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Narrowing the Class of Individuals with Disabilities: Sutton v. United Air Lines, Inc.

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Casenote

Narrowing the Class of Individuals with Disabilities: *Sutton v. United Air Lines, Inc.*

Mary Nebgen*

TABLE OF CONTENTS

I. INTRODUCTION 1130

II. HISTORICAL BACKGROUND OF THE ADA 1131

III. TITLE I OF THE AMERICANS WITH DISABILITIES ACT 1133
- A. *Claim Requirements Under Title I* 1134
- B. *The First Prong of the Definition of Disability* 1135
  - 1. *The Definition of "Physical or Mental Impairment"* 1136
  - 2. *The Definition of "Substantially Limiting"* 1136
  - 3. *The Definition of "Major Life Activity"* 1137
  - 4. *The Definition of "Substantially Limited in the Major Life Activity of Working"* 1137
- C. *The Second Prong of the Definition of Disability* 1138
- D. *The Third Prong of the Definition of Disability* 1139
- E. *An Individual with a Disability Must Be Able to Perform the Essential Functions of the Job* 1141
  - 1. *The Definition of "Reasonable Accommodations"* 1142
  - 2. *The Definition of "Undue Hardship"* 1143
- F. *Remedies Under the ADA* 1144

IV. CONSIDERATION OF MITIGATING MEASURES IN THE DETERMINATION OF WHETHER AN INDIVIDUAL HAS A DISABILITY 1144
- A. *Prior Cases in Which Courts Did Not Consider Mitigating Measures in Determining Whether an Individual Had a Disability* 1145
- B. *Prior Cases in Which Courts Considered Mitigating Measures in Determining Whether an Individual Had a Disability* 1147

V. *SUTTON V. UNITED AIR LINES, INC.* 1149
- A. *The Facts of the Case* 1149
- B. *The Court's Decision* 1150

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1. The Court's Decision Regarding the Plaintiffs' Claim of Disability Under the ADA 1150
2. The Court's Decision Regarding the Plaintiffs' Claim That They Were "Regarded As" Substantially Limited in the Major Life Activity of Working 1152
3. The Court Questions the Authority of the EEOC to Promulgate Regulations Regarding the Definition of Disabled 1153
4. The Court Questions the Authority of the EEOC's "Interpretive Guidance" 1153
C. Justice Ginsburg's Concurring Opinion 1154
D. The Dissenting Opinion of Justice Stevens, Joined by Justice Breyer 1154
E. Justice Breyer's Separate Dissent 1157

VI. RAMIFICATIONS OF *SUTTON V. UNITED AIR LINES, INC.* 1157
A. Impact on the Class of Individuals with a Disability as Defined by the ADA 1157
1. Limiting the Class of Individuals with a Disability Under the First Prong of the Definition of Disability 1158
2. Limiting the Class of Individuals with a Disability Under the Second Prong of the Definition of Disability 1158
3. Increased Future Use of the Third Prong of the Definition of Disability 1159
B. Questioning the Authority of the EEOC's Regulations Defining the Terms in the Statutory Definition of "Disability" 1160
C. Questioning the Validity of the EEOC's "Interpretive Guidance" .. 1162

VII. CONCLUSION 1164

I. INTRODUCTION

On July 26, 1990, President Bush signed into law the Americans with Disabilities Act.[1] The Act was heralded as "perhaps the most significant extension of federal civil rights protections since the 1960s," providing Americans with disabilities protections similar to those provided to individuals subjected to race, sex, or religious discrimination.[2] The Americans with Disabilities Act (ADA) guarantees equal opportunity in employment,[3] equal access to services and benefits

1. Americans with Disabilities Act, 42 U.S.C.A. §§ 1201-12213 (West 1995 & Supp. 2000).
2. Penn Lerblance, *Introducing the Americans with Disabilities Act: Promises and Challenges*, 27 U.S.F. L. REV. 149-50 (1992).
3. 42 U.S.C.A. §§ 12111-12117 (West 1995 & Supp. 2000).

provided by state and local governments,[4] and equal access to accommodations, goods, and services provided by private commercial entities.[5] The Equal Employment Opportunity Commission (EEOC), the Department of Justice, and the Department of Transportation have promulgated regulations to ensure compliance with the ADA's various subchapters.[6]

Since the 1992 implementation of the ADA's provisions regarding employment, one of the major areas of confusion and controversy has been defining the class of individuals who are protected by the statute.[7] A recent Supreme Court decision, *Sutton v. United Air Lines, Inc.*,[8] partially resolved this issue by clarifying the definition of "disability."[9] This Casenote focuses on the *Sutton* decision and its future impact on ADA employment litigation. Part II reviews the historical background of the ADA,[10] while Part III outlines the employment provisions of the Act.[11] Part IV considers the significance of mitigating measures in the definition of disability,[12] and Part V examines the text of the *Sutton* decision.[13] Finally, Part VI analyzes the future impact of the decision on the class of individuals with disabilities and on the authority of the EEOC's regulations and guidelines.[14]

II. HISTORICAL BACKGROUND OF THE ADA

Prior to the enactment of the ADA, the primary federal law addressing discrimination against the disabled was the Rehabilitation Act of 1973.[15] As the first federal legislation protecting individuals with disabilities, the Rehabilitation Act of 1973 was a large step toward eliminating discrimination against this group.[16] The coverage of the Act, however, was significantly limited. The Act only prohibited discrimination by federal executive agencies, federal grantees, and federal

4. *Id.* §§ 12131-12134, 12141-12165.
5. *Id.* §§ 12181-12189.
6. *See* 29 C.F.R. § 1630 (1999) (providing the text of the EEOC's regulations regarding employment compliance with the provisions of the ADA); 28 C.F.R. §§ 35-36 (1999) (stating the regulations of the Department of Justice for state and local government non-transportation compliance with the ADA's provisions, and for compliance by private businesses providing goods and services); 49 C.F.R. § 37 (1999) (asserting the regulations of the Department of Transportation for compliance of transportation providers with the ADA's provisions).
7. *See infra* Part IV.A-B (describing the differing court decisions regarding whether individuals whose disabilities had been mitigated were included in the class of individuals protected by the ADA).
8. 527 U.S. 471 (1999).
9. *Id.* at 482.
10. *Infra* Part II.
11. *Infra* Part III.
12. *Infra* Part IV.
13. *Infra* Part V.
14. *Infra* Part VI.
15. 29 U.S.C.A. §§ 701-796 (West 1999 & Supp. 2000).
16. Robert E. Rains, *A Pre-History of the Americans with Disabilities Act and Some Initial Thoughts as to Its Constitutional Implications*, 11 ST. LOUIS U. PUB. L. REV. 185, 188 (1992).

contractors.[17] Thus, despite the 1973 Act, a vast number of employers could freely discriminate on the basis of a disability without violating federal law.

Numerous measures followed the 1973 Act, including the Education for All Handicapped Children Act,[18] the Developmental Disabilities Assistance and Bill of Rights Act,[19] and the Voting Accessibility for the Elderly and Handicapped Act.[20] Like the 1973 Act, these Acts also provided limited coverage, regulating only the conduct of the federal government or federally funded activities.[21] As a result, many programs and activities remained free from sanction for discrimination against individuals with disabilities.

The nation, however, was growing increasingly aware of the plight of the disabled. In 1983, the United States Commission on Civil Rights produced a Congressional report revealing that discrimination against individuals with disabilities was a serious and pervasive national problem, and that such discrimination existed in education, employment, institutionalization, medical treatment, architectural barriers, and transportation.[22]

In 1986, Louis Harris and Associates conducted a nationwide poll of people with disabilities and found that this class of American citizens was less wealthy, less educated, more socially isolated, and more dissatisfied with themselves than other American citizens.[23] Significantly, the survey results indicated that unemployment, as a result of job discrimination, was the major source of frustration for individuals with disabilities.[24]

Also in 1986, the National Council on the Handicapped published an assessment of federal laws and programs affecting persons with disabilities.[25] The Council found that of 12.9 million working-age persons reporting a work disability, only 4.2 million, or thirty-two percent, were actually working at the time of the

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17. 29 U.S.C.A. § 794 (West 1999).

18. Education for All Handicapped Children Act of 1975 (now known as the Individuals with Disabilities Education Act), Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C.A. §§ 1400-1487).

19. Developmental Disabilities Act of 1984, Pub. L. No. 98-527, 98 Stat. 2662 (codified as amended at 42 U.S.C.A. §§ 6000-6083).

20. Voting Accessibility Act of 1984, Pub. L. No. 98-435, 98 Stat. 1678 (codified as amended at 42 U.S.C.A. §1973ee).

21. Robert L. Burgdorf Jr., *The Americans With Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 428-29 (1991).

22. *Id.* at 416-17 (quoting UNITED STATES COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 159, 165-68 (1983)).

23. *Id.* at 415-16 (citing LOUIS HARRIS AND ASSOCIATES, THE ICD SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM (1986)).

24. *Id.* (citing LOUIS HARRIS AND ASSOCIATES, THE ICD SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM (1986)).

25. NATIONAL COUNCIL ON THE HANDICAPPED [NOW NATIONAL COUNCIL ON DISABILITY], TOWARD INDEPENDENCE: AN ASSESSMENT OF FEDERAL LAWS AND PROGRAMS AFFECTING PERSONS WITH DISABILITIES-WITH LEGISLATIVE RECOMMENDATONS (1986) (visited Dec. 20, 1999) <http://www.ncd.gov> (copy on file with the *McGeorge Law Review*).

1980 census.[26] The Council attributed the high unemployment rate, in part, to employer attitudes that stereotyped persons with disabilities are unable to produce and compete like other workers.[27]

After conducting sixty-three public meetings in all fifty states, attended by more than 32,000 people, the Congressional Task Force on the Rights and Empowerment of Americans with Disabilities made their formal finding in 1990. The Task Force found that massive, society-wide discrimination against people with disabilities existed.[28] The Task Force noted that although great strides had been made in the past few decades, society was still infected by the almost subconscious assumption that people with disabilities are "less than fully human" and thus not worthy of the opportunities and services available to the non-disabled.[29]

All of the organizations, groups, and reports described above contributed to Congress' growing realization of the need for comprehensive legislation to deal with discrimination against people with disabilities. The information provided the impetus for the enactment of the ADA, which was signed into law on July 26, 1990.[30] The EEOC was charged with developing regulations for Title I, the employment section of the ADA, which encompassed sections 12111 through 12117.[31] These regulations were enacted on July 26, 1991, providing definitions and explanations of various terms, including definitions of the statutory terms defining disability.[32] In addition, the EEOC published an appendix to its regulations entitled "Interpretative Guidance."[33]

III. TITLE I OF THE AMERICANS WITH DISABILITIES ACT

Title I of the ADA seeks to eliminate employment discrimination by a broad array of individuals and entities, including employers, employment agencies, labor organizations, and joint labor-management committees.[34] All employers fall within the jurisdiction of Title I if they have fifteen or more employees for each working day in twenty or more weeks in the current or preceding calendar year.[35] However, Title I excludes the United States government, Indian tribes, and bona fide private membership clubs.[36]

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26. *Id.*
27. *Id.*
28. *See* H.R. REP. NO. 101-485(II), at 31-32 (1990) (providing the testimony of Justin Dart, chairperson of the Task Force on the Rights and Empowerment of Americans with Disabilities, regarding the findings of the Task Force).
29. *Id.*
30. Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327.
31. 42 U.S.C.A. § 12116 (West 1995).
32. 56 Fed. Reg. 35734 (1991) (codified at 29 C.F.R. § 1630 (1999)).
33. 56 Fed. Reg. 35726 & 35734 (1991) (codified at 29 C.F.R. § 1630, app. (1999)).
34. 42 U.S.C.A. § 12111(2) (West 1995 & Supp. 2000).
35. *Id.* § 12111(5)(A).
36. *Id.* § 12111(5)(B).

Title I establishes the general rule that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[37] To guide the application of this general prohibition of discrimination, Title I provides several rules of construction explaining that the following are forms of discrimination: (1) "limiting, segregating or classifying," because of a disability, an applicant or employee in a way that adversely affects the opportunities or status of the employee; (2) participating in contracts "or other arrangements or relationships," including employment agencies, labor unions, pension or fringe benefit plan organizations, or training organizations, that have the effect of subjecting an applicant or employee to discrimination; (3) using standards of performance that have a discriminatory effect on individuals with disabilities, unless such standards are directly related to the essential functions of the job; (4) excluding or disadvantaging an employee or applicant because of that individual's relationship or association with another individual known to have a disability; (5) "not making reasonable accommodations for known physical or mental limitations of a qualified individual with a disability," or denying employment opportunities to an individual because of the need for reasonable accommodation; and (6) using qualifications, employment tests, or other selection criteria that screen out or tend to screen out individuals because of their disabilities unless the qualifications, tests or criteria are job-related and consistent with business necessity.[38] Employment testing procedures that demonstrate only a person's impairments, rather than accurately reflecting skills, aptitudes, or other facts relevant to employment, are prohibited.[39] Likewise, making inquiries concerning a job applicant's disability, unless such pre-employment inquiries relate to the ability of the applicant to perform specific job-related functions, are prohibited.[40] In addition, Title I only allows job-related medical exams after an offer of employment.[41]

A. *Claim Requirements Under Title I*

To establish a claim under Title I of the ADA, a plaintiff must first demonstrate that she is disabled within the definition of the term under the Act.[42] All titles of the

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37. *Id.* § 12112(a).
38. *Id.* § 12112(b)(1)-(6).
39. *Id.* § 12112(b)(7).
40. *Id.* § 12112(c)(2).
41. *Id.*
42. *See* Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112 (8th Cir. 1995) (holding that an airline mechanic diagnosed with Parsonage-Turner syndrome, a rare neurological disorder, demonstrated that he was a qualified individual with a disability as defined in the Act because he met the prerequisites for the job and could perform the job with reasonable accommodation).

Act operate under the same definition of disability.[43] This definition has three separate prongs. First, a person is disabled if she has "a physical or mental impairment that substantially limits major life activity."[44] Second, a person is disabled if she has "a record of such an impairment."[45] Third, a person is disabled if she is "regarded as having such an impairment."[46]

After establishing that she is disabled under the Act, a plaintiff must then show that she is qualified to perform the essential functions of the job, either with or without reasonable accommodation.[47] If reasonable accommodation is necessary, the plaintiff is only required to show that reasonable accommodation is possible.[48] At that point, the burden shifts to the defendant to show that such accommodation constitutes an undue hardship.[49]

Finally, the plaintiff must show that she has suffered adverse employment action as a result of the disability.[50] Thus, a claim under Title I requires proof of three elements: (1) that the plaintiff is disabled under any of the three definitions;[51] (2) that the plaintiff can perform the essential functions of the job;[52] and (3) that the plaintiff was discriminated against in some way because of the disability.[53]

B. The First Prong of the Definition of Disability

The first prong of the definition of "disability" is perhaps the most straightforward and easily understood. The language of the statute is as follows: "[t]he term 'disability' means, with respect to an individual[,] a physical or mental impairment that substantially limits one or more of the major life activities of such individual."[54] Thus, this prong of the definition encompasses the terms "physical or mental impairment," "substantially limits," and "major life activity."[55]

43. *See* 42 U.S.C.A. § 12102(2)(A)-(C) (West 1995) (defining the term "disability").

44. *Id.* § 12102(2)(A).

45. *Id.* § 12102(2)(B).

46. *Id.* § 12102(2)(C).

47. *Benson*, 62 F.3d 1108, 1111-12.

48. *See* Mason v. Frank, 32 F.3d 315, 318-19 (8th Cir. 1994) (noting that the Postal Service must prove its inability to accommodate, without undue hardship, a distribution clerk who could not bend, crouch or stoop and who presented evidence of measures the Postal Service could take to accommodate him).

49. *Id.*

50. *See* 42 U.S.C.A. § 12112 (West 1995) (describing various forms of prohibited adverse action, including adversely affecting the employee's opportunities for advancement, denying equal pay or benefits, refusal to hire, refusal to provide training, and discharge).

51. *See infra* Part III.B-D (providing the definitions of disability).

52. *See infra* Part III.E (explaining the elements necessary to prove one can perform the essential functions of the job).

53. *Supra* note 50.

54. 42 U.S.C.A. § 12102(2)(A) (West 1995).

55. *Id.*

1. *The Definition of "Physical or Mental Impairment"*

A physical impairment includes any physiological conditions, cosmetic disfigurement, or anatomical loss affecting one or more major body systems, such as the neurological, musculoskeletal, respiratory, cardiovascular, reproductive, digestive, genito-urinary, hemic, or lymphatic system.[56] A mental impairment includes "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."[57]

The ADA and accompanying regulations expressly exclude several conditions or attributes from the definition of "disability." These include: homosexuality or bisexuality;[58] various types of sexual behavior such as transvestism, transsexualism, pedophilia, exhibitionism, voyeurism; gender identity disorders not resulting from physical impairments or other sexual behavior disorders;[59] compulsive gambling, kleptomania, or pyromania;[60] substance abuse disorders resulting from the current use of illegal drugs;[61] and normal pregnancy.[62] Circumstances such as advanced age, cultural or economic disadvantage, lack of education, and a prison record are also excluded as qualifying disabilities under the Act.[63]

2. *The Definition of "Substantially Limiting"*

An impairment is "substantially limiting" if it renders an individual "unable to perform a major life activity that the average person in the general population can perform." An impairment that significantly restricts "the condition, manner, or duration under which an individual can perform a particular major life activity as compared" to an average person in the general population is also "substantially limiting" under the Act.[64] The factors considered in determining whether a person is substantially limited in a major life activity are: (1) the nature and severity of the impairment; (2) its duration or anticipated duration; and (3) its long-term impact.[65] The determination of whether an individual is substantially limited in a major life activity must be made on a case-by-case basis.[66]

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56. 29 C.F.R. § 1630.2(h)(1) (1999).
57. *Id.* § 1630.2(h)(2).
58. 42 U.S.C.A. § 12211(a) (West 1995).
59. *Id.* § 12211(b)(1).
60. *Id.* § 12211(b)(2).
61. *Id.* § 12211(b)(3).
62. 29 C.F.R. § 1630, app. § 1630.2(h) (1999).
63. *Id.*
64. 29 C.F.R. § 1630.2(j)(1)(i)-(ii) (1999).
65. *Id.* § 1630.2(j)(2)(i)-(iii).
66. *See, e.g.*, Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir. 1997), *cert. denied*, 522 U.S. 1048 (1998) (quoting Harris v. H&W Contracting, 102 F.3d 516, 520-21 (11th Cir. 1996), and asserting that the court must analyze on an individual basis whether a police officer who is blind in one eye is substantially limited in the major life activity of seeing, because individuals can compensate for this loss of sight).

3. *The Definition of "Major Life Activity"*

The term "major life activity" includes not only activities that have a public, economic or daily aspect, but also private activities.[67] Major life activities include caring for one's self, performing manual tasks, walking, seeing, hearing, breathing, learning, and working.[68] Sitting, standing, lifting and reaching are also considered major life activities.[69] Mental and emotional processes such as thinking, concentrating, interacting with others and reading are major life activities.[70] Driving is not a major life activity under the ADA,[71] but sleeping, an act which occupies one third of life and which the majority of the population can perform with little or no difficulty, is a major life activity.[72]

4. *The Definition of "Substantially Limited in the Major Life Activity of Working"*

The term "substantially limited in the major life activity of working" is specifically defined in the EEOC regulations.[73] A person is substantially limited in the major life activity of working if she is "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."[74] A "class" of jobs is determined on a case by case basis.[75] "Classroom teacher," for example, is sufficiently broad to constitute a class of jobs,[76] but "airline pilot" is too narrow a category of jobs to be considered a class because other non-piloting jobs

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67. *See* Bragdon v. Abbott, 524 U.S. 624, 638 (1998) (stating that private activities such as reproduction are major life activities, and holding that asymptomatic HIV is a disability under the ADA because it substantially limits the major life activity of reproduction).

68. 29 C.F.R. § 1630, app. § 1630.2(i) (1999).

69. *Id.*; *see also* Helfter v. United Parcel Serv., 115 F.3d 613, 616 (8th Cir. 1997) (holding that lifting is a major life activity); McAlinden v. County of San Diego, 192 F.3d 1226, 1234 (9th Cir. 1999) (establishing that engaging in sexual relations, and interacting with others, are major life activities under the ADA). *But see* Soileau v. Guilford of Maine, 105 F.3d 12, 15 (1st Cir. 1997) (determining that "getting along with others" is perhaps too amorphous a concept to be considered a major life activity).

70. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE ADA § 2.1(a) (1992) [hereinafter TAM] (copy on file with the *McGeorge Law Review*). *But cf.* Pack v. Kmart Corp., 166 F.3d 1300, 1305 (10th Cir. 1999) (determining that depression was not disabling due to resulting difficulties in concentration, because concentration is not a major life activity in itself but simply a component of a major life activity).

71. 29 C.F.R. § 1613.702(c) (1999).

72. *Pack*, 166 F.3d at 1305.

73. 29 C.F.R. § 1630.2(j)(3) (1999).

74. *Id.* § 1630.2(j)(3)(i).

75. 29 C.F.R. § 1630, app. § 1630.2(j) (1999).

76. Mustafa v. Clark County Sch. Dist., 157 F.3d 1169, 1175 (9th Cir. 1998); *see also* DePaoli v. Abbott Lab., 140 F.3d 668, 673-74 (7th Cir. 1998) (asserting that assembly line work is a recognized class of jobs within the scope of the ADA).

are available to persons with similar training, skills, and experience.[77] The language "a broad range of jobs in various classes" is interpreted to mean the ability to perform more than two jobs.[78]

The following factors are considered in determining if a person is substantially limited in working: the number and type of jobs from which the impaired individual is disqualified; the geographical area to which the individual has reasonable access; and the individual's job training, experience, and expectations.[79] A plaintiff seeking recovery under the ADA is not required to provide a comprehensive list of jobs that she cannot perform, but she must provide some specific evidence as to the type and number of jobs from which she is excluded.[80] An analysis of substantial limitations in working must focus on the employee's condition combined with her personal situation, not speculation as to whether her restrictions would limit her employment prospects if she possessed more or different training, skills, or abilities.[81] In sum, finding that an individual is substantially limited in her ability to work requires a basic showing that her overall employment opportunities are limited.[82]

C. *The Second Prong of the Definition of Disability*

The second prong of the definition of disability states that an individual with a disability is one who has a "record of such an impairment."[83] This language identifies individuals who have a history of a mental or physical impairment that has substantially limited a major life activity for a significant period of time.[84]

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77. Witter v. Delta Airlines, Inc., 138 F.3d 1366, 1370 (11th Cir. 1998).

78. *See* Bridges v. City of Bossier, 92 F.3d 329, 334 (5th Cir. 1996) (rejecting a hemophiliac firefighter's argument that his disqualification from being a firefighter or an Emergency Medical Technician substantially limited him in the major life activity of working).

79. 29 C.F.R. § 1630.2(j)(3)(ii) (1999); *see also* Webb v. Garelick Mfg. Co., 94 F.3d 484, 487 (8th Cir. 1996) (stating that expertise, background, and job expectations are relevant in defining job classes used to determine whether the person is disabled).

80. Colwell v. Suffolk County Police Dept., 158 F.3d 635, 645 (2d Cir. 1998); *see also* Ricks v. Xerox Corp., 877 F. Supp. 1468, 1476 (D. Kan. 1995) (noting that the plaintiff failed to establish that he was substantially limited in the major life activity of working because he produced no evidence about his level of training, skills, and abilities; the geographical area to which he had access; or the number and type of jobs demanding similar training from which he was disqualified).

81. *See, e.g.*, Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778, 784-85 (3d Cir. 1998) (remanding to the district court the determination of whether a 55-year-old meat cutter with a sixth grade education who suffered a back injury was substantially limited in the major life activity of working).

82. *See, e.g.*, Miller v. City of Springfield, 146 F.3d 612, 614 (8th Cir. 1998) (finding that a police dispatcher who failed a psychological test for police officer was not disabled, because her overall employment opportunities were not limited).

83. 42 U.S.C.A. § 12102(2)(b) (West 1995 & Supp. 2000).

84. 29 C.F.R. § 1630.2(k) (1999); *see also* Bender v. Safeway Stores, Inc., 1997 WL 525186, at *4 (9th Cir. July 14, 1997) (holding that a shoulder injury that did not prevent a truck driver from driving his truck was not a record of a disability, because it was not substantially limiting); Pryor v. Trane Co., 138 F.3d 1024, 1028 (5th Cir. 1998) (explaining that to establish a record of impairment, the disorder must substantially limit one of life's major activities when active); Olson v. General Elec. Astrospace, 101 F.3d 947, 953 (3d Cir. 1996) (same);

Hospitalization alone is insufficient to establish a record of disability without a history of substantial limitation in a major life activity.[85] Even a letter from a doctor to an employer restricting the employee's work activities is insufficient to establish a record of an impairment, unless the letter describes an impairment that substantially limits a major life activity.[86]

Second, an individual may have a record of a disability because some written record misclassifies the individual as having an impairment that substantially limits a major life activity.[87] For example, an individual misclassified as learning disabled is protected under the Act.[88] Additionally, the definition covers an individual who has recovered from cancer, heart disease, or mental illness but who is misclassified by the employer because her medical records contain information regarding the prior disability.[89]

An employer who relies on educational, medical, or employment records in making an adverse employment decision about a person who is currently qualified to perform a job is subject to challenge for discriminatory practice.[90] The plaintiff, however, must prove that the employer both knew of the record and discriminated because of that knowledge.[91]

D. *The Third Prong of the Definition of Disability*

The third prong of the definition of a person with a disability includes those individuals who are "regarded as" having an impairment which substantially limits a major life activity.[92] This prong has three parts. First, an employee or applicant is within the definition of an individual with a disability if the employee or applicant has a physical or mental impairment that does not substantially limit any major life activities but the employee or applicant is treated by the employer as having an impairment which does substantially limit a major life activity.[93] For example, an employee with high blood pressure, which does not substantially limit

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Robinson v. Global Marine Drilling Co., 101 F.3d 35, 37 (5th Cir. 1996) (same).

85. *See, e.g.*, Burch v. Coca-Cola Co., 119 F.3d 305, 317 (5th Cir. 1997) (finding that employee's temporary hospitalization for alcoholism does not establish a record of disability); Byrne v. Board of Educ., 979 F.2d 560, 566 (7th Cir. 1992) (providing that temporary hospitalization is not a record of a disability); *Colwell*, 158 F.3d at 645-46 (same); Gutridge v. Clure, 153 F.3d 898, 901-02 (8th Cir. 1998) (same).

86. *See, e.g.*, Ray v. Glidden Co., 85 F.3d 227, 229 (5th Cir. 1996) (determining that a doctor's letter describing a lifting restriction was insufficient to establish a record of an impairment).

87. 29 C.F.R. § 1630(k) (1999).

88. Id. § 1630, app. § 1630.2(k) (1999).

89. S. REP. NO. 101-116, at 23 (1989).

90. 29 C.F.R. § 1630, app. § 1630.2(k) (1999).

91. *See* Grinstead v. Pool Co. of Tex., 1994 WL 25515, at *2 (E.D. La. Jan. 20, 1994) (reasoning that an employer cannot discriminate against an employee with a record of an impairment because of such impairment if the employer had no knowledge of that impairment), *aff'd*, 26 F.3d 1118 (5th Cir. 1994).

92. 42 U.S.C.A. § 12102(2)(C) (West 1995).

93. 29 C.F.R. § 1630.2(l)(1) (1999).

her in a major life activity, qualifies as an individual with a disability under this prong if her employer reassigns her to a less strenuous job because the employer perceives that the impairment is substantially limiting.[94] On the other hand, a welder who is terminated cannot claim that the employer regarded him as substantially limited in the major life activity of working if there is no evidence that company officials had knowledge of the rumors of the welder having AIDS.[95] Similarly, a firefighter who has failed certain physical tests and is consequently dismissed from his position is not regarded by his employer as being substantially limited in the major life activity of working because he has only been disqualified from the job of firefighter, which is a narrow job classification.[96]

Second, an employee or applicant is disabled under the third prong of the definition of disability if the employee or applicant has a physical or mental impairment that substantially limits a major life activity, but only as a result of the attitudes of others toward such an impairment. Thus, an employer may be liable for taking adverse employment action based on the attitudes of others. For example, an individual with a facial scar or burn, a nervous tic, a hearing aid, or cerebral palsy may suffer adverse employment action due to the negative reactions of coworkers or customers. The ADA protects such an individual as "disabled" under the third prong.[97] Likewise, a person who suffers adverse employment action due to HIV positive status may qualify as an individual with a disability if the impairment is substantially limiting because of the attitudes of others.[98]

Third, an individual is "disabled" under the Act if she has no impairment at all but is treated by the employer "as having a substantially limiting impairment."[99] The employer may have taken adverse action against the employee based on mistake or rumor. For example, mistakes or rumors may lead an employer to the erroneous belief that a person has a mental illness, cancer, or epilepsy. If the employer cannot articulate a non-discriminatory reason for the adverse action against the employee, an inference can be drawn that the decision was based on

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94. 29 C.F.R. § 1630, app. § 1630.2(l) (1999); *see also* Riemer v. Illinois Dept. of Transp., 148 F.3d 800, 806-07 (7th Cir. 1998) (explaining that an employer's refusal to reinstate an asthmatic fabrication shop worker to a higher-paying indoor job because of unsubstantiated fears that his health would be jeopardized may be sufficient to establish that the employee was "regarded as" disabled).

95. Roberts v. Unidynamics Corp., 126 F.3d 1088, 1093 (8th Cir. 1997); *see also* Runnebaum v. NationsBank of Maryland, N.A., 123 F.3d 156, 174 (4th Cir. 1997) (asserting that a bank trust salesman with HIV was not "regarded as" disabled because his employer's decision to fire him was made prior to learning of his diagnosis).

96. Smith v. City of Des Moines, 99 F.3d 1466, 1474 (8th Cir. 1996); *see also* Collings v. Longview Fibre Co., 63 F.3d 828, 834-35 (9th Cir. 1995) (refusing to find that a drug addicted employee was "regarded as" disabled when he was terminated from his employment; the employer did not perceive that he was substantially limited in a major life activity, but only that his use and sale of drugs at work constituted a serious safety hazard because of the large, fast-moving machinery at the plant).

97. 29 C.F.R. § 1630, app. § 1630.2(l) (1999).

98. *See, e.g.*, Doe v. Kohn, Nast & Graf, P.C., 862 F. Supp. 1310, 1322-23 (E.D. Pa. 1994) (remanding for jury consideration whether an attorney was fired because some members of the law firm believed he had AIDS).

99. 29 C.F.R. § 1630.2(l) (1999).

mistake or rumor.[100] On the other hand, an employer would not be liable for discrimination against an obese or an extremely short individual because these impairments are not impairments that substantially limit a major life activity.[101]

E. *An Individual with a Disability Must Be Able to Perform the Essential Functions of the Job*

The nondiscrimination requirements of Title I apply only to employees or applicants with a disability who are qualified for the job.[102] A "qualified individual with a disability" is defined as one "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[103] The essential functions include job tasks that are fundamental, as opposed to marginal.[104] The term "essential functions" is defined as "the fundamental job duties of the employment position the individual with a disability holds or desires."[105]

In determining what job functions are fundamental, the employer's judgment and the employer's written job description are evidence of the essential functions of the job.[106] However, a job description is not conclusive evidence and may be rebutted by evidence tending to show that a certain duty is not in fact an essential function.[107] Examples of job functions considered essential include attendance,[108]

100. *Id.* § 1630, app. § 1630.2(l).

101. *See supra* Part III.B.2-3 (defining "substantially limiting" and "major life activity").

102. 29 C.F.R. § 1630.2(m) (1999).

103. 42 U.S.C.A. § 12111(8) (West 1995 & Supp. 2000).

104. H.R. REP. NO. 101-485(II), at 55 (1990).

105. 29 C.F.R. § 1630.2(n)(1) (1999).

106. 42 U.S.C.A. § 12111(8) (West 1995).

107. *See, e.g.*, Deane v. Pocono Med. Ctr., 142 F.3d 138, 148 (3d Cir. 1998) (specifying that despite the fact that the employer's job description listed frequent lifting of patients as an essential job function, an issue of fact existed as to whether a nurse who could not lift more than 50 pounds was otherwise qualified for her position); Heise v. Genuine Parts Co., 900 F. Supp. 1137, 1152 (D. Minn. 1995) (observing that although customer contact is essential in a sales job, an employee who periodically suffered severe headaches established a genuine issue of material fact as to whether the written job description, which required the employee to drive to the customers' places of business on a daily basis, was followed by other employees).

108. Buckles v. First Data Resources, Inc., 176 F.3d 1098, 1101 (8th Cir. 1999) (holding that a credit card purchase authorizer with acute rhinosinusitis who had excessive absences had not proved he could perform the essential functions of the job).

punctuality,[109] ability to work overtime,[110] ability to work under an assigned supervisor,[111] and dealing appropriately with customers.[112]

A job function may be considered essential for several reasons. For example, "[t]he function may be essential because the reason the position exists is to perform that function."[113] The function may also be essential because a limited number of employees are available to perform that job function.[114] Finally, the function may be essential because it is so highly specialized that the incumbent in the position is hired specifically for "her expertise or ability to perform the particular function."[115]

Even after accurately delineating the essential functions of the job, an employer must consider whether there are alternate ways an individual with a disability can perform the essential tasks. Thus, determining whether an individual is qualified involves an individualized inquiry into whether the person can perform the essential functions of the job despite her disability, and if not, whether a reasonable accommodation would enable the person to do so.[116]

1. *The Definition of "Reasonable Accommodations"*

An employer must make reasonable accommodations for the known physical or mental limitations of a qualified person with a disability, unless such accommodations "would impose an undue hardship on the operation of the [employer's] business."[117] An accommodation is a change in the work environment or in the manner in which duties are accomplished that enables a qualified individual with a disability to enjoy equal employment opportunities.[118] Reasonable accommodations include: making existing facilities readily accessible to individuals with disabilities; job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modification of equipment or devices; modification of examinations, training materials, or policies; and the

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109. Hollestelle v. Metropolitan Wash. Airports Auth., 1998 WL 228199, at *3 (4th Cir. May 8, 1998) (indicating that property disposal technician who was tardy 96 times in eight months due to depression could not perform the essential functions of the job).

110. Simmerman v. Hardee's Food Sys., Inc., 1996 U.S. Dist. LEXIS 3437, at *27 (E.D. Pa. Mar. 25, 1996), *aff'd*, 188 F. 3d 1578 (3d Cir. 1998) (determining that an employee with clinical depression who insisted that he could not work overtime had not demonstrated that he could perform the essential functions of the job).

111. Wernick v. Federal Reserve Bank of N.Y., 91 F.3d 379, 384 (2d Cir. 1996) (stating that an employee who insisted that she could not return to work because her supervisor exacerbated her back problems by making her tense had not demonstrated that she could not perform the essential functions of the job).

112. Mole v. Buckhorn Rubber Prods., Inc., 165 F.3d 1212, 1217 (8th Cir. 1999) (finding that an employee with multiple sclerosis and depression who was fired for poor customer relations and errors in customer orders had not demonstrated that she could perform the essential functions of the job).

113. 29 C.F.R. § 1630.2(n)(2)(i) (1999).

114. *Id.* § 1630.2(n)(2)(ii).

115. *Id.* § 1630.2(n)(2)(ii).

116. *Id.* § 1630, app. § 1630.2(n).

117. 42 U.S.C.A. § 12112(b)(5)(A) (West 1995).

118. 29 C.F.R. §1630, app. § 1630.2(o) (1999).

provision of qualified readers or interpreters.[119] Other reasonable accommodations could include permitting the use of accrued paid leave for necessary treatment, making employer-provided transportation accessible, providing personal assistants such as a page turner or travel attendant, and providing reserved parking spaces.[120] However, employers are not required to provide accommodations which assist an individual with a disability both on and off the job, such as prosthetic limbs, wheelchairs, or eyeglasses.[121]

To determine what constitutes a reasonable accommodation, it may be necessary for the employer to initiate an interactive process with the disabled individual.[122] Some circuit courts have concluded that both the employer and the employee have a duty to act in good faith and assist each other in the search for appropriate reasonable accommodations.[123] In contrast, other circuits have concluded that no such obligation on the part of the employer exists and that an employer cannot be held independently liable under the ADA for simply failing to engage in an interactive process to determine reasonable accommodations.[124]

2. *The Definition of "Undue Hardship"*

If an employer can demonstrate that a particular job accommodation would result in an "undue hardship" on the operation of its business, the ADA does not require the employer to implement the accommodation.[125] The term "undue hardship" is defined as "an action requiring significant difficulty or expense, when considered in light of the overall financial resources of the business, the number of employees, and the type of operation."[126]

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119. *Id.* § 1630.2(o)(ii).

120. *Id.* § 1630, app. § 1630.2(o).

121. *Id.* § 1630, app. § 1630.9.

122. *Id.* §1630.2(o)(3).

123. *See, e.g.*, Taylor v. Phoenixville Sch. Dist., 174 F.3d 142, 158-59 (3d Cir. 1999) (asserting that once the employer knows of an employee's disability and the employee has requested accommodation, the employer's obligation to participate in the interactive process has been triggered); Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 165 (5th Cir. 1996) (same); Beck v. University of Wis. Bd. of Regents, 75 F.3d 1130, 1135 (7th Cir. 1996) (reasoning that an employer that fails to communicate necessary accommodations, through initiation or response, may be acting in bad faith).

124. *See, e.g.*, Willis v. Conopco, Inc., 108 F.3d 282, 285 (11th Cir. 1997) (holding that the ADA does not mandate a pretermination investigation of reasonable accommodations); White v. York Int'l Corp., 45 F.3d 357, 363 (10th Cir. 1995) (providing that the EEOC recommendation of an interactive process is not a statutory requirement).

125. 42 U.S.C.A. § 12112(b)(5)(A) (West 1995).

126. *Id.* § 12111(10)(A)-(B); *see also* Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 142-43 (2d Cir. 1995) (establishing that providing a teacher with an assistant to help with classroom control may be a reasonable accommodation if it does not unduly burden the school district budget).

In general, a larger employer is expected to make accommodations requiring greater effort or expense than would be required of a smaller employer.[127] Moreover, evidence that the employer has made a particular accommodation in the past may preclude the employer from claiming that the accommodation requested by the employee constitutes an undue hardship.[128] The impact on other employees, however, may also be considered in determining whether an accommodation constitutes an undue hardship. For example, in *Palmer v. Circuit Court of Cook County*,[129] the employer was not required to retain an employee who threatened to kill his supervisor. In that case, the employee demanded that the employer accommodate his mental illness either by instructing other employees to put up with his violent outbursts or by stationing guards to prevent the employee from getting out of hand.[130] The court held that such a demand was an undue hardship.[131]

F. Remedies Under the ADA

Relief from violations of the ADA includes injunctive relief and back pay.[132] In cases of intentional discrimination, the equitable remedies of compensatory and punitive damages are allowed and there is a right to a jury trial.[133] Future pecuniary losses, emotional pain and suffering, inconvenience, loss of enjoyment of life, and other non-pecuniary losses are relevant to the calculation of compensatory damages.[134] Punitive damages are authorized if the employer acted "with malice or with reckless indifference."[135]

IV. CONSIDERATION OF MITIGATING MEASURES IN THE DETERMINATION OF WHETHER AN INDIVIDUAL HAS A DISABILITY

The first hurdle a plaintiff must surmount in an ADA discrimination action is qualifying as an individual with a disability within the meaning of the ADA. Qualification under the ADA requires a finding that the individual has an

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127. TAM, *supra* note 70, § 3.9; *see also* Hogue v. MQS Inspection, Inc., 875 F. Supp. 714, 722 (D. Colo. 1995) (holding that an employee's request for an assistant to perform physical tasks and for other employees to conduct his field inspections may be a reasonable accommodation because the company had $40 million annual gross sales).

128. *See, e.g.*, Criado v. International Bus. Machs. Corp., 145 F.3d 437, 444-45 (1st Cir. 1998) (deciding that an IBM marketing executive who suffered from Attention Deficit Disorder, anxiety disorder, and depression was entitled to additional leave of absence, because employee "was not asking for more leave than would be granted to a nondisabled, sick employee").

129. 117 F.3d 351 (7th Cir. 1997).

130. *Id.* at 353.

131. *Id.*

132. 42 U.S.C.A. § 2000e-5(g) (West 1994).

133. *Id.* § 1981a(b).

134. *Id.* § 1981a(b)(3).

135. *Id.* § 1981a(b)(1).

"impairment that substantially limits one or more" major life activities.[136] According to the EEOC's "Interpretive Guidance,"[137] "[the] determination of whether [the] individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices."[138] However, these guidelines do not have the force of either law or regulation, although they are based on a permissible construction of the statute.[139]

A. *Prior Cases in Which Courts Did Not Consider Mitigating Measures in Determining Whether an Individual Had a Disability*

As litigation over ADA legislation reached the circuit court level, most circuit courts cited the EEOC's guidelines to require that the determination of the extent to which an impairment limits an individual's major life activities must be made without regard to mitigating measures.[140] For example, in *Baert v. Euclid Beverage, Ltd.*,[141] the defendant claimed that because the plaintiff, a diabetic, was by his own account healthy and unaffected by his condition in day to day activities, the plaintiff did not have an impairment which substantially limited a major life activity.[142] The court disagreed, stating that "the extent to which [an] impairment limits an individual's major life activities" must be determined without regard to mitigating measures.[143] A person with insulin-dependent diabetes, according to the court, is substantially limited in major life activities because such a person would lapse into a coma without medication.[144]

In *Washington v. HCA Health Services of Texas, Inc.*,[145] the court cited House Education and Labor Committee Report,[146] which specified that determining

136. *Id.* § 12102(2)(A); *see also supra* notes 64-66 and accompanying text (defining "substantially limiting").

137. *See supra* note 33 and accompanying text (noting that the EEOC published an appendix to its regulations entitled "Interpretative Guidance" at the same time it published the regulations).

138. *See* 29 C.F.R. § 1630, app. § 1630.2(j) (1999) (noting that mitigating measures include any action the individual takes to correct the disabling condition).

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

140. *See* 29 C.F.R. § 1630, app. § 1630.2(j) (1999) (indicating that the determination of whether or not an individual has an impairment that substantially limits a major life activity must be made without regard to mitigating measures taken to correct the impairment); Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996) (noting that courts are not to consider mitigating measures in determining whether an individual is disabled).

141. 149 F.3d 626 (7th Cir. 1998).

142. *Id.* at 629.

143. *Id.*

144. *Id.* at 629-30; *see also* Daugherty v. City of El Paso, 56 F.3d 695, 697 (5th Cir. 1995) (providing that insulin dependent diabetes constitutes a disability under the ADA without regard to whether it is controlled by medication).

145. 152 F.3d 464 (5th Cir. 1998).

146. H.R. REP. NO. 101-485(II), at 52 (1990).

whether a person has a disability should be assessed without regard to "mitigating measures."[147] The court noted that another report by the House Judiciary Committee stated that mitigating measures should not be considered when determining whether an individual has a disability.[148] However, both committee reports differed from the Senate Labor and Human Resources Committee Report, which directed that persons with medical conditions that are under control do not have impairments that currently limit major life activities.[149] Nevertheless, the Senate Labor and Human Resources Committee Report agreed with the House Committee Reports[150] when it stated that whether a person has a disability should be assessed without regard to the availability of mitigating measures.[151] The inconsistency in the Senate Report led the court to believe that the Senate was suggesting that mitigating measures should be considered in the determination of whether or not one was disabled under the ADA.[152]

While the court gave weight to the House Reports, the court also noted that the most reasonable reading of the ADA was that mitigating measures must be taken into account in considering whether one was "disabled" under the Act.[153] However, the court was reluctant to ignore legislative history and the EEOC guidelines which dictated the opposite result.[154] The court finally reasoned that it would consider the unmitigated state of a condition only for serious impairments, such as diabetes, epilepsy, and hearing impairments, and only if the condition required the individual to mitigate on a frequent basis.[155]

The ability to self-correct an impairment is another mitigating measure that courts have declined to consider in determining whether an individual is disabled. In *Bartlett v. New York State Board of Law Examiners*,[156] the plaintiff claimed that her dyslexia was a disability for which the New York State Bar must accommodate by providing special testing procedures for the state bar exam.[157] The plaintiff had earned a Ph.D. in Educational Administration from New York University and a law degree from Vermont Law School.[158] The court held that a person's ability to self-accommodate a learning disability does not foreclose a finding of disability.

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147. Washington v. HCA Health Servs. of Tex., Inc., 152 F.3d 464, 467 (5th Cir. 1998).
148. *See* H.R. REP. NO. 101-485(III), at 28 (1990) (stating that the impairment should be assessed without considering whether mitigating measures would result in a less-than-substantial limitation).
149. *Id.* at 24.
150. *Supra* notes 146, 148.
151. *Id.* at 23.
152. *Washington*, 152 F.3d at 468.
153. *Id.*
154. *Id.* at 469.
155. *Id.* at 470. *But cf.* Roth v. Lutheran Gen. Hosp., 57 F.3d 1446, 1454 (7th Cir. 1995) (holding that the determination of whether a corrected visual impairment such as strabismus substantially limits a major life activity must be made without regard to mitigating measures).
156. 156 F.3d 321 (2d Cir. 1998).
157. *Id.* at 325.
158. *Id.* at 324.

Although the plaintiff had generally competent reading skills as compared to the average reader, her success was due to her history of self-accommodation—a mitigating measure that did not prevent the plaintiff from qualifying as "disabled" under the ADA.[159]

In *Harris v. H & W Contracting Co.*,[160] the plaintiff had Graves disease, "an endocrine disorder affecting the thyroid gland." The condition was controlled by medication and did not interfere with the plaintiff's work or other life activities.[161] However, due to a change in the drug's manufacturing process, which caused an overdose of the medication, the plaintiff was hospitalized for a psychiatric disorder.[162] She was subsequently fired from her position, an action she claimed was due to her "disability."[163] The court admitted that it is difficult to understand "how a condition that is completely controlled by medication can substantially limit a major life activity."[164] The court noted that the "Interpretative Guidance" provided by the EEOC in the appendix to the federal regulations is not law.[165] Nevertheless, the court relied on the EEOC's interpretation, as well as legislative history, in its holding that the plaintiff's mitigating measures could not be considered in determining whether she qualified as an individual with a disability.[166]

B. Prior Cases in Which Courts Considered Mitigating Measures in Determining Whether an Individual Had a Disability

Despite the EEOC guidelines and the legislative history, a number of courts did take mitigating measures into account when determining whether an individual is qualified as "disabled" under the ADA. For example, in *Ellison v. Software Spectrum Inc.*,[167] the Fifth Circuit Court of Appeals examined the issue of whether mitigating measures should be considered in the determination of whether a disability substantially impairs a major life activity.[168] The court stated that if

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159. *Id.* at 329; *see also* Doane v. City of Omaha, 115 F.3d 624, 627-28 (8th Cir. 1997) (holding that a policeman who had been fired because he became blind in one eye was substantially limited in the major life activity of seeing and thus entitled to the ADA's protection; although his disability did not prevent him from performing the essential functions of the job because his brain made subconscious adjustments to compensate for the lack of peripheral vision, the courts should not consider mitigating measures in the determination of whether or not a person was disabled).

160. 102 F.3d 516 (11th Cir. 1996).

161. *Id.* at 517.

162. *Id.* at 518.

163. *Id.*

164. *Id.* at 520.

165. *Id.* at 521.

166. *Id.*

167. 85 F.3d 187 (5th Cir. 1996).

168. *Id.* at 191 n.3.

Congress had intended that the determination be made without regard to mitigating measures, it would have so provided in the definition of disability.[169]

In *Schluter v. Industrial Coils, Inc.*,[170] the plaintiff, an inspection supervisor, contended that she was a person with a disability under the ADA, because her insulin dependent diabetes prevented her from passing a vision test, resulting in her removal from the supervisor position.[171] The court noted that the EEOC guidelines are not binding regulations, but simply a statement of the agency's interpretation of the statute.[172] The court determined that "in this instance the EEOC's interpretation [was] in direct conflict with the language of the statute," requiring the plaintiff to show that an impairment substantially limited a major life activity.[173] The court reasoned that the plaintiff's impairment, as mitigated by insulin, only rendered her unable to perform a narrow range of production work; thus, she failed to adduce the facts necessary to meet her threshold burden of establishing that she was disabled.[174]

A similar result was reached in *Gaddy v. Four B Corp.*[175] The plaintiff asserted that the defendant discriminated against her when it terminated her because her asthma prevented her from retrieving carts from the store's parking lot.[176] The court reasoned "that the plaintiff's asthma should be evaluated in its medicated state."[177] The plaintiff successfully controlled her asthma with an inhaler; thus, the condition did not substantially limit the major life activity of breathing.[178] The court concluded that the plaintiff was not disabled within the definition of the ADA.[179]

In *Cline v. Fort Howard Corp.*,[180] the court decided that the use of assistive devices should be considered in the evaluation of whether an individual is disabled under the ADA.[181] However, the court recognized the split of authority on this issue and restricted its holding to the context of vision disabilities, which can be mitigated by corrective lenses to the extent that the person is not substantially limited in a major life activity.[182]

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169. *Id.*
170. 928 F. Supp. 1437 (W.D. Wis. 1996).
171. *Id.* at 1441.
172. *Id.* at 1444 (citing Coghlan v. H.J. Heinz Co., 851 F. Supp. 808, 812 (N.D. Tex. 1994)).
173. *Id.* at 1445.
174. *Id.* at 1448; *see also* Moore v. City of Overland Park, 950 F. Supp. 1081, 1088 (D. Kan. 1996) (concluding that insulin controlled diabetes was not an impairment that substantially limited a major life activity); Coghlan v. H.J. Heinz Co., 851 F. Supp. 808, 813 (N.D. Tex. 1994) (same).
175. 953 F. Supp. 331 (D. Kan. 1997).
176. *Id.* at 333.
177. *Id.* at 337.
178. *Id.*
179. *Id.*
180. 963 F. Supp. 1075 (E.D. Okla. 1997).
181. *Id.* at 1080 n.6.
182. *Id.* at 1081.

The disagreement among the courts as to whether mitigating measures should be considered in the determination of whether an individual is "disabled" under the ADA set the stage for clarification of the issue by the United States Supreme Court. This clarification was provided in *Sutton v. United Air Lines, Inc.*[183]

V. SUTTON V. UNITED AIR LINES, INC.

A. *The Facts of the Case*

Karen Sutton and Kimberly Hinton were severely myopic identical twin sisters who applied to United Air Lines (United) to become commercial airline pilots.[184] They were experienced commercial airline pilots, licensed by the Federal Aviation Administration to fly any class of passenger airplane.[185] Each sister's visual acuity was 20/200 or worse in her right eye and 20/400 or worse in her left eye.[186] With the use of corrective lenses, each had 20/20 vision.[187] The life-long goal of both twins was to fly for a major global air carrier.[188]

United's minimum uncorrected vision requirement was 20/100 or better, a standard that was modeled on military requirements for pilot training.[189] United refused to consider the twins' applications for employment as pilots because their vision failed to meet United's standards for visual acuity.[190]

The plaintiffs claimed that they qualified as disabled under the ADA because due to their severe myopia they had an impairment which substantially limited them in the major life activity of working as airline pilots for a major global carrier.[191] The class of jobs from which they were excluded included all of United's thousands of piloting positions, without regard to aircraft model, route, or flying conditions.[192] They further contended that United regarded them as disabled, because although they were able to work as pilots, United regarded them as substantially limited in the major life activity of working as pilots.[193] The plaintiffs alleged that United's policy regarding uncorrected vision requirements was unsupported by legitimate safety concerns and was based on myth, fear, and stereotype.[194]

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183. 527 U.S. 471 (1999).
184. *Id.* at 475.
185. Petitioners' Brief at 3, *Sutton* (No. 97-1943).
186. *Sutton*, 527 U.S. at 475.
187. *Id.*
188. *Id.*
189. Respondent's Brief at 1, *Sutton* (No. 97-1943).
190. *Id.*
191. *Id.*
192. *Supra* note 185, at 5.
193. *Supra* note 185, at 5.
194. *Supra* note 185, at 4-5.

B. The Court's Decision

Justice O'Connor delivered the opinion of the court. The opinion encompassed two claims: (1) the plaintiffs' claim that they met the ADA's definition of individuals with disabilities, i.e., that they had a physical impairment which substantially limited them in a major life activity; and (2) the plaintiffs' claim that United regarded them as disabled.

1. The Court's Decision Regarding the Plaintiffs' Claim of Disability Under the ADA

The Court held that if a person has taken measures to mitigate a physical or mental impairment, the positive and negative effects of those measures must be considered when determining whether a person is substantially limited in a major life activity.[195] The Court based its decision on three separate provisions of the ADA.

First, the Court examined the language of the Act defining disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."[196] The Court noted that "limits" was a present indicative verb, denoting that the impairment limits a major life activity now, not that it might or could limit a major life activity at some indefinite point in the future.[197] Thus, a person whose disability is corrected by medicine or other measures does not have a disability that substantially "limits"—in the present—a major life activity.[198]

Second, the Court scrutinized the ADA's definition of disability, which requires that disabilities and their consequent impairments be evaluated "with respect to an individual."[199] The Court noted that if an employer were to follow the EEOC guidelines in evaluating an individual's disability in its unmitigated state, she would be essentially forced to make a disability determination based on general information about how an uncorrected impairment usually affects people.[200] For example, the employer faced with a diabetic employee whose diabetes is under insulin control would need to determine whether unmitigated diabetes, in the general population, represents a substantial limitation of a major life activity.[201] Under this view, all diabetics would be disabled.[202] Thus, the EEOC guidelines

195. Sutton, 527 U.S. at 482.
196. 42 U.S.C.A. § 12102(2)(A) (West 1995).
197. *Sutton*, 527 U.S. at 482.
198. *Id.* at 483.
199. 42 U.S.C.A. § 12102(2) (West 1995).
200. *Sutton*, 527 U.S. at 483.
201. *Id.*
202. *Id.*

create a system in which disabled persons with the same impairment are treated as members of a group, rather than individuals. This system is "contrary to both the letter and the spirit of the ADA."[203]

Third, the Court examined the legislative findings enacted as part of the ADA and concluded that Congress did not intend to bring under the statute's protection all those individuals whose unmitigated conditions could fit the ADA definition of "disability."[204] The legislative findings include the assertion that 43 million Americans have one or more physical or mental disabilities,[205] a figure which the Court assumed was derived from a 1988 report issued by the National Council on Disability titled "On the Threshold of Independence."[206] This report stated that 37.3 million noninstitutionalized individuals over the age of fifteen have a functional limitation on performing certain basic activities such as seeing, hearing, speaking, working, or getting around.[207] The Court surmised that the difference between the 37.3 million and 43 million figures could probably be explained as an effort to include in the findings those who were excluded from the National Council figure.[208] The Court also cited the estimate of Mathematica Policy Research, Inc. that approximately 31.4 million civilian noninstitutionalized persons have chronic activity limitations,[209] and the 1989 Statistical Abstract estimate that 32.7 million noninstitutionalized persons had activity limitations in 1985.[210]

The Court reasoned that if Congress had meant to include in the ADA definition of "disabled" all those individuals whose conditions were mitigated, the legislative findings would have included significantly higher numbers.[211] For example, the Court estimated that the number of people with vision impairments alone is 100 million;[212] while more than 28 million Americans have impaired hearing,[213] and approximately 50 million people have high blood pressure.[214] Thus, the Court

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203. *Id.* at 484.

204. *Id.*

205. 42 U.S.C.A. § 12101(a)(1) (West 1995 & Supp. 2000).

206. *Sutton*, 527 U.S. at 485; *see also* NATIONAL COUNCIL ON DISABILITY, ON THE THRESHOLD OF INDEPENDENCE (1988) (visited Dec. 22, 1999) <http://www.ncd.gov> (copy on file with the *McGeorge Law Review*) (estimating that there were 37.3 million disabled individuals in the United States).

207. NATIONAL COUNCIL ON DISABILITY, ON THE THRESHOLD OF INDEPENDENCE (1988) (visited December 22, 1999) <http://www.ncd.gov> (copy on file with the *McGeorge Law Review*).

208. *Sutton*, 527 U.S. at 486.

209. *Id.* (citing MATHEMATICA POLICY RESEARCH, INC., DIGEST OF DATA ON PERSONS WITH DISABILITIES 25 (1984)).

210. *Id.* (citing UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 115 (1989)).

211. *Id.* at 487.

212. *Id.* (citing NATIONAL ADVISORY EYE COUNCIL, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, VISION RESEARCH-A NATIONAL PLAN: 1999-2003, 7 (1998)).

213. *Id.* (citing NATIONAL INSTITUTES OF HEALTH, NATIONAL STRATEGIC RESEARCH PLAN: HEARING AND HEARING IMPAIRMENT (1996)).

214. *Id.* (citing Bailliere Tindall, *Stalking a Silent Killer: Hypertension*, Business & Health 57 (August 1998)).

reasoned, a legislative finding that 43 million Americans are disabled is evidence that Congress intended the ADA's coverage to be restricted to those whose impairments are not mitigated by corrective measures.[215]

The Court clarified that the use of corrective measures does not, in itself, preclude coverage under the ADA.[216] One could, for example, use a prosthetic foot and still be substantially limited in the major life activity of running.[217] Individuals who take medicine to lessen the symptoms of a disability may still remain substantially limited.[218] Furthermore, a person who has taken mitigating measures to correct a disability may still be "regarded as" disabled by the employer, and thus may qualify as an individual with a disability under the third prong of the definition of disabled.[219]

2. The Court's Decision Regarding the Plaintiffs' Claim That They Were "Regarded As" Substantially Limited in the Major Life Activity of Working

The plaintiffs alleged that United believed that their vision impairment substantially limited them in the major life activity of working, and further, that the vision requirement was based on myth and stereotype.[220] This claim necessarily rested on the plaintiffs' assertion that the position of global airline pilot is a class of employment.[221]

The Court cited the EEOC's regulations, which indicate that the inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.[222] These regulations identify several factors that courts should consider when determining whether an individual is substantially limited in the major life activity of working, including the geographical area to which the individual has reasonable access, and the number and types of jobs utilizing similar training, knowledge, skills or abilities from which the individual is disqualified.[223] The Court noted that in order to be substantially limited in the major life activity of working, "one must be precluded from more than one type of job, a specialized job, or a particular job of choice."[224] Because the position of global airline pilot is a single job, not a class of jobs, the Court held that the plaintiffs had not supported their claim that United regarded them as substantially

215. *Id.*
216. *Id* at 488.
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* at 490.
221. *Id.*; *see also supra* Part III.B.4 (discussing the definition of "substantially limited in the major life activity of working").
222. *Sutton*, 527 U.S. at 490 (citing 29 C.F.R. § 1630.2(j)(3)(i) (1998)).
223. 29 C.F.R. §§ 1630.2(j)(3)(ii)(A), (B) (1999).
224. *Sutton*, 527 U.S. at 492.

limited in the major life activity of working.[225] A number of similar jobs, such as regional pilot and pilot instructor, were open to the plaintiffs.[226] Moreover, the Court pointed out that the EEOC's Interpretive Guidance in the appendix to the regulations addresses similar facts: "[A]n individual who cannot be a commercial airline pilot... 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."[227]

3. *The Court Questions the Authority of the EEOC to Promulgate Regulations Regarding the Definition of Disabled*

The Court noted that Congress granted the EEOC authority to issue regulations to carry out the employment provisions of Title I of the ADA, sections 12111 through 12117, pursuant to section 12116.[228] Although the Court emphasized that no agency had been authorized to issue regulations implementing section 12102, which provides the ADA's definition of "disabled," the Court did not consider what deference was due these regulations.[229] Both parties accepted the regulations as valid and the determination of their validity was not necessary to decide the case.[230]

The Court also pointed out the conceptual difficulty of the EEOC regulation which includes working as a major life activity.[231] The Court noted that even the EEOC was reluctant to include working in the definition of a "major life activity."[232] The EEOC guidelines indicate that working should be viewed as a residual life activity, to be used only if no other major life activity is substantially limited.[233]

4. *The Court Questions the Authority of the EEOC's "Interpretive Guidance"*

The Court also questioned the authority of the EEOC's guidelines for implementation of Title I of the ADA, which were published at the same time as its regulations.[234] The Court observed that the EEOC's requirement that the determination of whether an individual is substantially limited in a major life activity must be made without regard to mitigating measures was not included in

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225. *Id.* at 493.
226. *Id.*
227. *Id.* (citing 29 C.F.R. § 1630, app. § 1630.2(j) (1999)).
228. *Id.* at 478.
229. *Id.* at 479.
230. *Id* at 480.
231. *Id.* at 492; *see also infra* notes 299-301 and accompanying text (explaining the difficulties inherent in including working as a major life activity).
232. *Sutton*, 527 U.S. at 492 (citing 29 C.F.R. § 1630, app. § 1630.2(j) (1999)).
233. 29 C.F.R. § 1630, app. § 1630.2(j) (1999).
234. *See Sutton*, 527 U.S. at 479 (referring to the EEOC's appendix to its ADA regulations, entitled "Interpretive Guidance").

its regulations.[235] Instead, the requirement appears in the separate "Interpretive Guidance" which was issued as an appendix to the regulations.[236] The Court noted that the persuasive force of these guidelines was a question in the case. However, the Court did not decide what deference was due the guidelines because this case could be decided based on the plain meaning of the statutory language without reference to the guidelines.[237]

C. Justice Ginsburg's Concurring Opinion

Justice Ginsburg submitted a concurring opinion in which she observed that the legislative finding that 43 million Americans have one or more physical or mental disabilities is a strong clue that the definition of disability was not meant to include those individuals with correctable conditions.[238] She noted Congress' emphasis on the fact that individuals with disabilities are a "discrete and insular minority" with a history of unequal treatment and political powerlessness.[239] She reasoned that people with mitigated disabilities are in no sense a discrete and insular minority, nor are they historic victims of discrimination who are politically powerless.[240] Thus, according to Justice Ginsburg, Congress must have intended to restrict the ADA's coverage to the disabled whose impairments are not mitigated.[241]

D. The Dissenting Opinion of Justice Stevens, Joined by Justice Breyer

Justice Stevens wrote a dissenting opinion on behalf of himself and Justice Breyer. Although he agreed that Congress did not intend to include every person who wears glasses as a member of a "discrete and insular minority," Justice Stevens argued that the customary tools of statutory construction demonstrate that mitigating measures were not to be considered in determining whether a person was "disabled" under the Act.[242]

First, Justice Stevens noted that the task of statutory construction is to interpret the statute's wording in light of the purpose of the statute.[243] The purpose of the ADA, as set forth by Congress, is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[244] According to Justice Stevens, the three parts of the definition of

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235. *Id.* at 480.
236. *Id.*
237. *Id.*
238. *Id.* at 494.
239. *Id.* (citing 42 U.S.C.A. § 12101(a)(7) (West 1995 & Supp. 2000)).
240. *Id.*
241. *Id.* at 495.
242. *Id.*
243. *Id. at 496.*
244. 42 U.S.C.A. § 12101(b)(1) (West 1995 & Supp. 2000).

disability—"a physical or mental impairment that substantially limits" a major life activity, "a record of such . . . impairment," or being regarded as having such an impairment[245]—were not meant to be discrete categories, but rather overlapping formulas.[246] Justice Stevens found that, under the majority's reasoning, a person is disabled only when her present condition substantially impairs a major life activity, when she has a past record of such a condition, or when she is regarded as having such a condition.[247] Thus, a person who has surgically corrected a serious hearing impairment is "disabled" under the second prong of the definition, while one who wears a hearing aid is not "disabled."[248] Justice Stevens found the result "bizarre" that the definition could include fully cured impairments, but exclude impairments that are merely treatable.[249]

Second, Justice Stevens observed that any ambiguity in the meaning of statutory text can be easily resolved by reviewing the legislative history of the ADA.[250] The Senate Report stated that "whether a person has a disability should be assessed without regard to the availability of mitigating measures."[251] The Report explained that employers often discriminate against people with medical conditions such as epilepsy or diabetes, which can be controlled by medication.[252] These individuals would fit the third prong of the definition, because although their disability was mitigated, they were "regarded as" disabled by their employers.[253] Thus, according to Justice Stevens, the Senate Report confirms the intent of Congress to disregard mitigating measures in assessing disability.

Justice Stevens further pointed out that the House of Representatives clarified that unmitigated correctable disabilities were also to be considered in the first prong of the definition.[254] The Report of the House Committee on the Judiciary states that, in considering the first prong of the definition, the impairment should be assessed without regard to mitigating measures.[255] Thus, according to the House Report, persons with epilepsy controlled by medication, as well as persons with hearing aids, are considered persons with a disability under the Act.[256]

Third, Justice Stevens stressed that the executive agencies charged with the responsibility of implementing the Act have consistently interpreted the Act as mandating that mitigating measures must not be considered in determining whether

245. *Id.* § 12102(2) (West 1995).
246. *Sutton*, 527 U.S. at 497.
247. *Id.*
248. *Id.* at 498-99.
249. *Id.* at 499.
250. *Id.*
251. S. REP. NO. 101-116, at 23 (1989).
252. *Id.*
253. *Id.* at 24.
254. *Sutton*, 527 U.S. at 500.
255. H.R. REP. NO. 101-485(III), at 28 (1990).
256. *Sutton*, 527 U.S. at 500.

an individual is disabled.[257] The Court has traditionally respected agency interpretations of statutes,[258] and has specifically done so in regard to the EEOC's interpretation of the ADA.[259]

Justice Stevens observed that, even if the Court classified the plaintiffs as disabled, the plaintiffs must prove they could perform the essential functions of a commercial airline pilot in order to prevail on their claim of discrimination.[260] Once these facts were proven, United Air Lines would still prevail if it could demonstrate that having uncorrected visual acuity of at least 20/100 is job-related and consistent with business necessity or safety concerns.[261]

Justice Stevens noted that remedial legislation is generally construed broadly in order to effectuate its purpose.[262] The Court has commonly interpreted remedial statutes to cover individuals or discriminatory conduct that was not within Congress' immediate concern when passing the legislation in order to include "comparable evils."[263] For example, although Congress focused on the problem of discrimination against African-Americans when it enacted Title VII of the Civil Rights Act of 1964, the Court construed the statute to apply to all minority groups as well as to Caucasians.[264] Title VII's prohibition against sexual harassment was interpreted by the Court to include same-sex sexual harassment.[265] Justice Stevens asserted that the practice of bróad construction of remedial statutes should continue in this case and the plaintiffs should be considered to be within the definition of disabled.[266]

Justice Stevens was particularly disturbed by the majority's use as a rationale for its decision that the ADA requires an employer to look at each individual as an individual.[267] Although Justice Stevens agreed that the ADA requires an individualized approach, he disputed that the majority's decision was in fact an individualized approach, because the decision will deny ADA protection to all persons who, for example, have diabetes controlled by medication or who function effectively with a prosthetic limb.[268] Under the majority's interpretation, these individuals will no longer be considered disabled and thus will be denied the protection of the ADA.[269]

257. *Id* at 501.
258. *Id.* (citing Ford Motor Credit Co. v. Mihollin, 444 U.S. 555, 566 (1980)).
259. *Id.* at 502 (citing Bragdon v. Abbott, 524 U.S. 624, 642 (1998)).
260. *Id.* at 504
261. *Id.*
262. *Id.*
263. *Id.* at 505.
264. *Id.* (citing McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279-80 (1976)).
265. *Id.* (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79-80 (1998)).
266. *Id.* at 506.
267. *Id.* at 508-509
268. *See id.* at 509 indicating that the majority's approach in fact treated people as groups, allowing employers to refuse to hire every person, for example, who has diabetes which is controlled by medication).
269. *Id.*

E. Justice Breyer's Separate Dissent

Justice Breyer, writing in a separate dissent, suggested that the EEOC develop regulations distinguishing between those whom Congress may not have wanted to protect, such as those who wear eyeglasses, and those whom Congress did want to protect.[270] Justice Breyer also asserted that Congress would not have wanted to deny the EEOC the authority to issue regulations regarding the definition of the term "disability," because Title I of the ADA includes this term, and the definitional regulations were the foundation of the other EEOC regulations.[271]

VI. RAMIFICATIONS OF *SUTTON V. UNITED AIR LINES, INC.*

The Court's decision in *Sutton* was contrary to the decisions of all of the circuit courts, except the Fifth and Tenth, that had dealt with the question of whether to consider mitigating measures in determining whether a plaintiff qualifies as an individual with a disability.[272] The ramifications of the decision include: (1) significantly limiting the class of individuals who now qualify as individuals with disabilities;[273] (2) encouraging arguments on the part of litigants that the court should disregard the EEOC's definitions of terms for the ADA's section 12102(2) defining disability;[274] and (3) encouraging arguments on the part of litigants that the court should disregard the EEOC's "Interpretative Guidance."[275]

A. Impact on the Class of Individuals with a Disability as Defined by the ADA

The Court's definition of an individual with a disability as one whose impairment presently substantially limits a major life activity will impact all three prongs of the definition of "disability."[276] The first prong will suffer the greatest impact, narrowing the class of individuals who qualify as disabled.[277] The decision will result in a lesser impact on the second prong of the definition,[278] and a greater use by future plaintiffs of the third prong.[279]

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270. *Id.* at 514.
271. *Id.* at 514-15.
272. *See supra* Part IV.A-B (detailing prior court decisions regarding the consideration of mitigating measures).
273. *Infra* Part VI.A.
274. *Infra* Part VI.B.
275. *Infra* Part VI.C.
276. *See supra* Part III.B-D (explaining the three prongs of the definition of disability).
277. *Infra* Part VI.A.1.
278. *Infra* Part VI.A.2.
279. *Infra* Part VI.A.3.

1. *Limiting the Class of Individuals with a Disability Under the First Prong of the Definition of Disability*

The first prong of the definition of disability states that an individual with a disability is one who has a physical or mental impairment that substantially limits one or more major life activities.[280] By interpreting the definition of "disability" as excluding those whose impairments have been mitigated and who are not presently substantially limited in a major life activity, the Court has significantly narrowed the class of individuals who may claim the ADA's protection under this prong. "Substantially limits" now denotes only conditions which are substantially limiting at the time the adverse employment decision is made.[281] Conditions which are controlled by medication, such as diabetes, epilepsy, and high blood pressure, will no longer qualify as impairments which substantially limit a major life activity.[282] An employee or applicant suffering from these or similar conditions will not be able to claim discrimination on the basis of a disability. Thus, many plaintiffs who may have been successful under the ADA prior to *Sutton* will no longer qualify to bring suit.[283]

The picture is less clear for employees or applicants who have a recurring condition which is temporarily controlled by medication, but which is likely to flare up at some point in the future. However, following the Court's emphasis on "present" conditions, it is likely that those individuals whose chronic condition is presently mitigated by medication would not be considered substantially limited in a major life activity. If the adverse employment action occurred during a period of time when the condition was under control, the employer would probably not be liable for discrimination on the basis of disability because, after the *Sutton* decision, a disability must be an impairment which substantially limits a major life activity at the time the adverse employment action is taken.

As a result of the *Sutton* decision, the plaintiff's current physical or mental condition has acquired a great deal of importance in ADA litigation. Medical or psychological examinations completed at or around the time of the alleged adverse employment action may be critical to the determination of an ADA case.

2. *Limiting the Class of Individuals with a Disability Under the Second Prong of the Definition of Disability*

The second prong of the definition of an individual with a disability pertains to a person who has a record of having a physical or mental impairment that

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280. 42 U.S.C.A. § 12102(2)(A) (West 1995).
281. *Supra* note 195 and accompanying text.
282. *Supra* note 198 and accompanying text.
283. *See, e.g.*, *supra* notes 141, 156, 160 and accompanying text (providing examples of plaintiffs whose disability had been mitigated but who qualified as "disabled" under the Act).

substantially limits a major life activity.[284] Plaintiffs utilize this prong the least because it is generally unsuccessful.[285] The *Sutton* Court's definition of disability now limits this prong to records of past impairments which were substantially limiting in a major life activity at the time of their occurrence.[286] Thus, records of conditions controlled by medication or otherwise mitigated no longer qualify the individual as a member of the class of individuals with a disability.

Plaintiffs will continue to prevail, however, if the impairment was substantially limiting in a major life activity and they can demonstrate that the employer took action based on the record of the impairment. For example, the denial of a promotion due to a record of heart disease would be a successful ADA action, provided that the heart disease substantially limited the plaintiff in a major life activity at the time it occurred.

3. Increased Future Use of the Third Prong of the Definition of Disability

The third prong of the definition of an individual with a disability includes individuals who are "regarded as" having a physical or mental impairment that substantially limits a major life activity.[287] As interpreted by the EEOC, this prong has three meanings: (1) the person has an impairment which does not substantially limit a major life activity but is regarded by the employer as if she does have such an impairment; (2) the person has an impairment which substantially limits a major life activity, but only as a result of myths, stereotypes, and the negative attitudes of others; or (3) the person has no impairment, but as a result of rumor or mistake, she is treated as if she has an impairment that substantially limits a major life activity.[288]

The first part of this prong of the definition of disability could become the subject of increased attention in the future. The *Sutton* Court itself pointed out that although the Court's decision foreclosed those whose conditions, such as diabetes, are controlled by medication from being included in the class of disabled, the employee may still qualify as a member of the class if she is regarded by the employer as substantially limited in a major life activity.[289] For example, if the employer actually regards epilepsy, diabetes, or high blood pressure as presently substantially limiting in a major life activity, and takes adverse employment action based on that belief, courts may determine that the plaintiff is a member of the protected class. This interpretation of the *Sutton* decision is consistent with the

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284. 42 U.S.C.A. § 12102(2)(B) (West 1995 & Supp. 2000).

285. *See supra* notes 84-91 and accompanying text (discussing cases wherein plaintiffs argued discrimination on part of employers using the second prong of the definition of disability).

286. *See supra* Part V.B.1 (explaining the Court's decision that if a disability is mitigated, it is not substantially limiting).

287. 42 U.S.C.A. § 12102(2)(C) (West 1995 & Supp. 2000).

288. 29 C.F.R. § 1630.2(l) (1999).

289. *Sutton*, 527 U.S. at 489.

language of the statute because "regarded as" implies that this prong of the definition refers not to the actual limitations of an impairment, but what the employer believes is true regarding that impairment.[290]

The difficulty for the plaintiff in a "regarded as" case will continue to be proving both that the employer believed that the impairment was substantially limiting in a major life activity and that the employer took adverse action based on that belief. The proof of what another believed is a heavy burden for the plaintiff. For instance, if the defendant can articulate any non-discriminatory reason for the action, the plaintiff is unlikely to succeed under the third prong.[291]

B. Questioning the Authority of the EEOC's Regulations Defining the Terms in the Statutory Definition of "Disability"

The *Sutton* Court pointed out, in dicta, that the EEOC had been authorized by Congress to develop regulations only for the implementation of the employment sections of the ADA.[292] Neither the EEOC, nor any other agency, had been given authority to amplify the definition of disability contained in section 12102(2).[293] The Court has thus opened the door to future arguments that the EEOC regulations defining the terms in this definition are not binding on the courts.

The EEOC amplified the statutory definition of disability by defining the following terms: "physical or mental impairment," "substantially limits," "major life activity," "substantially limited in the major life activity of working," "having a record of," and "regarded as."[294] If the EEOC does not have authority to define these terms, the terms retain only their plain meaning in the language of the statute.[295] Thus, the courts are free to determine for themselves the plain meaning of the terms.

Disregarding the authority of the EEOC's definitions of some of these terms will probably have little impact on future ADA decisions. For example, the EEOC's amplification and explanation of the term "physical or mental impairment"[296] simply provides examples of conditions which could be disabilities if they were substantially limiting in a major life activity. The definition of "substantially limits" provides a parameter against which to evaluate whether the condition is truly

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290. *See supra* Part III.D (explaining the "regarded as" prong of the definition of disability).

291. *See supra* note 50 (noting that the plaintiff must show that the employer has discriminated because of her disability).

292. *Sutton*, 527 U.S. at 479.

293. *Id.*

294. 29 C.F.R. § 1630.2(h)-(i) (1999).

295. *See* United States v. Lewis, 67 F.3d 225, 228 (1995) (stating that if the language of a statute is clear, the court looks no further than that language in determining the statute's meaning).

296. 29 C.F.R. § 1630.2(h) (1999).

substantially limiting.[297] The regulation regarding major life activities does not define major life activity, but simply lists examples of major life activities.[298]

However, the inclusion of "working" in the EEOC's list of examples of major life activities was itself of particular concern to the *Sutton* court and thus may be a subject of future contention regarding the appropriateness of its inclusion as a major life activity. The Court observed that defining "major life activity" to include working has the potential to make the ADA circular.[299] The stronger the evidence that an employee or applicant cannot work, the less likely that the individual will be covered by the Act because the person who cannot work cannot perform the essential functions of a job. The EEOC itself realized this flaw in its regulations, indicating in the appendix that the individual's ability to perform the major life activity of working should be considered only if the individual is not substantially limited in any other major life activity.[300] By pointing out the difficulty of logically applying the concept of "major life activity" to "working,"[301] the *Sutton* Court has offered defense attorneys the opportunity to make a strong case for disregarding, if not all of the regulations surrounding the definition of "disability," at least those regulations that define working as a "major life activity."

The EEOC's definition of "having a record of" will probably not be questioned in the future because the regulation merely defines this prong as having "a history of" a disability that substantially limits a major life activity.[302] However, the EEOC's definition of "regarded as"[303] does have the potential for future controversy. The first and third parts of the "regarded as" definition accord with the plain meaning of the statute—an individual is regarded as having a disability if she either has an impairment which does not substantially limit a major life activity or has no impairment at all, but is treated by the employer as if she does have such an impairment.[304] However, the second part of the EEOC's definition allows a plaintiff to initiate an ADA action based not on the employer's belief or attitudes, but on the attitudes of others.[305] Thus, attitudes of coworkers or customers may generate employer liability.[306] As a result, this section of the third prong extends the meaning of "regarded as" beyond the plain meaning of the statute by requiring employers to bear the burden of others' attitudes. Therefore, this part of the definition of "regarded as" may well be a point of contention in the future.

297. *Id.* § 1630.2(j).
298. *Id.* § 1630.2(i).
299. *Sutton*, 527 U.S. at 492.
300. 29 C.F.R. § 1630, app. § 1630.2(j) (1999).
301. *Sutton*, 527 U.S. at 492.
302. 29 C.F.R. § 1630.2(k) (1999).
303. *Id.* § 1630.2(l)(1)-(3).
304. *Id.* § 1630.2(l)(1),(3).
305. *Id.* § 1630.2(l)(2).
306. *Supra* Part III.D.

C. Questioning the Validity of the EEOC's "Interpretive Guidance"

The *Sutton* Court not only specifically overruled the EEOC's mandate that the determination of whether an individual is substantially limited in a major life activity must be made without regard to mitigating measures,[307] but it also called into question the persuasive force of the entire "Interpretive Guidance"[308] containing this mandate. According to the Court, the "Interpretive Guidance" guidelines are not regulations promulgated under the authority of Congress.[309] Furthermore, courts may accord guidelines less weight than regulations.[310] Thus, the EEOC's guidelines may, in the future, be accorded even less weight in the courts.

This result may have a fairly substantial impact on how future cases are decided. For the most part, the "Interpretive Guidance" provides straightforward and common sense amplifications of the regulations based on the Senate and House of Representative Reports on the statute,[311] as well as helpful illustrations.[312] However, the "Interpretive Guidance" does move beyond the regulations in some instances. Of course, the most outstanding example is the mandate in the "Interpretive Guidance" that mitigating measures must not be considered in determining whether a person has a disability that substantially limits a major life activity.[313]

The guidelines also reach beyond the regulations to include sitting, standing, lifting and reaching as examples of major life activities.[314] Courts may decide, in the future, that some or all of these activities are not major life activities. Furthermore, the guidelines include "heavy lifting" as a class of jobs,[315] giving some indication of the narrowness of the EEOC's interpretation of a "class." In the future, courts may determine that a "class" ought to be interpreted more broadly. For example, future courts may interpret a "class of jobs" to mean the general category of manual labor jobs, not a specific category of jobs that require heavy lifting. This would further narrow the class of individuals who could qualify as an

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307. *Sutton*, 527 U.S. at 482.

308. *Id.* at 480.

309. *See* Schluter v. Industrial Coils, Inc., 928 F. Supp. 1437, 1444 (W.D. Wis. 1996) (stating that the EEDC's mandate is not binding on the court).

310. General Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976).

311. *See, e.g.*, 29 C.F.R. § 1630, app. § 1630.2(b)-(c) (1999) (noting that the House Labor Report and the House Judiciary Report indicate that employers must meet the standard of the ADA despite lower standards in other laws); *id.* § 1630.2(h) (recognizing that the Senate Report, the House Labor Report, and the House Judiciary Report provide that various medical conditions associated with age do constitute impairments).

312. *See, e.g.*, *id.* § 1630, app. § 1630.2(j) (1999) (using the example of a commercial airline pilot with vision impairment as an illustration of an individual who is not substantially limited in the major life activity of working, and a person with a back injury who cannot do heavy lifting as an example of a person who is substantially limited in the major life activity of working).

313. *Id.* § 1630, app. § 1630.2(h).

314. *Id.* § 1630.2(i).

315. *Id.* § 1630.2(j).

individual with a disability under the ADA's definition because fewer individuals would qualify as substantially limited in the major life activity of working.

In addition, the guidelines state that HIV infection is inherently substantially limiting.[316] This is contradictory to the *Sutton* decision, in which the Court held that an impairment is only substantially limiting if it presently substantially limits a major life activity.[317] A person with asymptomatic HIV infection is not presently limited in a major life activity. Thus, this guideline is obviously contrary to the Court's decision and should not be followed in the future.

The guidelines' implication that obesity is generally not substantially limiting[318] may also be contrary to the Court's decision in *Sutton*. Obesity is an impairment because it affects the respiratory system, and may substantially limit the major life activities of walking and running.[319] Thus, future courts may find that, as a general rule, obesity qualifies the individual to meet the ADA definition of disabled.

Moreover, the "Interpretive Guidance" proclaims that, in determining what is an essential function of a job, courts should not second guess an employer's business decisions regarding the appropriate production standards for a job.[320] The "Interpretive Guidance" points to typing speed and the number of rooms to be cleaned in a day as examples of production standards.[321] As a result of the *Sutton* decision, future courts may be inclined to disregard these guidelines and instead require employers to offer business necessity reasons for all production standards. If the employer could not prove such business necessity, the court may determine that the production standard in question is not an essential function of the job.

The "reasonable accommodations" section of the guidelines details the process of consultation that the employer should engage in with the employee to determine what is a reasonable accommodation.[322] If future courts question the validity of the "Interpretive Guidance," they may decide that such consultation is unnecessary. The guidelines further require the employer to consider the preference of the employee for a particular accommodation.[323] A court that views the guidelines as merely suggestions for the employer's conduct would not necessarily concern itself with whether the employer considered the employee's preference.

The "Interpretive Guidance" also states that reassignment of an individual with a disability should be considered only when accommodation within the individual's

316. *Id.* § 1630.2(j).

317. *Sutton*, 527 U.S. at 482.

318. 29 C.F.R. § 1630, app. § 1630.2(j) (1999).

319. *See* NATIONAL INSTITUTES OF HEALTH, CLINICAL GUIDELINES ON THE IDENTIFICATION, EVALUATION, AND TREATMENT OF OVERWEIGHT AND OBESITY IN ADULTS vii (1998) (copy on file with the *McGeorge Law Review*) (noting that obesity raises the risk of morbidity from respiratory problems and well as a number of other health problems).

320. 20 C.F.R. § 1630.2(n) (1999).

321. *Id.*

322. *Id.* § 1630.9 (1999).

323. *Id.*

current position would pose an undue hardship."[324] If this provision is disregarded by the courts in the future, employers will be free to reassign employees with disabilities without proving that reasonable accommodation in the present position is an undue hardship.

Finally, the guidelines prohibit employers from claiming that negative impact on the morale of other employees as a result of an accommodation constitutes "undue hardship."[325] This prohibition ignores the fact that low morale may contribute to low productivity. From an employer's perspective, an accommodation that has a substantial negative impact on the morale of other employees may not be a reasonable accommodation. In the future, *Sutton* will lend weight to arguments that the guidelines' prohibition is not legally binding and should not be given weight in the determination of whether an accommodation constitutes an undue hardship.

VII. CONCLUSION

The Supreme Court's decision in *Sutton v. United Air Lines, Inc.*[326] requires consideration of mitigating measures in the determination of whether an individual meets the ADA's definition of an individual with a disability.[327] An individual will be considered a person with a disability only if that individual is presently substantially limited in a major life activity despite mitigating measures.[328] This decision significantly narrows the class of individuals protected under the ADA.[329] As a consequence, future plaintiffs will more often attempt to qualify as an individual with a disability under the third "regarded as" prong of the definition of disability.[330]

Moreover, in dicta, the Court called into question the validity not only of the EEOC's regulations regarding the definition of "disability,"[331] but also the EEOC's "Interpretive Guidance" which provides guidelines for the interpretation of the various employment sections of the regulations.[332] As a result, the *Sutton* decision will lead to an increase in petitions by litigants asking courts not to defer to the EEOC regulations regarding the definition of disability nor to the EEOC's "Interpretative Guidance."[333]

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324. *Id.* § 1630.2(o).
325. *Id.* § 1630.2(p).
326. 527 U.S. 471 (1999).
327. *Id.* at 482.
328. *Id.*
329. *Supra* Part VI.A.
330. 42 U.S.C.A. § 12102(2)(C) (West 1995).
331. *Sutton*, 527 U.S. at 480.
332. *Id.* at 480.
333. *Supra* Part VI.B-C.