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SUPREME COURT'S CLARIFICATION OF THE EFFECT OF "MITIGATING MEASURES" IN DISABILITY DETERMINATIONS MUDDIES DISABILITIES WATERS: *Sutton v. United Airlines, Inc.*

*William B. Lovett, Jr.**

"The ADA is not a job insurance policy, but rather a congressional scheme for correcting illegitimate inequities the disabled face."[1]

I. INTRODUCTION

On June 22, 1999, the Supreme Court changed the course of Americans with Disabilities ("ADA") litigation with its decision in *Sutton v. United Airlines, Inc.*[2] The determination of whether an impairment substantially limits a major life activity depends on the nature and severity of the impairment, how long one has been or is expected to be impaired, and the permanent or long-term impact of the impairment on one's life.[3] Before *Sutton*, a court's conclusion on this issue often hinged on how it viewed mitigating or corrective measures utilized by the impaired individual: Courts that determined substantial limitation without regard to the corrective effects of medication or treatment tended to find disability more often than courts that took mitigative measures into account.[4]

Sutton settled the question of mitigating measures with its holding, "[T]he effects of [mitigating] measures—both positive and negative—must be taken into account when judging whether [an individual] is 'substantially limited' in a major life activity and thus 'disabled' under the [ADA]."[5] With this pronouncement, the Court swept aside regulatory guidelines promulgated by three agencies empowered by Congress to implement the Act,[6] and turned on their collective heads the eight circuit courts that had deferred to those regulations when determining disability.[7]

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1. Hedberg v. Indiana Bell Tel. Co., Inc., 47 F.3d 928, 934 (7th Cir. 1995).

2. Sutton v. United Airlines, Inc., 527 U.S. 471 (1999). On the same day the *Sutton* decision was handed down by the Court, the Court also decided Murphy v. United Parcel Service, 527 U.S. 516 (1999) (holding that in determinations of disability, courts must consider the corrective effects of mitigating measures on impairments), and Albertsons, Inc. v. Kirkingburg, 527 U.S. 555 (1999) (holding that federal requirements for certain jobs are binding on employers and that employers so bound may, without running afoul of the ADA, disqualify an employee or applicant based on his failure to meet those requirements).

3. *See* 29 C.F.R. § 1630.2(j)(2) (1997).

4. *See infra* note 72.

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

6. The Equal Employment Opportunity Commission has the authority to issue regulations to carry out the employment provisions of Title I of the ADA (42 U.S.C. §§ 12111-12117) pursuant to § 12116. The Attorney General has the authority to issue regulations with respect to Title II, subtitle A (§§ 12131-12134 relating to public services) pursuant to § 12134. The Secretary of Transportation has the authority to issue regulations pertaining to the transportation provisions of Titles II and III pursuant to § 12149(a). Each of these agencies is also authorized to offer technical assistance regarding the provisions they administer pursuant to § 12206(c)(1). *See Sutton*, 527 U.S. at 477-79.

7. The First, Second, Third, Seventh, Eighth, Ninth and Eleventh Circuits (and sometimes the Fifth) deferred to the agency guidelines. Only the Sixth and Tenth did not. *See infra* Part II.E.

Although the Supreme Court generally came to the right conclusions with this decision, the issues it intended to settle in *Sutton*—whether one is substantially limited by his impairment, and whether one regarded as substantially limited in the major life activity of "working" is "disabled" because he is precluded from a single job—will require further attention. The progenies of *Sutton* highlight the flaws in this Supreme Court decision with their broad applications of its principles to cases outside of the narrow realm in which *Sutton* was meant to apply.[8]

Sections I and II of this Note will examine the purpose of the ADA, the mechanics of meeting its threshold requirement of "disability," and the conflicting interpretations of the Act among the circuit courts which led to the Supreme Court's decision in *Sutton*. Sections III and IV will examine the courts' analyses and dispositions of the Sutton sisters' ADA claims. Section V will look at the *Sutton* decision through the eyes of courts interpreting ADA cases based on *Sutton*'s two holdings: (1) "[t]he effects of [corrective] measures—both positive and negative—must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act,"[9] and; (2) "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working"—one must be, at a minimum, unable to work in a broad class of jobs.[10] Whether *Sutton* helps or hurts those Congress intended the ADA to protect is the question this Note considers in its conclusion. While it may be too soon to conclusively answer this question, the author of this Note suggests that *Sutton*, with its bright-line rules and confusing analysis, may in fact hurt more than it helps.

II. BACKGROUND AND HISTORY OF THE LAW

The ADA is a protective umbrella designed by Congress to provide equal access and equal opportunity to qualified individuals with disabilities.[11] It was meant to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; [set] standards addressing discrimination [based on disability]; and ensure that the Federal Government plays a central role in enforcing [these] standards . . . on behalf of individuals with disabilities."[12] The ADA prohibits discrimination by an employer "against a qualified individual with a disability because of the disability . . . in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions,

8. The Court's confusing (and rigid) restatement of its holding regarding mitigating measures—a corrected impairment "does not 'substantially limit[ ]" a major life activity—has been quoted by Ohio, California and Texas district courts as well as the Fifth and Eighth Circuit Courts. Its focus on "working" as a major life activity of *last resort* has been largely overlooked by the lower courts. *Sutton*'s language on this issue seems to be irresistible to the lower courts that find it easy to use to dismiss ADA claims brought under the "regarded as" prong of the "disabled" definition.

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

10. *See id.* at 491 (quoting C.F.R. § 1630-2(j)(3)(i)).

11. *See* 42 U.S.C. §§ 12101 *et seq.* The ADA became effective on July 26, 1992. Pub. L. 101-336, § 108 ("This title shall become effective 24 months after the date of enactment [July 26, 1990].")

12. 42 U.S.C. § 12101(b)(1)-(3).

and privileges of employment."[13] With the passage of the ADA, Congress broadened the scope of federal anti-discrimination law by extending the protections of the Rehabilitation Act of 1973[14] into the private sector.[15]

A. Establishing a Prima Facie Case Under the ADA

To establish a prima facie case under the ADA, one must show that he or she is a qualified individual with a disability who was discriminated against because of his or her disability.[16] The threshold issue in every ADA case is whether an individual is "disabled" within the meaning of the ADA.[17] "[I]f one is not disabled, then one is not protected from discrimination."[18]

"Disability," as used in the ADA means, "with respect to an individual—(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[19] This definition, however, provides little more than a starting point for determining whether one is disabled. "To ascertain whether an individual meets [the ADA's] definition of disability, a court must determine whether: (1) an individual's condition is a physical impairment; (2) a claimed activity that the impairment affects is a major life activity; and (3) the impairment substantially limits that major life activity."[20]

B. Consideration and Analysis of "Major Life Activity" and "Substantially Limits" in ADA Claims

1. "Major Life Activity"

Although the statute does not define "impairments," "major life activity," or "substantially limited," Congress gave the Equal Employment Opportunity Commission ("EEOC") authority to issue regulations necessary to implement the Act.[21] The EEOC's definitions of these terms[22] guide courts through the disability analysis.

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13. 42 U.S.C. § 12112(a).

14. 29 U.S.C. § 794. The Rehabilitation Act prohibits federal government agencies and private organizations receiving federal funding from discriminating against qualified individuals with handicaps.

15. *See* 42 U.S.C. § 12111(5)(A) (defining "employer" as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year . . . .")

16. *See* 42 U.S.C. § 12132. *See also* Harris v. H & W Contracting Co., 102 F.3d 516, 519 (11th Cir. 1997).

17. Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 863 (1st Cir. 1998).

18. *Id.*

19. 42. U.S.C. § 12102(2).

20. Michael J. Puma, *Respecting the Plain Language of the ADA: A Textualist Argument Rejecting the EEOC's Analysis of Controlled Disabilities*, 67 GEO. WASH. L. REV. 123, 125 (1998) (citing Bragdon v. Abbott, 524 U.S. 624, 632 (1998)).

21. *Id.* The EEOC's regulations are found at 29 C.F.R. § 1630.

22. A physical or mental impairment is defined as

> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
>
> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h)(1), (2) (1997). "Substantially limits" is defined at 29 C.F.R. §§ 1630.2(j)(1)(i), (ii). "Major life activities" are defined at 29 C.F.R. § 1630.2(i).

In the broadest sense, major life activities are "those basic activities that the average person . . . can perform with little or no difficulty."[23] They encompass "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[24] Whether an activity is significant to a particular plaintiff is not considered by a court when determining whether that activity is a "major life activity."[25] Rather, a court looks at "whether [an] activity is a significant one within the contemplation of the ADA. . . ."[26]

The standards by which major life activities are to be determined were examined by the Supreme Court in *Bragdon v. Abbott*.[27] In *Bragdon*, Randon Bragdon, a dentist, was sued under the ADA by a patient (respondent) with asymptomatic human immunodeficiency virus ("HIV") who was refused treatment in his office.[28] Finding that HIV is an impairment from the moment of infection[29] and that HIV substantially affects the major life activity of reproduction,[30] the Court held that HIV was a "disability" under § 12102(2)(A) even though respondent's HIV infection had not progressed to the symptomatic phase.[31] In determining that reproduction was a major life activity, the Court quoted the First Circuit's holding that "'[t]he plain meaning of the word 'major' denotes comparative importance' and 'suggest[s] that the touchstone for determining an activity's inclusion under the statutory rubric is its significance.'"[32] "Reproduction and the sexual dynamics surrounding it are," the Supreme Court stated, "central to the life process itself."[33]

Even though reproduction was not listed among the named major life activities in the regulations,[34] its omission did not prevent the Court from finding it to be such an activity.[35] The regulations are merely a representative list meant to be illustrative rather than exhaustive.[36] "[R]eproduction [cannot] be regarded as any less important than [the listed activities] working and learning."[37]

2. "Substantially Limits"

Analysis of the term "substantially limits" looks at the particular plaintiff and must be "individualized and fact-specific"[38]—the substantiality of the limitation

23. 29 C.F.R. § 1630, App. § 1630.2(i) (1998).
24. 29 C.F.R. § 1630.2(i). This list was not meant to be exhaustive, but only illustrative. *See* Bragdon v. Abbott, 524 U.S. 624, 639 (1998).
25. *See* Colwell v. Suffolk County Police Dep't, 158 F.3d 635, 642 (2d Cir. 1998).
26. *Id.*
27. 524 U.S. 624 (1998).
28. *See id.* at 629. The ADA prohibits discrimination against any individual "'on the basis of disability in the . . . enjoyment of the . . . services . . . of any such place of public accommodation by any person who . . . operates [such] a place.'" *Id.* (quoting 42 U.S.C. § 12182(a)).
29. *See Bragdon*, 524 U.S. at 637.
30. *See id.* at 639-40 (stating that a woman infected with HIV imposes on both the man with whom she conceives a child and the child a significant risk of infection).
31. *See id.* at 647.
32. *Id.* at 638 (quoting Bragdon v. Abbott, 107 F.3d 934, 939-40 (1st Cir. 1997).
33. *Bragdon*, 524 U.S. at 638.
34. *See id.* at 638-39 (citing 28 C.F.R. § 41.31(b)(2) (1997)).
35. *See Bragdon*, 524 U.S. at 639.
36. *See id.*
37. *Id.*
38. Reeves v. Johnson Controls World Servs., Inc., 140 F.3d 144, 152 (2d Cir. 1998); Ryan v. Grae & Rybicki, P.C., 135 F.3d 867, 872 (2d Cir. 1998).

on the particular plaintiff is key to the determination of disability. The EEOC, in its regulations, defines "substantially limits" as

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.[39]

The regulations recommend that courts, when determining whether an impairment substantially limits a major life activity, consider: "(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected long term impact of or resulting from the impairment."[40]

3. "Substantially Limits" When "Working" Is the Major Life Activity Claimed

When the "major life activity" is "working," however, "substantially limits" takes on a more restrictive meaning.[41] To be substantially limited in one's ability to work, an individual must be "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."[42] "The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."[43]

Bolton v. Scrivner[44] illustrates the requirement that a plaintiff show that he or she is unable to perform a broad spectrum of jobs before his or her ADA claim based on "working" may succeed. Floyd Bolton alleged that Scrivner, his

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39. 29 C.F.R. §§ 1630.2(j)(1)(i), (ii) (1997).

40. *Id.* at § 1630.2(j)(2).

41. Although listed as a major life activity in 29 C.F.R. § 1630.2(i), the EEOC advises courts to consider the major life activity of "working," *only* "[i]f an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered. If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working." Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726 n. 10 (5th Cir. 1995) (quoting 29 C.F.R. pt. 1630, App. § 1630.2(j) (1998)).

42. 29 C.F.R. § 1630.2(j)(3)(i). The Regulations list additional factors that may be considered in determining whether an individual is substantially limited in the major life activity of "working":

> (A) The geographical area to which the individual has reasonable access; (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or (C) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Id. at § 1630.2(j)(3)(ii)(A)-(C).

43. *Id.* at § 1630.2(j)(3)(i).

44. Bolton v. Scrivner, 36 F.3d 939 (10th Cir. 1994).

employer, discriminated against him in violation of the ADA.[45] The district court found that, although there was evidence that Bolton's impairment prevented him from performing his job, he was not substantially limited in the major life activity of working.[46] On review of the case, the Tenth Circuit affirmed the lower court's holding.[47] It found that Bolton's inability to return to his particular job did not demonstrate a substantial limitation in the major life activity of working.[48] "'While the . . . regulations define a major life activity to include working, this does not necessarily mean working in the job of one's choice. [A]n impairment that an employer perceives as limiting an individual's ability to perform only one job is not a handicap . . . .'"[49]

The Fifth Circuit came to the same conclusion in *Dutcher v. Ingalls Shipbuilding*.[50] Tamela Dutcher seriously injured her right arm in a gun accident in 1989.[51] In 1991, Dutcher was hired by Ingalls Shipbuilding ("Ingalls") only to be laid-off as part of a large-scale reduction in force in May, 1992.[52] When she was recalled to work a few months later, Dutcher, at her pre-employment physical, requested that she be assigned to a job that did not require climbing because of her impairment.[53] The accommodation was granted, but, in light of the job restriction, Ingalls refused to re-hire her.[54] Dutcher sued Ingalls because of this refusal, alleging that she was discriminated against by Ingalls in violation of the ADA.[55]

The district court found that Dutcher's impairment did not qualify as a "disability" under the ADA and granted summary judgment in favor of Ingalls.[56] The Fifth Circuit affirmed the lower court's decision finding that "the inability to perform one aspect of a job while retaining the ability to perform the work in general does not amount to substantial limitation of the activity of working."[57] "'An impairment that affects only a narrow range of jobs can be regarded either as not reaching a major life activity or as not substantially limiting one.'"[58] Because she

45. Bolton suffered a work-related injury in 1991 and was given a medical leave of absence. *See id.* at 941. According to Scrivner policy, an employee on medical leave was required to be certified by the company doctor that he was fit to resume work before he could return to work. *See id.* Because the company doctor concluded that Bolton was unable to perform the job he had performed before his injury, Scrivner refused to rehire him in his former position. *See id.*

46. *See id.*

47. *See id.* at 944.

48. *See id.* at 943.

49. *See id.* at 942. (quoting Welsh v. City of Tulsa, 977 F.2d 1415, 1419 (10th Cir. 1992)). Although *Welsh* involved a claim brought under the Rehabilitation Act of 1973, the rule is applicable to claims brought under the ADA. *See Bolton* 36 F.3d at 943. "The legislative history of the ADA indicates that 'Congress intended that the relevant caselaw developed under the Rehabilitation Act be generally applicable to the term 'disability' as used in the ADA.'" *Id.* (quoting 29 C.F.R. pt. 1630, App. § 1630.2(g) (1998)).

50. Dutcher v. Ingalls Shipbuilding, 53 F.3d 723 (5th Cir. 1995).

51. *See id.* at 724. To prevent deterioration in the use of her arm, she began training as a welder. *Id.* at 725. She completed welding school in 1991. *Id.*

52. *Id.* at 725.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 727 (citing Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993)).

58. *Dutcher*, 53 F.3d at 727 (quoting Jasany v. United States Postal Serv., 755 F.2d 1244, 1249 n.3 (6th Cir. 1985) (interpreting Rehabilitation Act)).

was not prevented from performing an entire class of jobs, the court held that Dutcher was not "disabled" within the meaning of the ADA.[59]

In addition to protecting those who are *actually* disabled, the ADA also protects those who *were*,[60] or are *regarded* as, disabled.[61] Should an individual fail to prove his or her impairment is disabling under subsection (A) of the ADA's definition of "disabled," protection from discrimination in the workplace may still be available through subsections (B) or (C) of the Act.[62]

C. "Record of" and "Regarded as" Disabled—Alternative Pleadings Under the ADA for Those Discriminated Against Who Are Not "Actually" or "Presently Substantially Limited"

Section 12102(2), subsection (B) of the ADA extends protection to individuals who have a record of an impairment that substantially limits a major life activity.[63] This provision of the ADA is intended "to ensure that people are not discriminated against because of a history of disability."[64] "A person . . . fall[s] into this category of disability . . . if his medical records indicated he had once been disabled, but is no longer. To prove discrimination under this section of the statute, a plaintiff must show that his [present or prospective] employer relied on a record showing the plaintiff's substantially limiting impairment."[65] To have a record of an impairment is, therefore, not enough; like the analysis of an actual impairment under subsection (A), the impairment on record must also have substantially limited one or more major life activities.

Subsection (C) provides that an individual who is regarded by an employer as having an impairment that substantially limits a major life activity is an individual with a disability.[66] This "regarded as" definition of disability may be satisfied in three ways:

> (1) The individual may have an impairment which is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantially limiting impairment;
>
> (2) The individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or

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59. *Dutcher*, 53 F.3d at 727.

60. *See* 29 C.F.R. § 1630, App. § 1630.2(k) (1998); Hilburn v. Murata Elecs. North America, Inc., 181 F.3d 1220, 1229 (11th Cir. 1999) (stating "The intent of [42 U.S.C. § 12102(2)(B)], in part, is to ensure that people are not discriminated against because of a history of disability . . . .").

61. *See* Vande Zande v. State of Wis. Dep't of Admin., 44 F.3d 538, 541 (7th Cir. 1995) (finding that the third prohibition [42 U.S.C. § 12102(2)(C)], that the employer regarded the employee as disabled, fits with the goals of the ADA, because "[m]any such impairments are not in fact disabling but are believed to be so, and the people having them may be denied employment or otherwise shunned as a consequence").

62. *See* 42 U.S.C. § 12102(2).

63. *See* 42 U.S.C. § 12102(2)(B). The EEOC's regulations define "record of such impairment" as meaning that an individual "has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2(k).

64. 19 C.F.R. 1630, App. at § 1630.2(k) (1998).

65. Sweet v. Elec. Data Sys., Inc., 1996 WL 204471 (S.D.N.Y.).

66. *See* 42 U.S.C. § 12102(2)(C).

> (3) The individual may have no impairment at all but is regarded by the employer or other covered entity as having a substantially limiting impairment.[67]

The analysis of a "regarded as" claim, like the "record of" analysis, is much the same as the analysis of a discrimination claim based on an actual impairment. To qualify as a disability, the employer's misperception must have the same effect as an actual impairment found to be disabling. The perceived impairment, if it were true, must substantially limit an individual in a major life activity. Thus, all three prongs of the ADA's disability definition have in common that the alleged impairment—actual, historical, or perceived—must substantially limit an individual in one or more major life activities. Unless the plaintiff succeeds in this threshold issue—unless he proves he is disabled within the meaning of the ADA—he may not go forward with his ADA claim.

D. The EEOC's Role in Implementing the ADA

Since the ADA's inception, the EEOC has played an important role in its implementation. The regulations the EEOC promulgated to define and enforce the ADA are generally given deference by courts,[68] but the same deference has not been uniformly given to the EEOC's Interpretive Guidance[69] on Title I of the ADA.[70] These guidelines drafted by the EEOC and attached to the regulations as an appendix were meant to clarify and explain the regulations with examples. One guideline was, however, the subject of disagreement among the circuit courts. It stated, "[T]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices."[71]

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67. Murphy v. United Parcel Serv, Inc., 946 F. Supp. 872, 879 (D. Kansas 1996); *See also* 29 C.F.R. § 1630.2(1).

68. Unless the plain language of the statute is clear, courts under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984), defer to an interpretation of the statute by the agency authorized to enforce that statute so long as the agency's interpretation is "a permissible construction" of the statute. A permissible construction is one that is not "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. "Chevron binds courts to an agency's interpretation of a statute if Congress requested such an interpretation and if the resulting interpretation is reasonable." Maureen R. Walsh, *What Constitutes a "Disability" Under the Americans With Disabilities Act: Should Courts Consider Mitigating Measures?*, 55 WASH. & LEE L. REV. 917, 934 (1998).

69. 29 C.F.R. pt. 1630, App. § 1630 (1998). Although designated "Interpretive Guidance" by the EEOC, these interpretations of the Regulations are most often referred to as "guidelines" by the courts. This Note will hereinafter refer to the "Interpretive Guidance" as "guideline(s)."

70. *See* Sutton v. United Airlines, Inc., 130 F.3d 893, 899 (10th Cir. 1997) (stating "while the EEOC's [guidelines] may be entitled to some consideration in our analysis, it does not carry the force of law and is not entitled to any special deference . . . .")

71. 29 C.F.R. pt. 1630, App. § 1630.2(j).

E. Discord Among the Circuit Courts: To Defer or Not to Defer

1. Courts Deferring to the EEOC's Guideline

A majority of courts deferred to the guideline and did not consider the effects of mitigating measures when determining whether an individual was substantially limited in a major life activity.[72] These courts found that, because the text of the ADA was ambiguous regarding the effect of mitigating measures, and because the EEOC's interpretation of the statute with regard to these effects was reasonable, the guideline should be given deference.[73]

The First Circuit followed this line of reasoning in *Arnold v. United Parcel Service, Inc.*[74] Arnold alleged that United Parcel Service ("UPS") refused to hire him because of his disability, diabetes mellitus, in violation of the ADA.[75] UPS argued that Arnold was not substantially limited in one or more major life activities and moved for summary judgment.[76] UPS argued that he had successfully controlled his diabetes for twenty-three years by monitoring his blood glucose levels and giving himself insulin injections.[77] The district court, by taking into account ameliorative medications, based its decision to grant summary judgment to UPS on the fact that Arnold's diabetic condition did not substantially limit one or more major life activities.[78]

On appeal to the First Circuit, Arnold argued that the district court's consideration of his impairment in its corrected condition was erroneous.[79] Arnold further argued that as a matter of law his condition should have been considered in its unmedicated state.[80] The Court of Appeals agreed, reversing the lower court's decision and reinstating Arnold's discrimination claim.[81] In coming to this conclusion, the Court of Appeals reasoned that "the statutory language is far from clear, particularly with respect to the key question" of mitigating measures.[82] The court looked to the legislative history and the EEOC regulations and guidelines for clarification and found that: (1) the legislative history was clearly in favor of disregarding mitigating measures;[83] and (2) the EEOC provided an interpretation consistent with the legislative history, text, and broad, remedial purposes of the ADA.[84]

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72. *See* Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 866 (1st Cir. 1998); Bartlett v. N. Y. State Bd. of Law Exam'rs, 156 F.3d 321, 329 (2d Cir. 1998); Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933, 937 (3d Cir. 1997); Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997); Holihan v. Lucky Stores, Inc., 87 F.3d 362 (9th Cir. 1996); Harris v. H & W Contracting Co., 102 F.3d 516 (11th Cir. 1996); Roth v. Lutheran Gen. Hosp., 57 F.3d 1446, 1454 (7th Cir. 1995); Gilbert v. Frank, 949 F.2d 637 (2d Cir. 1991).

73. *See supra* note 68.

74. *Arnold*, 136 F.3d 854 (1st Cir. 1998).

75. *See id.* at 856.

76. *See id.*

77. *See id.*

78. *See id.* at 857 (stating the district court's holding that "because Arnold's diabetes was effectively controlled by insulin injections, he was not disabled within the meaning of the ADA").

79. *See id.* at 856.

80. *See id.*

81. *See id.* at 866.

82. *Id.* at 858.

83. *See id.* at 859-60 (citing H.R. REP. No. 101-485, pt. III at 28 (1989); S. REP. No. 101-116, at 23 (1989)).

84. *See Arnold*, 136 F.3d at 866.

Harris v. H & W Contracting Co.[85] presents a progression of claims and judicial holdings similar to *Arnold v. United Parcel Service, Inc.*[86] Ellen T. Harris appealed entry of summary judgement in favor of H & W Contracting Company on grounds that Harris's treated condition[87] prevented her from showing that she was disabled within the meaning of the ADA. Harris appealed the decision to the Eleventh Circuit which found that, absent mitigating measures, her medical condition would substantially limit her major life activities.[88]

The Eleventh Circuit, like the First Circuit in *Arnold*, looked at the legislative history and the EEOC's regulations and guidelines.[89] The court found the EEOC's interpretation of the statute to be "firmly rooted in the ADA's legislative history,"[90] and, citing *Chevron*,[91] stated that, because "there is no direct conflict between the interpretation contained in the appendix to the [EEOC's] regulations and the language of the statute itself,"[92] the guideline's directive to consider impairments without regard to mitigating measures was permissible and should be given deference.

2. Courts Refusing to Defer to the EEOC's Guideline

A minority of pre-*Sutton* courts found the EEOC guideline in direct conflict with clear statutory requirements, and rejected the EEOC's instruction to determine disability without taking into consideration the ameliorative effects of mitigating measures.[93] These courts argued that the concern was "whether the impairment affects the individual *in fact*, not whether it would hypothetically affect the individual without the use of corrective measures."[94]

Gilday v. Mecosta County[95] is representative of the struggle courts had over whether the EEOC's guideline was interpretive of an ambiguous statute or an interpretation in conflict with clear statutory language requirements. Kevin Gilday sued his employer Mecosta County, Michigan, ("Mecosta") for disability discrimination under the ADA.[96] Gilday asserted that his diabetes was a disabili-

85. 102 F.3d 516 (11th Cir. 1996).

86. 136 F.3d 854 (1st Cir. 1998).

87. In 1973, Harris was diagnosed with active Graves' disease, an endocrine disorder affecting the thyroid gland. *See Harris*, 102 F.3d. at 517. The treatment of her disease had been generally successful, and her thyroid problems had only interfered with her work and other life activities once since the diagnosis. *Id.*

88. *See id.* at 523.

89. *See id.* at 520-21. The court quoted the EEOC's guideline, 29 C.F.R. pt. 1630, App. § 1630.2(j) (1998), which states, "The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, *without regard to mitigating measures* such as medicines, or assistive or prosthetic devices." (emphasis added).

90. *Harris*, 102 F.3d at 521.

91. *See supra* note 68.

92. *Harris*, 102 F.3d at 521.

93. Three years before being fired by Mecosta (for conduct unbecoming of a paramedic and a history of rudeness to patients and colleagues), Gilday was diagnosed with non-insulin dependent diabetes mellitus, a condition he could control with medication and a strict diet and exercise regimen. *See id.* at 761. He blamed his conduct on stress and periodic departures from his exercise/diet regimen that caused his blood sugar to fluctuate wildly making him frustrated and irritable. *See id.*

94. Sutton v. United Airlines, Inc., 130 F.3d 893, 902 (10th Cir. 1997) (emphasis added).

95. 124 F.3d 760 (6th Cir. 1997).

96. Three years before being fired by Mecosta (for conduct unbecoming of a paramedic and a history of rudeness to patients and colleagues), Gilday was diagnosed with non-insulin dependent diabetes mellitus, a condition he could control with medication and a strict diet and exercise regimen. *See id.* at 761. He blamed his conduct on stress and periodic departures from his exercise/diet regimen that caused his blood sugar to fluctuate wildly making him frustrated and irritable. *See id.*

ty and that Mecosta should have granted his request for reasonable accommodation.[97] Had he been accommodated, he argued, his behavior would not have risen to the level of an offense requiring termination.[98] The district court granted summary judgment in favor of Mecosta holding that Gilday's diabetes did not significantly limit a major life activity and was, therefore, not a disability.[99]

Gilday appealed the district court's decision to the Sixth Circuit which found that, while "portions of the ADA's vast legislative history lend support to the EEOC's position [on mitigating measures]," "'we do not resort to legislative history to cloud a statutory text that is clear.'"[100] "The EEOC's rule, in effect, eliminates the statutory requirement that an impairment 'substantially limit[]' a major life activity in order to constitute a disability."[101] Judge Kennedy, writing for the court, stated, "I do not believe that Congress intended the ADA to protect as 'disabled' all individuals whose life activities would hypothetically be substantially limited were they to stop taking medication."[102] When an impairment is "fully controlled by mitigating measures and such measures do not themselves substantially limit an individual's major life activities, . . . the ADA provides no protection."[103]

In *Pack v. K-Mart Corp.*,[104] Teresita Pack sued K-Mart alleging that K-Mart violated the ADA when it terminated her employment.[105] The district court granted K-Mart's motion for summary judgment finding that "periodic sleep deprivation" and "the inability to concentrate" as alleged by Pack were not major life activities.[106] "[E]ven assuming sleep and concentration are major life activities, Pack . . . 'ha[d] not demonstrated that her impairment of depression substantially limit[ed] either her concentration or her ability to sleep.'"[107]

On appeal to the Tenth Circuit, Pack asserted that the district court erred in "determining that sleep and concentration are not major life activities, and . . . in concluding that reasonable jurors could not find her depression substantially limited her major life activities of sleep and concentration."[108] The court compared sleep and concentration to the EEOC's illustrative list of basic activities[109] and found that: (1) sleep is a major life activity, but (2) concentration, while "a significant and necessary component of a major life activity," is not an "activity" itself.[110] The district court, therefore, erred in determining that sleep was not a major life activity.

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97. *See id.*
98. *See id.* Gilday argued that accommodating his condition and isolating him from stressful situations would have prevented the very behavior that led to his dismissal—stress made him irritable and rude. *See id.*
99. *See id.*
100. *Id.* at 767 (quoting Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994)).
101. *Id.*
102. *Gilday*, 124 F.3d at 767.
103. *Id.*
104. 166 F.3d 1300 (10th Cir. 1999).
105. *See id.* at 1303. Pack alleged that K-Mart refused to accommodate her disability (which she identified as "the inability to tolerate the stressful environment created by . . . a K-Mart pharmacist . . . .") *Id.* at n. 3.
106. *See id.*
107. *Id.* (quoting App. Vol. II at 490).
108. *Pack*, 166 F.3d at 1303.
109. *See* 29 C.F.R. § 1630.2(i) (1997).
110. *See Pack*, 166 F.3d at 1305.

The circuit court affirmed the district court's decision in spite of this error.[111] To be a disability under the ADA, Pack's major life activity had to be substantially limited by her impairment.[112] "Evaluat[ion of] whether a physical or mental impairment is substantially limiting in a major life activity" must, the court stated, "tak[e] into consideration any mitigating or corrective measures utilized by the individual, such as medications."[113] Because Pack's sleep problems were "generally control[led] . . . with medication," and because she failed to establish that she was substantially limited in the major life activity of sleeping, Pack, the court determined, was not disabled within the meaning of the ADA.[114]

III. FACTS

Sutton v. United Airlines, Inc. is the story of Karen Sutton and Kimberly Hinton ("sisters"), twin sisters who worked as pilots for a regional commuter airline when their court battles began.[115] Wanting to fly for a major airline, they applied for pilot positions with United Airlines ("United") and were invited to interviews in Denver, Colorado.[116] Their poor vision stood between them and their goals.[117] Applicants for pilot positions at United were required to have, at a minimum, uncorrected vision of 20/100 or better in each eye.[118] The sisters were told at their interviews that there had been a mistake—despite their experience as pilots and the fact that their corrected vision was 20/20, they were not qualified to work as passenger pilots for United because their uncorrected vision did not meet United's minimum requirement for the jobs.[119]

A. United States District Court, District of Colorado

Believing United's reason for rejecting them to be neither legitimate nor legal, the sisters filed a charge of disability discrimination under the ADA against United with the EEOC.[120] When they received their right to sue letter from the EEOC, the sisters filed suit in the United States District Court for the District of Colorado.[121] They alleged that United violated the ADA by rejecting them on the basis of their "disability,"[122] or because United regarded them as being dis-

111. *See* id. at 1306.
112. *See* 42 U.S.C. § 12102(2)(A).
113. *Pack*, 166 F.3d at 1305. (citing Sutton v. United Airlines, Inc., 130 F.3d 893, 902 (10th Cir. 1997)).
114. *See Pack*, 166 F.3d at 1306. The court noted that the EEOC, in its Guidance on Psychiatric Disabilities and the Americans With Disabilities Act, EEOC Compliance Manual (BNA) No. 59, at E-2 n. 16 (Mar. 27, 1997), stated, "Sleeping is not substantially limited just because an individual has some trouble getting to sleep or occasionally sleeps fitfully." *Id.* at n. 6.
115. *See* Sutton v. United Airlines, Inc., 130 F.3d 893, 895 (10th Cir. 1997).
116. *See id.*
117. Each of the sisters had uncorrected vision of 20/200 or worse in her right eye and 20/400 or worse in her left eye. *See id.* With 20/200 vision, a person can see an object from 20 feet as well as a person with 20/20 vision can see from 200 feet. *See id.* at n. 1.
118. *See id.*
119. *See* Sutton v. United Airlines, Inc., 119 S. Ct. 2139, 2143 (1999).
120. *See id.*
121. *See id.*
122. The sisters claimed that their poor vision was an impairment that substantially limited them in the major life activity of seeing. *See* Sutton v. United Airlines, Inc., 1996 WL 588917 *2 (D. Colo.).

abled.[123] United argued that the sisters were not disabled because they did not have an impairment that substantially limited any major life activity.[124]

The district court found that, although the sisters were impaired by their poor vision, they were not substantially limited in the major life activity of seeing.[125] In coming to this conclusion, the court held that impairments—not disabilities—must be determined without regard to mitigating measures such as eyeglasses.[126] The court noted that "[n]umerous federal courts have concluded that the need for corrective eye wear is commonplace and does not substantially limit major life activities."[127] Finding that the sisters had neither proved they were disabled, nor that United regarded them as impaired in a way that substantially limited them in a major life activity,[128] the court dismissed the sisters' civil action for failure to state a claim upon which relief could be granted under the ADA.[129]

B. United States Court of Appeals for the Tenth Circuit

The sisters appealed the district court's holding to the Tenth Circuit.[130] They contended that the lower court erred in dismissing their complaint and alleged that there were

> sufficient facts to establish that: (1) they were qualified applicants with a disability because they were substantially limited in the major life activity of seeing, and (2) United regarded them as having a substantially limiting impairment because its policy deprive[d] them of employment throughout the global air carrier industry with no rational job-related basis.[131]

The court, they argued, erred by evaluating their impairment in its corrected state rather than in its uncorrected state as required by EEOC guidelines.[132]

In response, United contended that the sisters' vision did not constitute an impairment within the meaning of the ADA and that, even if their vision was an impairment, it did not substantially limit them in a major life activity.[133] United

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123. *See id.* at *1.
124. *See id.* at *2.
125. *See id.* at *3.
126. *See id.* at *5 (citing 29 C.F.R. pt. 1630, App. § 1630.2(j) (1998)).
127. *Sutton*, 1996 WL 588917 at *3.
128. *See id.* at *6. The court stated the "proper test for a 'regarded as' claim was whether the impairment, as perceived, would affect the individual's ability to find work across the spectrum of same or similar jobs." *Id.* at *5. United did not necessarily regard the sisters as disabled simply because they found the sisters incapable of meeting the requirements of a single job. *See id.* "The statutory reference to a substantial limitation indicates instead that an employer regards an employee as handicapped in his or her ability to work by finding the employee's impairment to foreclose *generally* the type of employment involved." *Id.* (emphasis added). Because the sisters' complaint was based on their inability to obtain the "single, particular job of passenger airline pilot with United," *Id.* at *4, they were not *generally* foreclosed from obtaining other jobs in their field. *See id.* at *5.
129. *See id.* at *6.
130. *See* Sutton v. United Airlines, 130 F.3d 893 (10th Cir. 1997).
131. *Id.* at 896.
132. *See id.* The EEOC's Interpretive Guidelines provide that "the determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. pt. 1630, App. § 1630.2(j) (1998). The sisters argued that this meant that the determination of whether a person has a physical impairment and is *disabled* within the meaning of the ADA must be made without regard to mitigating or corrective measures. *See Sutton*, 130 F.3d at 896.
133. *See Sutton*, 130 F.3d at 896.

argued that the EEOC's guideline relied upon by the sisters was in direct conflict with the ADA.[134] "[T]o evaluate a disability without regard to mitigating measures would," they argued, "read out the ADA's requirement that the impairment be 'substantially' limiting."[135] United also asserted that the sisters could offer no proof that United regarded them as "anything other than as unable to meet the rational job-related safety requirements of the jobs sought."[136]

The court found for United on all counts holding that the EEOC's guideline was in direct conflict with the ADA, and the sisters could neither show that their *corrected* vision substantially limited their major life activity of seeing, nor that their denial of a single job at United disqualified them from a "broad range of jobs in various classes" as required by the "regarded as" prong of the ADA.[137] The Tenth Circuit affirmed the lower court's dismissal of the sisters' ADA claims for failure to state a claim upon which relief could be granted.[138]

IV. INSTANT CASE

The sisters appealed the Tenth Circuit's decision to the United States Supreme Court.[139] Because the Tenth Circuit's holding[140] was in conflict with decisions by other Courts of Appeals, the Supreme Court granted the sisters' petition for certiorari.[141] At issue was whether corrective measures should be taken into account when determining whether an impairment is substantially limiting.[142] The sisters argued that the guidelines issued by the EEOC should be given deference, because the ADA did not directly address the issue.[143] The guidelines, they argued, "specifically direct that the determination of whether an individual is substantially limited in a major life activity be made without regard to mitigating measures."[144] United maintained that a corrected impairment did not substantially limit a major life activity and that the Court should not defer to the EEOC's guidelines because they conflicted with the plain meaning of the ADA.[145] United further asserted that, even if the statute was ambiguous, the guidelines' directive to ignore corrective measures was unreasonable, and the Court should not defer to it.[146]

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134. *See id.*
135. *Id.*
136. *Id.*
137. *See id.* at 902.
138. *See id.* at 906.
139. *See* Sutton v. United Airlines, 527 U.S. 471 (1999).
140. "[T]o state a prima facie case and survive United's motion to dismiss, [the sisters'] vision in its corrected state must 'substantially limit' their major life activity of seeing. [They] cannot make this showing." *Sutton*, 130 F.3d at 902.
141. *See Sutton*, 527 U.S. at 477 (citing Bartlett v. New York State Bd. of Law Examiners, 156 F.3d 321, 329 (2d Cir. 1998) (holding self-accommodations cannot be considered when determining a disability), cert. pending, No. 98-1285; Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 629-30 (7th Cir. 1998) (holding disabilities should be determined without reference to mitigating measures); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937-38 (3d Cir. 1997) (same); Arnold v. United Parcel Service, Inc., 136 F.3d 854, 859-66 (1st Cir. 1998) (same); Washington v. HCA Health Servs. of Texas, Inc., 152 F.3d 464, 470-71 (5th Cir. 1998) (holding that only some impairments should be evaluated in their uncorrected state), cert. pending, No. 98-1365.)
142. *See Sutton*, 527 U.S. at 482.
143. *See id.*
144. *Id.*
145. *See id.*
146. *See id.*

Although the members of the Court were split on this issue,[147] the majority agreed with United that the approach adopted by the EEOC in its guidelines was an "impermissible interpretation of the ADA."[148] A person whose impairment is "corrected by mitigating measures still has an impairment,"[149] to be sure, but whether that person is "disabled" under the Act depends on the "effects of those [corrective] measures."[150] "[I]f a person is taking measures to correct for, or mitigate, a physical or mental impairment," the Court held "the effects of those measures—both positive and negative—must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act."[151] Because the sisters' corrected vision was 20/20, and because disability must be determined with reference to corrective measures, the Supreme Court affirmed the lower courts findings that the sisters had not stated a claim that they were substantially limited in a major life activity.[152]

The sisters also urged the Court to find that they were regarded by United as having a disability within the meaning of the ADA.[153] Both United's mistaken perception and its vision requirement,[154] the sisters argued, substantially limited their ability to engage in the major life activity of working, and precluded them from a class of employment.[155] United responded by arguing that because the position of global airline pilot was not a class of jobs, the sisters had not stated a claim that they were regarded as substantially limited in the major life activity of working.[156]

The Court stated that "by its terms, the ADA allow[ed] employers to prefer some physical attributes over others and to establish physical criteria."[157] Such

147. *See id.* Justices Stevens and Breyer dissented finding through study of the statute's language, structure, basic purposes, and history that "the Act's protected class includes individuals with various medical conditions that ordinarily are perfectly 'correctable' with medication or treatment." *Id.* at 501. The EEOC's interpretation of the Act should be accorded respect because "'the agenc[y] played a pivotal role in setting [the statutory] machinery in motion.'" *Id.* (quoting Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980) (brackets in original)).

148. *Sutton*, 527 U.S. at 482. The majority found the EEOC's interpretation of the ADA impermissible because: (1) the Act's definition of "disability" is properly read "as requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability," *Id.*; (2) the agency guidelines' directive that "persons be judged in their uncorrected or unmitigated state runs directly counter to the individualized inquiry mandated by the ADA," *Id.* at 483, and; (3) Congress's inclusion in the ADA's text of the finding that 43 million Americans are disabled gives content to how "disability" must be defined under the ADA. *See id.* at 487. "Had Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings. That it did not is evidence that the ADA's coverage is restricted to only those whose impairments are not mitigated by corrective measures." *Id.*

149. *Id.* at 483.

150. *Id.* at 481 (brackets in original).

151. *Id.*

152. *See id.* at 488-89.

153. *See id.*

154. The sisters alleged that the vision requirements were based on "myth and stereotype." *Id.* The Court did not explore the foundations upon which United's requirements were based. *Id.*

155. *See id.* The Court points out that the sisters did not "make the obvious argument that they [were] regarded as substantially limited in the major life activity of seeing," but that they only contended that they were regarded as being substantially limited in the major life activity of working. *See id.* The sisters further alleged that United's vision requirement was a substantial limitation of a major life activity (working) that precluded them from obtaining jobs as global airline pilots (which they asserted was a "class of employment"). *See id.*

156. *See id.*

157. *Id.*

requirements do not establish a claim that an employer regarded an applicant as substantially limited in his or her ability to work.[158] "'The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.'"[159] One must be, at a minimum, unable to work in a broad class of jobs.[160] Because there were a number of other positions available utilizing the sisters' skills as pilots, the Court found they were not substantially limited in the major life activity of working.[161] The sisters, therefore, had not stated a claim that United regarded them as having a substantially limiting impairment, and the lower courts were correct in dismissing their case.[162]

V. ANALYSIS

A. In the Wake of Sutton

A number of ADA cases decided since *Sutton* made it clear that the Supreme Court's holdings based on a fairly simple case of myopia do not translate well into more complicated factual situations. The interpretations of *Sutton* that follow demonstrate that the lower courts may have misunderstood the narrow context in which *Sutton* was meant to be applied. The only other explanation is that *Sutton* is simply wrong.

In *Taylor v. Blue Cross and Blue Shield of Texas,*[163] Robert Taylor, an employee of Blue Cross Blue Shield ("BCBS") from July, 1994, until his employment was terminated in August, 1997, filed suit against BCBS alleging discrimination in employment on the basis of his disability, sleep apnea.[164] BCBS filed a motion with the court for summary judgment.[165] The court approached its decision on the motion for summary judgment with *Sutton* in hand, quoting the *Sutton* court's statement that "[a] person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently 'sub-

158. *See id.* "An employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity." *Id.* Employers are free to pick and choose among "physical characteristics or medical conditions that do not rise to the level of an impairment—such as one's height, build, or singing voice—[that they find] . . . preferable to others, just as [employers are] free to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job." *Id.* United's visual requirements, by themselves, do not establish a subsection (C) "regarded as" claim. *See id.*

159. *Id.* at 492 (quoting 29 C.F.R. § 1630.2(j)(3)(i) (1997)) (The EEOC's guidelines state that, when referring to the major life activity of working, one is "substantially limited" when one 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.")

160. *See Sutton*, 527 U.S. at 491.

161. The sisters only "allege[d] that [United] regard[ed] their poor vision as precluding them from holding positions as 'global airline pilot[s].' Because the position of global airline pilot is a single job," the Court held that the sisters' allegation "does not support the claim that [United] regards [the sisters] as having a substantially limiting impairment." *Id.*

162. *See id.* at 494.

163. 55 F. Supp. 2d 604 (N.D. Tex. 1999).

164. *See id.* at 607. Taylor was discharged because of his alleged poor work history, mismanagement of projects, and misrepresentations to supervisors. *See id.* Taylor was diagnosed with sleep apnea in the months prior to his discharge, and blamed his poor performance on the fatigue he felt as a result of his sleep disorder. *See id.* He began Constant Positive Air Pressure (CPAP) treatment in September, 1997, and, at the time this action was instituted, no longer suffered any symptoms of sleep apnea. *See id.*

165. *See id.* at 608.

stantially limits' a major life activity.'"[166] Finding that Taylor's sleep apnea "ha[d] been corrected and d[id] not substantially limit any major life activity," the court granted summary judgment to BCBS.[167] Taylor, the court held, did not suffer from a disability within the meaning of the ADA.[168]

Taylor also alleged that BCBS "perceived him as having a disorder that substantially limited one or more major life activities."[169] The court, in dismissing Taylor's "regarded as" claim, stated that, "speculation, unsupported by any factual evidence, . . . cannot defeat a motion for summary judgement."[170] The evidence in the record indicated that BCBS discharged Taylor based on his poor work performance, not because of a perceived disability.[171] "'[W]here an employee engages in conduct that is legitimately a basis for dismissal, and the employer believes that the employee's conduct is symptomatic of disability, the employer may fire the employee on the basis of the conduct itself, as long as the collateral assessment of disability plays no role in the decision to dismiss.'"[172]

The *Sutton* pronouncement—that "a person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently 'substantially limits' a major life activity"[173]—used by the *Taylor* court is finding its way into many court opinions and is being applied to situations in which the plaintiff's conditions are far more complex than the Sutton sisters' poor eyesight. This language was used in *Equal Employment Opportunity Commission v. R. J. Gallagher Co.*[174] to refuse plaintiff, Michael Boyle, relief under the ADA.[175] Boyle suffered from myelodysplastic syndrome, a form of blood cancer that had been forced into remission with aggressive chemotherapy.[176]

When Boyle, President of R. J. Gallagher Company ("Gallagher"), returned to work, he was "immediately and aggressively" confronted by Robert Gallagher, CEO and chairman of the board of Gallagher.[177] Gallagher, doubtful of the true state of Boyle's health and Boyle's ability to perform his duties as President, reduced Boyle's salary by half and demoted him to a position far below the one he had occupied prior to the onset of his illness.[178] Boyle's refusal to accept the demotion resulted in his dismissal.[179]

"Use of the predicted effects of the impairment in its untreated state for the purposes of considering whether a major life activity has been affected by a

166. *Id.* at 610 (quoting *Sutton*, 527 U.S. at 482).
167. *See Taylor*, 55 F. Supp. at 611.
168. *See id.*
169. *Id.* at 612.
170. *Id.*
171. *See id.*
172. *Id.* (quoting Newberry v. East Tex. State Univ., 161 F.3d 276, 280 (5th Cir. 1998)).
173. Sutton v. United Airlines, Inc., 527 U.S. 481-83 (1999).
174. 181 F.3d 645 (5th Cir. 1999).
175. *See id.* at 655.
176. *See id.* at 648-49.
177. *See id.* at 649.
178. *See id.*
179. *See id.*

physical or mental impairment has . . . ," the court stated, "been foreclosed by the recent opinion of the Supreme Court in *Sutton v. United Airlines, Inc.* . . ."[180] "The [Supreme] Court made clear that § 12102(2)(A) requires 'that a person be presently—not potentially or hypothetically—substantially limited.'"[181] The court found that Boyle's condition was an impairment but because the affected major life activity alleged was "working," his impairment in its corrected condition did not substantially limit him.[182] The court reasoned that Boyle, if he chose to, could still "access his job and all of its accoutrements . . . ."[183] He was, after all, offered continued employment at Gallagher.[184]

The court in *Spades v. City of Walnut Ridge*,[185] using a broad brush to apply *Sutton*, analyzed Sam Spades' depression in much the same way that Boyle's cancer was analyzed by the Fifth Circuit. Spades took medication and received counseling for depression and was, by his own admission, able to "function without limitation."[186] "Thus," the court stated, "his depression is corrected and *cannot* substantially limit a major life activity."[187] The lower court's summary judgment for the City of Walnut Ridge was, therefore, upheld by the circuit court.[188]

With its use of the word "cannot," the *Spades* court showed a basic misunderstanding of *Sutton's* statement that "a person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently 'substantially limits' a major life activity."[189] Not all conditions, even though corrected to the extent pharmacologically possible, are fully correctable in a way that it can be said that they "cannot" substantially limit a major life activity. Depression, unlike myopia, is not easily treated or fully correctable in every case. To say that depression that has been treated is corrected and "cannot" substantially limit a major life activity is to distort *Sutton* beyond recognition.

John Matuska also faced a court armed with *Sutton* in his suit against the township of Hinckley, Ohio, for alleged discrimination in violation of the ADA.[190] Matuska suffered from depression and Post Traumatic Stress Syndrome that, he alleged, were the result of two on-the-job accidents that resulted in a lower back

180. *Id.* at 653.
181. *Id.* (quoting Sutton v. United Airlines, Inc., 527 U.S. 471, 482 (1999)).
182. *See Gallagher*, 181 F.3d at 653-55.
183. *Id.* at 655.
184. The Fifth Circuit also reviewed Boyle's claim that he was "regarded as" disabled by Gallagher. *See id.* at 656-57. Finding that "there [was] a genuine issue of material fact as to whether Boyle was regarded as disabled," the Court of Appeals vacated the lower court's grant of summary judgment to Gallagher and remanded it for further proceedings consistent with its opinion. *Id.* at 657.
185. 186 F.3d 897 (8th Cir. 1999).
186. *Id.* at 900.
187. *Id.* (emphasis added).
188. *Id.*
189. Sutton v. United Airlines, Inc., 527 U.S. 471, 481-83 (1999).
190. Matuska v. Hinckley Township, 56 F. Supp. 2d 906 (N.D. Ohio, 1999).

injury and the amputation of a finger.[191] The court, in determining whether Matuska's impairments substantially limited him in his ability to work, would not consider "(as suggested by Matuska) whether he would be substantially limited in his ability to work if he discontinued his medication."[192] Quoting *Sutton*, the district court stated, "'To be sure, a person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not 'substantially limit[]' a major life activity.'"[193]

In support of its conclusion that Matuska was not substantially limited in his ability to work and, therefore, not disabled within the meaning of the ADA, the court stated,

> When a physical or mental impairment does not prevent an individual from performing any specific (or even minute) functions of one's job, then that individual cannot be found to be precluded from performing a broad class of jobs. To find as such would eviscerate the meaning of the phrase "substantially limits."[194]

The *Sutton* decree that the medicated condition be the starting point for substantial limitation analysis, combined with the *Sutton* affirmation that preclusion from a broad class of jobs is required before one is substantially limited in the major life activity of working, defeated Matuska's ADA claim. By these post-*Sutton* standards, he was not disabled.

Similarly, *Sorensen v. University of Utah Hospital*[195] involved a plaintiff with Multiple Sclerosis ("MS") who alleged discrimination under both the "record of" and "regarded as" definitions of "disabled." Laura Sorensen was an AirMed Flight Nurse at the University of Utah Hospital ("Hospital") from 1991 to 1994.[196] In 1993, Sorensen was diagnosed with MS and admitted to the hospital for five days—a period in which she "was unable to perform *any* life activities."[197] When she was released from the hospital, her physician cleared her to return to work, but before being allowed to return, Sorensen was told she would have to present to management a letter from her physician stating that she was able to return to her position as a flight nurse.[198] She did, but management, still concerned about Sorensen's ability to perform the work, compiled a list of job

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191. *See id.* at 909. Matuska and the township of Hinckley entered into a negotiated settlement as a result of his amputation and subsequent filing of Ohio Civil Rights Charges and Bureau of Workers' Compensation Claim. *See id.* at 909-10. The township's alleged request for Matuska's resignation (in violation of the settlement), Matuska claimed, aggravated his physical and mental impairments resulting in his inability to work without accommodation of his "disabilities" by the township. *See id.* at 910. The township contacted Matuska's physicians to determine how and whether he could be accommodated. *See id.* at 911. Because of his severe depression and extreme disdain for the township's trustees, Matuska's physician determined he could not be accommodated. *See id.* The township sent Matuska a letter demanding he return to work or be terminated. *See id.* Matuska did not return to work and was fired as a consequence. *See id.* His ADA claim grew out of these events.

192. *Id.* at 913.

193. *Id.* (quoting *Sutton*, 527 U.S. at 482).

194. *Matuska*, 56 F. Supp. 2d at 915.

195. 194 F.3d 1084 (10th Cir 1999).

196. *See id.* at 1085. AirMed Flight Nurses must be specially certified as a Certified Emergency Nurse and trained in Advance Burn Life Support, as well as surgical procedures not generally required for nurses in other hospital units. *See id.*

197. *Id.* (emphasis added).

198. *See id.*

qualifications for her physician to review.[199] Faced with the list of job conditions Sorensen would encounter as a flight nurse, her physician withdrew his recommendation that she was ready to return to her former position.[200]

Sorensen was seen by a second physician who also cleared her to return to work.[201] When faced with the same list of job conditions, the second physician did not retract his recommendation that she could essentially perform the duties required of her as a flight nurse.[202] He could not, however, guarantee that Sorensen would never suffer from an episode or problem associated with MS while on duty.[203]

Sorensen was employed during this time as a regular nurse at the Hospital, but resigned after several months alleging constructive discharge, because the Hospital had neither returned her to her job as flight nurse, nor made a determination of whether she would be returned to her former position.[204] Sorensen brought suit against the Hospital alleging disability discrimination under the ADA.[205] The district court dismissed her claim finding that she neither had an impairment that substantially limited a major life activity, nor was regarded as substantially limited in her ability to perform a class of jobs.[206]

On appeal to the Tenth Circuit, Sorensen, like Matuska and Spades, faced a court ready, willing and able to quote *Sutton* and deny relief.[207] In determining that Sorensen had not suffered discrimination because of a record of impairment, the court found that the record of her five day hospital stay when she was substantially limited in all major life activities did not pass the "duration and long-term impact tests"[208] set out in the EEOC regulations and explained by the EEOC's guidelines.[209] "Because [Sorensen's] hospitalization and MS symptoms affected her for only a brief period of time and d[id] not presently impact her ability to perform the job, [she] did not suffer an impairment that substantially limit[ed] a major life activity under the ADA."[210]

The court's cursory treatment of Sorensen's "regarded as" claim is more troubling. Sorensen argued that the Hospital "regarded her as having an impairment that substantially limited the major life activity of working because [it] did not return her to her position as flight nurse."[211] Quoting *Sutton*, the court stated that "'[w]hen the life activity under consideration is that of working, the statutory

199. *See id.*
200. *See id.*
201. *See id.*
202. *See id.*
203. *See id.*
204. *See id.* at 1086.
205. *See id.*
206. *See id.*
207. *See id.* at 1089.
208. *Id.* at 1087. The EEOC in its regulations, 29 C.F.R. § 1630.2(j)(2) (1997), set out factors to be considered in determining whether a person is substantially limited in a major life activity. *See supra* Part II.D.2. According to these Regulations, courts should consider the duration of the impairment, and the long term impact resulting from the impairment. 29 C.F.R. § 1630.2(j)(2)(ii)-(iii).
209. *See Sorenson*,194 F.3d at 1087. The guidelines state that a broken leg taking eight weeks to heal is an impairment of brief duration. *See* 29 C.F.R. pt. 1630, App. § 1630.2(j).
210. *Sorenson*, 194 F.3d at 1087.
211. *Id.* at 1088.

phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad range of jobs.'"[212] The court, after finding *Sutton* consistent with EEOC guidelines, cited an example from the guidelines in which an individual with a minor vision impairment denied a job as a commercial pilot would not be substantially limited in the major life activity of working.[213] Based on *Sutton* and this EEOC pilot example, the court found that Sorensen was not regarded as having an impairment that substantially limited the major life activity of working.[214] She was, after all, provided numerous other opportunities to work as a nurse, and, the court stated, "[Sorensen had] not distinguished the flight nurse position from the class of regular nurse jobs [the Hospital] permitted her to perform."[215] As a matter of law, the Circuit Court found that Sorensen was not disabled under either subsection (B) or (C) of the ADA.[216] The court did not look beyond the major life activity of "working" alleged by Sorensen in her complaint.

B. The Effects of Sutton *on Future ADA Claims*

What emerges from these decisions is an affection for bright-line rules by the lower courts coupled with either an indifference to the illegitimate inequities faced by the disabled or an overeagerness by the courts to deny relief to all but those most blatantly discriminated against. The Court in *Sutton* stated its holding regarding mitigating measures three times: First, "Looking at the Act as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a[n] . . . impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act;"[217] then, "[A] person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it *does not* 'substantially limi[t]' a major life activity;"[218] and finally, "one has a disability under subsection A if, notwithstanding the use of a corrective device, that individual is substantially limited in a major life activity."[219] The second statement by the Court of its holding regarding mitigating measures is distinguishable from the Court's other statements and intent.

To say on the one hand that both the positive and negative effects of corrective measures must be considered when determining whether one is substantially limited in a major life activity is quite different from saying that a corrected impairment *does not* substantially limit one in a major life activity. Use of such definitive language as "does not," forecloses the possibility that the corrective measures themselves may substantially limit one in a major life activity. This lan-

212. *Id.* (quoting Sutton v. United Airlines, Inc., 527 U.S. 471, 491 (1999)).
213. *See Sorenson*, 194 F.3d at 1088-89 (citing 29 C.F.R. pt. 1630, App. § 1630.2 (1998)).
214. *See Sorenson*, 194 F.3d at 1089.
215. *Id.*
216. *See id.*
217. *Sutton*, 527 U.S. at 482.
218. *Id.* at 483 (emphasis added).
219. *Id.* at 488.

guage also overlooks the fact that not all conditions, though corrected to the degree technologically and medically possible, are completely correctable. The Court's use of this language confuses the issue.

It is, unfortunately, this very language— "if the impairment is corrected it *does not* 'substantially limi[t]' a major life activity"—that is most often quoted by the lower courts and that inevitably leads these courts to the conclusion that the individual alleging disability discrimination is not, in fact, disabled. The courts using this language have applied it to conditions as diverse as sleep apnea, cancer, severe depression and multiple sclerosis. While it is easy enough to find that putting on eyeglasses fully corrects a visual acuity impairment so that it no longer substantially limits one in a major life activity, using this same reasoning to find that intensive psychological or medical treatment of conditions that are much harder—even impossible—to fully correct is a misapplication of the law as stated in *Sutton*.

The Court in *Sutton* dealt with nearsightedness—a minor impairment. In such narrow fact situations in which it may be contemplated that impairments are easily and fully correctable without adverse affect, *Sutton's* second statement of its mitigating measures holding may properly be used. Outside of these situations, it is merely a convenient tool, easily wielded to dismiss claims that should legitimately be heard by a jury. It is, in difficult and complex cases, inapplicable.

Sutton went to great lengths to bring mitigating measures into the determination of *disability* equation. When faced with the same opportunity with regard to determinations of *substantial limitation* when "working" is the major life activity claimed, however, the Court did little more than affirm prior decisions based on the EEOC's guidelines. In its approach to "working," the Court in *Sutton* noted that the EEOC "has suggested that working [should] be viewed as a residual life activity, considered, as a last resort, only '[i]f an individual is not substantially limited with respect to any other major life activity. If an individual is substantially limited in *any* other major life activity, no determination should be made as to whether the individual is substantially limited in working.'"[220] Yet "working" seems to be the beginning and end of judicial consideration in "regarded as" claims since *Sutton*.

Perhaps this is because *Sutton* did not look beyond "working," even as it pointed out that the Sutton sisters "d[id] not make the obvious argument that they [were] regarded due to their impairments as substantially limited in the major life activity of *seeing*."[221] This choice, to focus on "working"—even though "seeing" was a major life activity that could have been claimed and that properly should have been alleged by the Suttons—may have been influenced by the fact that either major life activity would have brought the Court to the same conclusion. Had the alleged major life activity in *Sutton* been "seeing," the fact remained that seeing was easily and fully correctable, and the job in question was piloting com-

220. *Id.* at 492 (quoting 29 C.F.R. pt. 1630, App. § 1630.2(j)) (emphasis added).
221. *Sutton*, 527 U.S. at 490 (emphasis added).

mercial passenger airliners—an area in which sight-based job requirements are easily justified as business related. Again, this holding, while correct in the case of the Sutton sisters, does not translate well to other contexts.

The court in *Matuska v. Hinckley Township*, following much the same analytical path as *Sutton*, focused on "working" in spite of Matuska's allegations of depression, loss of sleep, vision problems, and loss of memory.[222] By focusing on "working," the court ignored the fact that an individual impaired in the major life activity is more than likely impaired in other major life activities as well. When an individual claims to have been discriminated against by an employer that regarded him as disabled, it is hard to believe that the employer's misperception can be isolated to the individual's ability to work. An employer that regards an employee or an applicant as disabled will, more than likely, regard the individual as impaired in a number of major life activities.

Even if the employer did, in truth, only regard the employee/applicant as impaired in his ability to work, courts should be reluctant to go directly to the EEOC's recommended work-based analysis. To say at this point that a person is not substantially limited simply because he is precluded from one job and not a class or broad range of jobs ignores the possibility that the individual, if he were in fact impaired as the employer regarded him to be, would probably be impaired in more than his ability to work.

A cancer patient, for instance, who completes chemotherapy and returns to work bald and haggard, may encounter bias or even hostility based on his unhealthy appearance even though his doctor has given him a clean bill of health. If he is fired or demoted because his employer regarded him as disabled, a court considering his discrimination claim should look past the obvious allegation that the employee was only regarded as impaired in his ability to work and avoid hastily finding that his preclusion from one job did not substantially limit him in the major life activity of working. If the employee were truly impaired in the way his employer regarded him as being impaired, his abilities to function would be substantially limited in a number of ways, possibly including seeing, hearing, walking, breathing, sleeping, or learning. Were any of these activities substantially limited, a court would not—in fact, could not—look to "working" as a substantially limited major life activity.[223]

Yet, following the example set by the Court in *Sutton*, this is exactly what the courts in *Equal Employment Opportunity Commission v. R. J. Gallagher Co.*[224] and *Sorensen v. University of Utah Hospital*[225] did. These cases involved cancer and multiple sclerosis, respectively, and in each case, the "regarded as" analysis began and ended with the major life activity of working. While this approach is not the approach endorsed by the Supreme Court in *Sutton*, the language employed by the *Sutton* Court with its "regarded as" analysis, makes the alleged

222. *See* 56 F. Supp. 2d 906, 913 (N.D. Ohio 1999).
223. *See* 29 C.F.R. §§ 1630.2(j)(1)(i), (ii) 1997).
224. 181 F.3d 645 (5th Cir. 1999). *See* discussion *supra* Part V.A.
225. 194 F.3d 1084 (10th Cir. 1999). *See* discussion *supra* Part V.A.

major life activity of working an especially easy activity to deny. Courts armed with quotes like, "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working,"[226] and, "[i]f jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs"[227] are apparently becoming myopic in their ability to see disability discrimination in "regarded as" claims.

VI. CONCLUSION

The Supreme Court's decision in *Sutton v. United Airlines, Inc.*, while problematic, is generally correct. Mitigating measures should be taken into consideration by courts determining whether a major life activity is substantially limited by an impairment. To say that an individual *would be* disabled if he did not take medicine or other available treatments for his impairment is to disregard the core meaning of the statutory phrase "substantially limits one or more . . . major life activities."[228] "Substantially limits" requires that the impairment presently exist. If corrective measures have mitigated the effect of the impairment to the extent that it no longer presently substantially limits an individual, then that individual should not be considered disabled within the meaning of the ADA. In this aspect, the Court was correct, in spite of its awkward and confusing restatement of its holding.

The *Sutton* Court's choice of words in its second statement of its mitigating measures holding will almost certainly require the Court's attention in the not-so-distant future. Because the facts of the situation in *Sutton* were simple, and the impairment fully corrected in a way that many impairments may never be corrected, the Court's pronouncement that corrected impairments *do not* substantially limit a major life activity was, perhaps, an acceptable restatement of its holding—but only in situations analogous to *Sutton*. Taken out of context, that is, applying this rule—that corrected impairments do not substantially limit a major life activity—to a situation where the corrective measures either do not fully mitigate the effects of the impairment or have side effects that are themselves a substantially limiting impairment, is a perversion of *Sutton*'s intent. It can only harm those Congress intended to help with the ADA.

The Court's handling of the Sutton sisters' "regarded as" claim and its focus on "working" neither broke new ground nor cleared up the confusion surrounding subsection (C) claims. Indeed, *Sutton*'s affirmation of the EEOC's directive that preclusion from a single job is not a substantial limitation when "working" is the major life activity claimed, will probably force plaintiffs to rethink future "regarded as" claims based on "working." *Sutton* all but closes the door on subsection (C) claims in which the employee was fired from or not hired for the job of his choice. How many jobs a plaintiff must be denied before his "working"

226. *Sutton*, 527 U.S. at 493 (quoting 29 C.F.R. § 1630.2(j)(3)(i)).
227. *Sutton*, 527 U.S. at 491.
228. 42 U.S.C. § 12102(2).

claim succeeds remains the unanswered question. With its decision in *Sutton*, the Supreme Court demonstrated that it, too, believes that "[t]he ADA is not a job insurance policy . . . ."[229] Employees and the protection Congress intended the ADA provide them will suffer needlessly at the cold-hearted hands of corporate "Scrooges" unless and until the Supreme Court reconsiders its "regarded as" stance.

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229. Hedberg v. Indiana Bell Tel. Co., Inc., 47 F.3d 928, 934 (7th Cir. 1995).