standards for a commercial drivers license.[85] Despite his impairment, however, Albertsons had erroneously hired him as a commercial driver, and he had served satisfactorily in that capacity for approximately 16 months when he was injured and took a leave of absence.[86] Upon returning, he was obligated to take a physical at which time his visual impairment was discovered by the employer.[87] He then sought to obtain a waiver of the DOT standards, but Albertsons, nonetheless, terminated him because he could not meet the basic DOT vision standards.[88] Although he later received a DOT waiver, Albertsons refused to rehire him.[89]

The Court first addressed whether an individual may be disabled *per se* under the ADA simply because of the nature of the impairment—monocular vision in this instance.[90] It rejected any such interpretation.[91] It noted the record established that the plaintiff had learned to compensate for his vision by making subconscious adjustments to the manner in which he sensed depth and perceived peripheral objects.[92] Reemphasizing its holding in *Sutton*, the Court held, "We see no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems."[93] It was further emphasized that there is a statutory obligation to determine ADA cases on a case-by-case basis and, therefore, it was inappropriate to adopt a *per se* rule in determining the existence of a disability.[94] The Court did not "suggest that monocular individuals have an onerous burden in trying to show that they are disabled."[95] It held simply that "the Act requires monocular

83. *See id.*
84. *See Kirkingburg*, 119 S. Ct. at 2165.
85. *See id.* at 2166.
86. *See id.*
87. *See id.*
88. *See id.*
89. *See id.*
90. *See Kirkingburg*, 119 S. Ct. at 2167 n.8
91. *See id.* at 2167.
92. *See id.* at 2168.
93. *Id.* at 2169.
94. *See id.*
95. *Id.*

individuals, like others claiming the Act's protection, to prove a disability by offering evidence that the extent of the limitation in terms of their own experience, as in loss of depth perception and visual field, is substantial."[96]

The Court also rejected the argument that an employer may not follow established regulatory standards when they are subject to waiver "without making some enquiry [sic] beyond determining whether the applicant or employee meets that standard, yes or no."[97] The plaintiff argued that, before an employer may insist on compliance with a regulatory standard, the employer must first make a showing that a waivable standard is "job related and justified by business necessity," and that "a reasonable accommodation could not fairly resolve the competing interests."[98] A unanimous Court rejected this proposition.[99] As Justice Thomas in his concurring opinion noted, "it would be unprecedented and nonsensical to interpret § 12113 to require [the employer] to defend the application of the Government's regulation to respondent when [the employer] has an unconditional obligation to enforce the federal law."[100]

VI. ADA AFTER *SUTTON*

First, there are certain clear legal principles which are readily discerned from *Sutton* and its sister cases. Foremost is that, in determining the existence of a "disability" under the ADA, the focus of that inquiry is on the effects of an impairment on an individual's major life activity rather than upon the nature of that impairment. No matter how debilitating an impairment might be, it cannot be presumed to rise to the level of a disability. This increases the burden on a plaintiff, since no matter how severe the impairment, the plaintiff still has the burden of demonstrating how that impairment affects him when compared to the average person in the general population.[101] On the other hand, it also complicates life for the employer because there is no black letter list of "disabilities" to which an employer can easily refer and use to guide its conduct. Rather, each situation will require an individualized assessment of the effects of an impairment on a particular individual which increases the possibility of error by the employer.

Second, the Court has also placed a major hurdle for plaintiffs to overcome in their attempt to demonstrate a protected disability. Specifically,

96. *Kirkingburg*, 119 S. Ct. at 2169.
97. *Id.* at 2170.
98. *Id.*
99. *See id.*
100. *Id.* at 2175 (Thomas, J., concurring).
101. *See Sutton*, 119 S. Ct. at 2145 (citing 29 C.F.R. § 1630.2(j) (1998)).

if a plaintiff is seeking to use "working" as the major life activity affected by an impairment, he will have to prove that the impairment substantially limits his ability to perform a broad range of jobs and will not be able to use the ADA to further the goal of performing a particular job.

Third, employers now know that they may rely upon any minimum physical requirements promulgated by federal statute or regulation. Employers will not be required to judge the legitimacy or job-relatedness of any such requirement. Instead, they may rely, without further inquiry, on such regulatory standards.

VII. QUESTIONS REMAIN

There are, however, questions left unresolved. For example, what happens when the individual has an easily correctable impairment but refuses to take corrective measures? What if the plaintiffs in *Sutton* had refused to wear eyeglasses or contact lenses? Could they then have argued they were substantially limited in the major life activity of seeing and demanded to be permitted to use those eyeglasses as a reasonable accommodation since without glasses their vision would have been substantially limited as likely would be their ability to work in a broad range of jobs thereby triggering the right to a reasonable accommodation they did not have by already wearing glasses?

The Court emphasized both the individuality of the disability assessment and the actual effect of an impairment rather than its potential effect. By example, in *Sutton*, the Court emphasized that, "*if* a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account."[102] And later, "a person whose physical or mental impairment *is corrected* by medication or other measures does not have an impairment that presently 'substantially limits' a 'major life activity.'"[103] Such language strongly suggests that employers will have to take individuals as they find them. If those individuals, in fact, use a corrective device or other mitigating measures, then their disability will be determined considering the effects of those corrective measures. On the other hand, if the individual refuses, no matter how unreasonably, to use some corrective measure, it may be that his disability will be determined without regard to the availability of such devices.

Unfortunately, this may lead to the elevation of form over substance with applicants and employees jockeying for position by refusing to take advantage

102. *Id.* at 2146 (emphasis added).
103. *Id.* at 2146-47 (emphasis added).

of readily available corrective measures or by misrepresenting their reliance, or lack of reliance, on such measures. Thus, employers are faced with the possibility that, in addition to the usual areas of discovery in preparation to defend disability claims, they will now have to add to those areas the investigation of a plaintiff's past use of such devices. And it still remains to be seen whether such past use even matters. The Court's emphasis on the present tense leaves open the possibility that an individual may forego the use of a corrective measure at *any* point. Thus, while an individual may have worn glasses, for example, for decades, she may be free to stop using glasses based upon how that affects her rights under the ADA. This certainly presents the possibility of absurdly inconsistent results, but the overriding emphasis on present effects in *Sutton* would support such a result.[104]

Additionally, it also appears that the Supreme Court has grave reservations about the propriety of classifying "working" as a "major life activity." Much can be inferred from the Court's observation that,

> [b]ecause the parties accept that the term 'major life activities' includes working, we do not determine the validity of the cited [EEOC] regulations. We note, however, that there may be some conceptual difficulty in defining 'major life activities' to include work, for it seems 'to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others] . . . then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap.'[105]

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104. The one court to address this issue has reached just such a conclusion. In *Finical v. Collections Unlimited, Inc.*, No. CIV 97-1649, 1999 U.S. Dist. LEXIS 13080 (D. Ariz. Aug. 19, 1999), the plaintiff had a hearing impairment which might have been corrected by use of a hearing aid. However, she did not use one. The district court, in finding the existence of a disability, observed:

> [A]n individualized inquiry into the limitations faced by a claimant who does not use corrective devices is inconsistent with an evaluation focusing on the limitations the claimant would face in a corrected state. Both approaches frequently require speculation—with respect to the latter, speculation about the limitations a plaintiff would face if she used a corrective measure she presently does not use, and, with respect to the former speculation about the limitations that a plaintiff would face if she stopped using a corrective measure she presently uses.

Id. at *11-12.

105. *Sutton*, 119 S. Ct. at 2151.

The Court underscored this observation in both *Murphy*[106] and *Kirkingburg*.[107] In light of these comments, one cannot help but speculate that, given the opportunity, the Court will reject the EEOC's regulations, at least, with respect to the inclusion of "working" as a major life activity.

Finally, whatever one's opinion of the Court's decision and its underlying rationale, it is undisputably clear that the Court is firmly committed to its position. These were not close decisions. Any traditional philosophical divisions on the Court were disregarded with at least seven members joining in each of the three decisions and with all nine reaching a rare unanimous verdict with respect to the right of employers to rely on federal regulations governing physical standards. There is no reason to anticipate a retreat from the principles enunciated in these opinions in future cases.

VIII. JUDICIAL ESTOPPEL

During the 1999 term, the Court also addressed the applicability of the doctrine of judicial estoppel to ADA cases. This doctrine prohibits a party from taking a factual position in one legal proceeding that is contradictory to a position taken by the same party in a different legal proceeding.[108] Before *Cleveland v. Policy Management System Corp.*,[109] it was becoming increasingly prevalent for defendants to move for dismissal on the grounds that a plaintiff's statement in an application for Social Security Disability or Workers Compensation benefits that he was totally disabled was directly contradictory of his representation in an ADA claim that he was able to work with a reasonable accommodation.

In *Cleveland*, the Court determined that there are circumstances in which a claim for disability payments, in that instance Supplemental Security Disability Income benefits (hereinafter "SSDI"), could coexist with a claim under the ADA.[110] As the Court observed, the Social Security Administration

106. The court stated "[a]s in *Sutton* . . . we assume, *arguendo*, that the EEOC regulations regarding the disability determination are valid." *Murphy*, 119 S. Ct. at 2138.

107. The *Kirkingburg* case stated as follows:

> As the parties have not questioned the regulations and interpretive guidance promulgated by the EEOC relating to the ADA's definitional section, for the purposes of this case, we assume, without deciding, that such regulations are valid, and we have no occasion to decide what level of deference, if any, they are due.

Kirkingburg, 119 S. Ct. at 2167-68. n.10 (citation omitted).

108. *See, e.g.*, Bates v. Long Island R.R. Co., 997 F.2d 1028, 1037 (2d Cir.), *cert. denied*, 510 U.S. 992 (1993).

109. 119 S. Ct. 1597 (1999).

110. *See id.* at 1600.

does not take the possibility of "reasonable accommodation" into account when determining of SSDI benefits.[111]

However, while the Court rejected any presumption that a disability claim inherently contradicts an ADA claim, it did recognize that, depending on the precise nature of the representation, a contradiction could still exist:[112]

> An ADA plaintiff bears the burden of proving that she is a 'qualified individual with a disability'—that is, a person 'who, with or without reasonable accommodation, can perform the essential functions' of her job. And a plaintiff's sworn assertion in an application for disability benefits that she is, for example, 'unable to work' will appear to negate an essential element of her ADA case—at least if she does not offer a sufficient explanation. For that reason, we hold that an ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim. Rather, she must proffer a sufficient explanation.[113]

Thus, as with every other aspect of the ADA, the application of the doctrine of judicial estoppel will depend on a case-by-case analysis, in this instance, one relating to the precise nature of the representation made. If that statement is as simple as, "I am disabled for purposes of SSDI," then the doctrine of judicial estoppel will not preclude an ADA claim. However, should the plaintiff elaborate about the scope of his disability, and its impact on his ability to work, he may find himself in the position that the two claims are, in fact, mutually exclusive and the doctrine will prohibit his ADA claim.[114]

IX. CONCLUSION

The Court has clearly concluded that the protections of the ADA, at least in the employment context, should be reserved for those individuals who "as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally."[115] This description does not extend to protect individuals who, no matter how unfortunately, are prevented from holding the particular job they prefer as

111. *See id.* at 1602.

112. *See id.* at 1603.

113. *Id.* at 1603 (citation omitted).

114. This is precisely what occurred in *Mitchell v. Washingtonville Ctr. Sch. Dist.*, No. 98-7185, 1999 U.S. App. LEXIS 19651 (2d Cir. Aug. 18, 1999) (holding prior statements to Worker's Compensation Board and Social Security Administration that the plaintiff was incapable of standing or walking and could only perform work while seated contradicted ADA claim that he could perform job with substantial standing and walking requirements with a reasonable accommodation).

115. 42 U.S.C. § 12101(a)(6) (1997).

opposed to being unable to work in any meaningful way. In *Sutton*, *Murphy*, and *Kirkingburg*, none of the plaintiffs were compelled to work outside of the occupation of their choice. The Suttons, for example, could qualify for other pilot positions than global pilot for United Air Lines.[116] Mr. Kirkingburg had other driving positions available. In fact, Albertsons offered him alternative jobs,[117] and he, ultimately, obtained a waiver that would allow him to drive for other companies.[118] Mr. Murphy, likewise, had numerous other mechanic's positions available.[119]

The purpose of the ADA is to allow individuals who, because of their disabilities, are prevented from or hampered in participating in the mainstream of American life. It was aimed at an "insular minority," not a broad majority. Yet, if the expansive definition of disability promulgated by the plaintiffs in these cases had been adopted by the Court, that is what precisely what would have occurred. Virtually every working American would have been able to articulate a claim of disability.

The Court has determined that not every impairment rises to the level of a disability simply because it prohibits an individual from holding a particular job. Just as the Age Discrimination in Employment Act[120] does not prohibit *all* discrimination based upon age—it only protects those over 40—neither does the ADA protect *all* persons who are denied a position because of an impairment. Rather, it only protects those who are disabled in a much broader sense. All of us must face the reality of our personal limitations, some of which may prevent us from holding the job we prefer. The ADA, however, was not intended as a weapon to force employers to give employees the job they desire. Nor was it intended to prohibit *any* consideration of physical or mental impairments in determining job requirements or selecting employees. It *was* intended to protect those who were being denied the opportunity to work in a general sense or who were otherwise being denied access to the mainstream of American life. The Court recognized this principle and adopted an interpretation that appropriately limits the scope of the Act to those it was designed to protect.

116. *See Sutton*, 119 S. Ct. at 2151.
117. *See Kirkingburg*, 119 S. Ct. at 2166 n.6.
118. *See id.* at 2166.
119. *See Murphy*, 119 S. Ct. at 2139.
120. 29 U.S.C. § 621 (1998).