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The Untenable Stricture: Pre-Mitigation Measurement Serves To Deny Protection Under the Americans With Disabilities Act

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THE UNTENABLE STRICTURE: PRE-MITIGATION MEASUREMENT SERVES TO DENY PROTECTION UNDER THE AMERICANS WITH DISABILITIES ACT

INTRODUCTION

From its inception, this nation has been governed by a guiding principle of equality. The Declaration of Independence professes,

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . .[1]

In order to secure equality and these inalienable rights, the people of the United States have established a constitution,[2] amendments thereto,[3] and supporting legislation.[4] Congress sought to insure dis-

1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
2. *See* U.S. CONST. art. I, § 9, cl. 8 (forbidding the federal government from granting anyone title of nobility); U.S. CONST. art. IV, § 2, cl. 1 (extending the privileges and immunities of citizens in each state to the citizens among all the states).
3. *See* U.S. CONST. amend. XIV, § 1 (granting due process and equal protection rights to all citizens against State governments); U.S. CONST. amend. XIX, cl. 1 (prohibiting voting discrimination based upon gender).

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abled individuals equality in the workplace through the enactment of the Rehabilitation Act of 1973 ("Rehabilitation Act"),[5] specifically, section 504 ("section 504")[6] and Title I of the Americans with Disabilities Act ("ADA").[7] Congress intended that these Acts create opportunities for the disabled and reduce the discrimination, whether expressed or not,[8] faced by an isolated group of individuals in the population.[9] This Comment questions some courts' interpretation and application of these statutes. In particular, it questions the lack of harmony among courts in defining and measuring *disabilities* and *limitations* under the ADA and section 504 of the Rehabilitation Act.[10]

Courts have applied two separate standards in determining the proper time to measure disabilities. Some courts, guided by the Equal Employment Opportunity Commission's ("EEOC")[11] decisions, regulations, and interpretive guidelines, provide for a *pre-mitigation* measurement of disability.[12] Other courts reject the EEOC guidelines and

4. *See* The Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000h (1994) (proscribing discrimination based on race, color, religion, sex, and national origin).

5. 29 U.S.C. §§ 791-796 (1994). Other sections are not discussed in detail. While proscribing discrimination, other sections target different entities.

> Sections 501 and 503 of the Rehabilitation Act prohibit the federal government and most federal contractors from discriminating in employment and requires them to use affirmative action to employ persons with disabilities. Section 504 of the Rehabilitation Act goes beyond employment and prohibits discrimination against persons with disabilities in programs and activities of the federal government and by recipients of federal financial assistance.

H.R. REP. NO. 101-485, pt. 3, at 24 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 446.

6. 29 U.S.C. § 794 (1994).

7. 42 U.S.C. §§ 12101-12117 (1994).

8. *See* Alexander v. Choate, 469 U.S. 287, 295-97 (1985).

9. This Comment does not solely concern the dilemma facing any particular disability. It is intended to address all disabilities. However, certain disability claims, such as diabetes claims, are often litigated and simply a vehicle to prove the author's point. Additionally, the cases discussed in this Comment are not unique in their holdings or in their decisions to measure disabilities post-mitigation. *See, e.g.,* Murphy v. UPS, Inc., 946 F. Supp. 872 (D. Kan. 1996); Schluter v. Industrial Coils, Inc., 928 F. Supp. 1437 (W.D. Wis. 1996). They are simply representative of the rationale and problems created by a significant number of courts.

10. In this paper, the discrimination in the cited cases is to be taken as true. This approach is similar to a damages issue under a *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854) analysis. In a *Hadley* analysis, consequential damages are not awarded unless the damages are foreseeable. The question is not whether the breach is foreseeable but, rather, given the breach, are these damages foreseeable. Without such a stipulation, the analysis is often misguided. The only issue in question is whether the individual is disabled as defined under the ADA. The author has discovered that without this stipulation, readers tend to digress into the philosophical wisdom of affording protection and possible abuses by employees. While valid, these discussions distract from the issue.

11. The EEOC is the agency charged with implementing and enforcing this title of the act. *See* 42 U.S.C. § 12117 (1994).

12. A pre-mitigation impairment means an impairment that exists "without regard to mitigating measures such as medicines or assistive or prosthetic devices." 29 C.F.R. app. § 1630.2(h) (1996).

apply a *post-mitigation* measurement.[13] An individual seeking statutory protection faces a difficult, if not impossible, burden proving a disability under the post-mitigation standard. In contrast, the post-mitigation standard favors the employer, because fewer individuals will ultimately carry this burden. The question therefore becomes, should discrimination claims be evaluated in a light more favorable to the individual or the employer? The answer may lie somewhere in the middle.

While the statutes at issue offer protection to the disabled, they are not inherently anti-employer statutes. Rather, they are designed to afford disabled individuals the very privileges most Americans receive on a daily basis. But determination of the appropriate standard can affect the outcome. Whichever standard is chosen, the plaintiff still bears the burden of proving a disability, proving discrimination, and proving that he is otherwise qualified for the position. Additionally, while the plaintiff carries these burdens, the employer is secure in the knowledge that only reasonable accommodations are necessary. This, while seeming harsh, is the appropriate approach, and is grounded in the Act's legislative history and the EEOC's interpretive guidelines.

On the other hand, courts which measure a plaintiff's condition only after a mitigation or correction, unnecessarily favor the employer and severely limit an individual's ability to seek redress under the Acts. These courts claim to find support for post-mitigation measurement in the "plain language" of the statutes. Based on an inflexible reading of the statute, these courts are denying the existence of a disability and thereby consigning some disabled individuals to a life of continuing discrimination. These judicial decisions manifest reasoning that threaten the scope and policies at the very foundation of the legislation and unnecessarily burden individuals claiming legal redress under the Acts.

This Comment begins with an historical background of the ADA and Rehabilitation Act, looking at specific language in the statutes and how the courts' and the EEOC's application of that language is inconsistent. Next, this Comment explores the dilemma that employers face when post-mitigation measures are taken against them by the courts. Finally, this Comment concludes that courts must widen the mitigation opportunities of disabled Americans.

13. A post-mitigation measurement looks to see whether an impairment still exists after the use of medication or other medical treatment. *See, e.g.,* Sutton v. United Air Lines, Inc., 130 F.3d 893, 902 (10th Cir. 1997); Coghlan v. H.J. Heinz Co., 851 F. Supp. 808, 813 (N.D. Tex. 1994).

I. HISTORICAL BACKGROUND

A. *Rehabilitation Act*

As early as the 1920s, legislation was enacted recognizing the plight of the disabled.[14] Nearly fifty years later, a second wave of recognition, expanding the rights of the handicapped, was established in court decisions mandating that disabled children receive public education.[15] These decisions are nearly contemporaneous with the debate and passage of the Rehabilitation Act.[16] This Act was Congress's response to the discrimination still experienced by the handicapped which the Civil Rights Act of 1964[17] failed to address. Although "[t]he Rehabilitation Act is silent as to the constitutional authority under which it was enacted,"[18] the consensus appears to be that it was enacted pursuant to the Spending Clause[19] and targeted government agencies and private entities that received federal assistance.[20] Section 504, as writ-

14. The Fess-Kenyon Act of 1920, 41 Stat. 735, was the first major legislation to challenge the then prevalent notion that a disability equated to an inevitable lifelong economic dependency. *See* H.R. REP. No. 101-485, pt. 3, at 25 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 448. The impetus of this act was the return of large numbers of injured and disabled World War I veterans. This influx, combined with the nation's industrialization and the corresponding rise in industrial accidents, prompted this early legislation. *See id.*

15. *See, e.g.*, Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972) (holding that the exclusion of disabled children from receiving public education is unlawful); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971) (stating that mentally retarded children have an equal right to receive public education).

16. 29 U.S.C. §§ 701-797(b) (1994).

> In addition to the 1973 Rehabilitation Act, Congress enacted several other pieces of legislation designed to promote equal opportunity and integration of disabled people into the mainstream of American life. Chronologically, these statutes included: 1968, Architectural Barriers Act, 42 U.S.C. § 4151 *et seq.* (required federally funded or leased buildings to be accessible); 1970, Urban Mass Transportation Act, 49 U.S.C. § 1612 (required eligible jurisdictions to provide accessibility plan for mass transportation); 1973, Education for All Handicapped Children Act, 20 U.S.C. § 1401 *et seq.* (provided that each handicapped child was entitled to a free appropriate education in the least restrictive environment); and 1975, National Housing Act Amendments, 12 U.S.C. § 1701 *et seq.* (provided for barrier removal in federally supported housing).

H.R. REP. No. 101-485, pt. 3, at 25 n.10 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 448.

17. Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. 2000e to 2000e-17 (1994)). The Civil Rights Act of 1964 proscribed discrimination based on race, color, religion, national origin and sex. *See id.*

18. Armstrong v. Wilson, 942 F. Supp. 1252, 1262 (N.D. Cal. 1996), *aff'd*, 124 F.3d 1019 (9th Cir. 1997).

19. *See* U.S. CONST. art. I, § 8, cl. 1 (giving Congress the power to lay and collect taxes and charging Congress with the duty of paying debts and providing for the common defense and the general welfare of the country).

20. The U.S. Supreme Court has interpreted the Act under both the Spending Clause and the Fourteenth Amendment. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985) (upholding states' Eleventh Amendment immunity from a pri-

ten, regulated all *private* entities receiving federal assistance.[21] These entities were deemed to have accepted the duties and responsibilities of the Act as quid pro quo for receiving federal moneys.[22]

According to the Supreme Court, Congress's purpose in passing and amending the Rehabilitation Act was "an effort 'to share with handicapped Americans the opportunities for an education, transportation, housing, health care, and jobs that other Americans take for granted.'"[23] The Rehabilitation Act mandates:

> No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[24]

In 1974, Congress amended the definition of a *handicapped individual* to include, "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."[25] According to the Court, Congress's intent in amending the definition was not only to attack simple prejudice, but also to reform "archaic attitudes and laws."[26] Additionally, the Court found "the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps."[27] The Court expounded further on Congressional reasons for the modification, stating:

> To combat the effects of erroneous but nevertheless prevalent perceptions of the handicapped, Congress expanded the definition of "handicapped individual" so as to preclude discrimination against "[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all."[28]

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vate cause of action under the Rehabilitation Act) (superseded in 1986 by the Civil Rights Remedies Equalization Act, 42 U.S.C. § 2000d-7 (1994), which provides that "[a] State shall not be immune under the Constitution of the United States from suit in Federal Court for a violation of . . . the Rehabilitation Act of 1973.").

21. *See* 29 U.S.C. § 794(a) (1988).

22. *See* United States Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 605 (1986) (citing Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 633 n.13 (1984)).

23. School Bd. of Nassau County v. Arline, 480 U.S. 273, 277 (1987) (quoting 123 CONG. REC. 13515 (1977) (statement of Sen. Humphrey)).

24. 29 U.S.C. § 794(a) (1988).

25. *Arline*, 480 U.S. at 279 (citing 29 U.S.C. § 706(8)(B) (1982) (amended by 29 U.S.C. § 706(8)(B) (1994)).

26. *Id.* (quoting S. REP. NO. 93-1297, at 50 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6400).

27. *Id.* (quoting S. REP. NO. 93-1297, at 50 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6400) (alteration in original).

28. *Id.* (citing Southeastern Community College v. Davis, 442 U.S. 397, 405-06 n.6 (1979) (alteration in original)).

Under this expanded definition, an individual having no current incapacity may find protection under the statute.[29] Simply stated, Congress's intent in amending the definition of "disabled" was to ensure greater protection for those individuals facing discriminatory employment policies and barriers predicated on actual or perceived disability.[30]

While seemingly broad in scope, neither the ADA nor the Rehabilitation Act is as consummate in its proscription as other anti-discriminatory legislation or amendments,[31] because their impact is tempered with language that requires an individual be *otherwise qualified*.[32] Recognition of a disability, coupled with blatant discrimination, is not commensurate to statutory protection. The term, *otherwise qualified*, has been construed by the Supreme Court to require a person to be "able to meet all of a program's essential requirements in spite of his handicap."[33] Thus, an individual must be disabled *and* possess the necessary credentials, job skills, and ability to perform the tasks required by a position before he is entitled statutory relief.[34] An individual's disability, therefore, is not by itself determinative of eligibility; rather, it is the intersection between the individual's disability and the requirements of the position.[35]

B. *Case Law Interpreting the Rehabilitation Act*

In a trilogy of cases, *Southeastern Community College v. Davis*,[36] *Alexander v. Choate*,[37] and *School Board of Nassau County v. Arline*,[38] the Supreme Court established the concept of *essential functions* and *reasonable accommodations*. Additionally, the Court broadened the definition of *handicap*, while narrowing the meaning of

29. *See id.*

30. *See id.* at 278-79 & n.3.

31. *See, e.g.*, U.S. CONST. amend. XIV, § 1.

32. *See* 42 U.S.C. § 12112(b)(5) (1994).

33. Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979).

34. *See* 29 C.F.R. app. § 1630.2(m) (1996). This examination is to determine whether an individual satisfies the prerequisites for the position. *See id.* "[To] determin[e] whether an accountant who is paraplegic is qualified for a certified public accountant (CPA) position is to examine the individual's credentials to determine whether the individual is a licensed CPA." *Id.* Additionally, an individual's disability can be so limiting as to prevent the individual from meeting the *otherwise qualified* requirement. In other words, an individual might be too disabled to be afforded statutory protection.

35. This is quite different than the Civil Rights Act. Under that Act, a court would never inquire if a woman's gender made her too female for statutory protection.

36. 442 U.S. 397 (1979).

37. 469 U.S. 287 (1985).

38. 480 U.S. 273 (1986).

otherwise qualified.[39] *Essential functions* are the minimum job requirements that an individual must be capable of performing before statutory protection may be invoked.[40] The *essential functions* concept was the Court's interpretation and expansion of the statute's *otherwise qualified* requirement.[41] This concept was designed to ensure that handicapped individuals will not be excluded from legal protection when they are fully capable of performing all of the *essential functions* of a position, yet are unable to perform some marginal functions.[42]

The second concept, *reasonable accommodation*, is the standard employers must tolerate in facilitating a disabled individual's introduction into the workplace.[43] This requirement provides greater opportunity to the handicapped by demanding flexibility of the employer.

Finally, by expanding the term *handicap* to include the impact of an impairment on others, the Court broadened the scope of the statute. Again, an apparent victory for the handicapped is diffused because this expansion also includes evaluation of the impact on others in the *otherwise qualified* evaluation.

1. *Southeastern Community College v. Davis*

The first case to interpret the Rehabilitation Act was *Southeastern Community College v. Davis*.[44] In *Southeastern*, the plaintiff sought training as a registered nurse; however, the nursing program[45] refused to admit her because of a severe hearing disability.[46] The plaintiff instituted suit and alleged that the school refused to admit her because of her disability. She contended that the Department of Health, Education, and Welfare ("HEW") regulations required the school to make all necessary accommodations[47] or to modify the curriculum requirements.[48]

39. *See* W. Robert Gray, *The Essential-Functions Limitation on the Civil Rights of People with Disabilities and John Rawls's Concept of Social Justice*, 22 N.M. L. REV. 295, 300 (1992).

40. *See id.* at 299-302.

41. *See Southeastern*, 442 U.S. at 406-07.

42. *See* 29 C.F.R. app. § 1630.2(m) (1996).

43. *See Alexander*, 480 U.S. at 301.

44. 442 U.S. 397 (1979) (finding a nursing student unqualified to meet the necessary standards required by a nursing program).

45. This was a state institution that received federal assistance and was, therefore, subject to the Act. *See id.* at 400.

46. *See id.* at 401.

47. *See id.* at 404. Generally, an employer is required to make *reasonable* accommodations allowing a disabled individual to perform all necessary job functions. *See id.* However, the Court articulated that if the accommodation created an "undue financial or administrative burden" it was not reasonable. *Id.* at 406. Accommodation is a critical concept in disability jurisprudence; however, it is beyond the scope of this Comment. Any discussion will be specifically limited to the facts discussed.

48. *See id.* at 407-09.

The Court began its opinion with an analysis of the Rehabilitation Act and found section 504 only requires that "otherwise qualified" individuals not be excluded because of their handicaps.[49] It adopted the definition that an *otherwise qualified* individual is "[an individual] who is able to meet all of a program's requirements in spite of [a] handicap."[50] The Court concluded that section 504 does not require substantial modifications to programs, nor does it require employers to totally ignore the actual limitations associated with the disability.[51] Thus, any such requirement by HEW would be contrary to the statute's language, history, and purpose and would require judicial scrutiny of the regulation's validity.[52]

Relying on the same HEW regulations, the Court determined that educational programs may require an applicant to possess certain necessary or *essential* physical qualifications to participate in a program.[53] Simply stated, a federally funded program may establish essential job related criteria.[54] If an individual fails to meet these criteria, then discrimination does not exist.[55] However, the Court emphasized that these criteria must be essential or necessary to the job, not simply marginally related to the position.[56] This is the *essential functions* concept.

To determine whether Southeastern Community College discriminated, the Court then ascertained the necessity of the requirements set by the nursing program and adjudicated the requirements valid.[57] Again, the Court rejected any interpretation of the Act requiring *affirmative action* or a fundamental alteration of the program.[58] However, the Court added:

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49. *See id.* at 405.

50. *Id.* at 406 (appearing to ignore accommodation and requiring individuals to meet essential requirements without any adjustment). *See also* Gray, *supra* note 39, at 300-01.

51. *See Southeastern*, 442 U.S. at 408-12.

52. *See id.* at 411-12.

53. *See id.* at 406-07, 414.

54. *See id.* at 406-07.

55. *See id.* at 409-10. This is a finding that the individual is not otherwise qualified for the position.

56. *See id.* at 407.

57. *See id.* at 407-09.

58. *See id.* at 404. The Court received much criticism for the term "affirmative action" in this context. The Court subsequently noted the difference between "affirmative action and reasonable accommodation; the former is said to refer to a remedial policy for the victims of past discrimination, while the latter relates to the elimination of existing obstacles against the handicapped." Alexander v. Choate, 469 U.S. 287, 300 n.20 (1985). The *Alexander* Court, in further explaining "affirmative action," directed readers to the following: Dopico v. Goldschmidt, 687 F.2d 644, 652 (2d Cir. 1982) ("Use of the phrase 'affirmative action' in this context is unfortunate, making it difficult to talk about any kind of affirmative efforts without importing the special legal and social connotations of that term."); Note, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 55 N.Y.U.

> We do not suggest that the line between lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear. It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected . . . to qualify them [the handicapped] for some useful employment.[59]

Although the nursing program had set forth reasonable, essential requirements, the Court did not foreclose the possibility of discrimination when programs refuse to make accommodations.[60] The Court emphasized that its interpretation recognized a preference, demonstrated by Congress, to effectuate evenhanded treatment of qualified, handicapped individuals, rather than to mandate the surmounting of all disabilities.[61]

2. *Alexander v. Choate*

The next case before the Supreme Court was *Alexander v. Choate*.[62] The State of Tennessee reduced the number of annual inpatient hospital days covered by the state's Medicaid program,[63] and the plaintiffs filed a class action suit asserting disproportionate impact on the disabled in violation of section 504 of the Rehabilitation Act.[64]

In *Alexander*, the Court began by recognizing that the need to "give effect to the statutory objectives" and the need to keep the Act "manageable" were competing considerations that required balancing.[65] The *Alexander* Court ruled that the reduction in coverage did not distinguish the handicapped from the non-handicapped and also did not deny plaintiffs meaningful access to the state's Medicaid services.[66]

Additionally, and more importantly, the *Alexander* decision clarified *Southeastern's* statements, when the Court ruled that *Southeastern* did not eliminate the requirement of accommodation, only those instances of accommodation that required a *fundamental* change.[67] The Court stated, "It is clear from the context of [*Southeastern*] that the

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L. REV. 881, 885-86 (1980); Note, *Accommodating the Handicapped: Rehabilitating Section 504 After Southeastern*, 80 COLUM. L. REV. 171, 185-86 (1980).

59. *Southeastern*, 442 U.S. at 412.

60. *See id.* at 412-13. While announcing this policy, the Court provided no guidance or standard to be used. *See id.*

61. *See id.* at 410.

62. 469 U.S. 287 (1985) (dealing with disparate impact on handicapped due to changes in state Medicaid program).

63. *See id.* at 289.

64. *See id.* at 289-90.

65. *Id.* at 299.

66. *See id.* at 302. Essentially the Court ruled that the restriction was not facially discriminatory and, although the handicapped might be impacted, it was not impermissible for the State to mandate the restriction. *See id.* at 292-309.

67. *See id.* at 300.

term 'affirmative action' referred to those 'changes,' 'adjustments,' or 'modifications' to existing programs that would be 'substantial,' or that would constitute fundamental alteration[s] in the nature of a program, . . . rather than to those changes that would be *reasonable* accommodations."[68] The Court further elucidated that it was the duty of the implementing agency to identify and police those instances where a refusal to reasonably accommodate a handicapped individual is discriminatory.[69] Again, the Court emphasized that the Rehabilitation Act intended to provide evenhanded treatment of the handicapped; it did not guarantee equal results.[70] By clarifying *Southeastern, Alexander* reintroduced the necessity of reasonable accommodation to the Act and harmonized *Southeastern* with the competing interests espoused in *Alexander.*[71]

3. *School Board of Nassau County v. Arline*

In the final case of the trilogy, *School Board of Nassau County v. Arline*,[72] the Court broadened the definition of handicap, but it also restricted an individual's ability to meet the *otherwise qualified* requirement. Arline was a school teacher with a history of tuberculosis;[73] consequently, the school board terminated Arline's employment not citing her diminished capacity, but the *fear* associated with the contagion.[74]

Addressing the statutory language and the precedent of *Alexander*, the Court proceeded by reiterating that "only those individuals who are both [(1)] handicapped and [(2)] otherwise qualified are eligible for relief."[75] Over a strong dissent,[76] the Court ruled that contagious diseases are a handicap under the statute.[77] The opinion carefully articulates that distinguishing between discrimination based on *fear* of a contagion and discrimination based on the *limitations* arising from the disease is inconsistent with the purpose of the Act.[78] The majority stated, "Nothing in the legislative history of § 504 suggests that Congress intended such a result [allowing for discrimination based on

68. *Id.* at 301 n.20 (emphasis added) (citations omitted).
69. *See id.* at 300 (citing Southeastern Community College v. Davis, 442 U.S. 397, 413 (1979)).
70. *See id.* at 304.
71. *See supra* text accompanying note 64.
72. 480 U.S. 273 (1986).
73. *See id.* at 281.
74. *See id.* (citing Brief for Petitioners at 15-16, School Bd. of Nassau County v. Arline, 480 U.S. 273 (1986)).
75. *Id.* at 285.
76. *See id.* at 289 (Rehnquist, C.J., and Scalia, J., dissenting) (challenging the validity of expanding the definition of handicapped since entities forced into compliance were held so under a quasi-contractual basis and those entities could not knowingly have accepted the expanded definition as part of exchange for federal assistance).
77. *See id.* at 285-86.
78. *See id.* at 284.

fear]. That history demonstrates that Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual."[79] Finding Congressional intent sufficiently broad to include Arline, the Court repeatedly cites to the Act's history as the foundation for its decision.[80]

After finding Arline within the statutory definition of disabled, the Court moved to determine whether she was otherwise qualified. The Court reiterated the basic factor considered in conducting this inquiry, whether an individual "is able to meet all of a program's requirements in spite of his handicap."[81] In the employment context, an otherwise qualified person is one who can perform the *essential functions* of the job in question.[82] Arline was fully qualified to teach. The School Board, rather than exposing the students to the contagion, chose to prevent Arline from teaching. Stripped of her ability to interact and, therefore, teach, Arline could not perform the essential functions of the position. When a handicapped individual is unable to perform the essential functions of the job, then "the court must also consider whether any 'reasonable accommodation' by the employer would enable the handicapped person to perform those functions."[83] However, any accommodation that "either imposes 'undue financial and administrative burdens' on a grantee, or requires 'a fundamental alteration in the nature of [the] program'"[84] is unreasonable. In its inquiry, the Court evaluated, in light of the holding and medical findings, "whether the employer could *reasonably* accommodate the employee under the established standards for that inquiry."[85] With regard to a contagious disease, the Court found that deference should normally be given to the reasonable medical judgments of public health officials.[86] Regarding the reasonableness of accommodation, the Court implied these medical determinations would be conclusive, but not irrefutable.

In discussing whether Arline met the second element necessary for statutory protection, the *otherwise qualified* prong, the Court found that although Arline was handicapped, from the record it could not determine if she was *otherwise qualified*.[87] The Court found the record insufficient regarding the duration and extent of Arline's condition, and it did not address the probability of transmitting the disease

79. *Id.* at 282.

80. *See id.* at 282-83 & n.9.

81. *Id.* at 287 n.17 (quoting Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979)).

82. *See id. See also supra* notes 40-42 and accompanying text.

83. *Arline*, 480 U.S. at 287 n.17 (citation omitted).

84. *Id.* (citations omitted).

85. *Id.* at 288 (emphasis added).

86. *See id.* at 288. The Court did not address whether courts should also defer to the reasonable medical judgments of private physicians on whom the employer has relied. *See id.* at n.18.

87. *See id.* at 288-89.

or whether the School Board could reasonably accommodate Arline's condition.[88] This deficiency mandated the Court's remand for a determination of additional facts. Although unable to conduct an inquiry, the decision does provide guidance for subsequent judicial inquiries. The *Arline* Court instructed lower courts to conduct individualized findings, because "[s]uch an inquiry is essential if section 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks."[89] *Arline's* holding clearly extends *otherwise qualified* analysis to include the safety of others as an additional factor in a court's analysis.[90]

C. *Americans with Disabilities Act*

In an effort to expand the reach of protection for the handicapped,[91] Congress, using its nearly plenary power granted under the Commerce Clause,[92] enacted the ADA.[93] Enactment pursuant to the Commerce Clause allows regulation of private industry, as well as those entities presently regulated by section 504. The ADA claims to extend protection to approximately 43 million Americans[94] and clearly contemplates the protected class will grow as the American population ages.[95] The Act encompasses all employers with fifteen or more employees for each working day in twenty or more calendar weeks per year.[96] Congress made an additional distinction between the ADA and Rehabilitation Act by substituting the word *disabilities* for *handicaps* but intended no change in the meaning, definition, or

88. *See id.*

89. *Id.* at 287. On remand the trial court found "the probability that Arline would transmit tuberculosis to anyone was so extremely small as not to exist." Arline v. School Bd. of Nassau County, 692 F. Supp. 1286, 1292 (M.D. Fla. 1988).

90. *See Arline*, 480 U.S. at 287 n.16 (stating when an individual actually poses significant risk of communicating a disease, if reasonable accommodations will not eliminate the risk of transmission, then that individual is not *otherwise qualified*). This decision is interesting because its findings are only remotely dependant on Arline. Determination of Arline's disability is in reference to the impact (the fear) it had on others. *See id.* at 284-85. Also, whether Arline was otherwise qualified is determined in reference to others. *See id.* at 287 n.16.

91. Although legislation proscribing discrimination against the disabled had been enacted, studies and polls indicated that individuals with disabilities still experienced higher levels of unemployment and poverty. *See* H.R. REP. No. 101-485, pt. 2, at 32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 314.

92. *See* United States v. Lopez, 514 U.S. 549 (1995) (imposing the first judicial restraint on congressional commerce power in nearly 60 years).

93. *See* U.S. CONST. art. I, § 8, cl. 3 (granting Congress power to regulate interstate commerce).

94. Using 1990 census figures, this is roughly 2.5 times the population of Texas.

95. *See* 42 U.S.C. § 12101(1) (1994).

96. *See id.* § 12111(5)(A).

application.[97] One other small change is noted. The Act states a "covered entity shall [not] discriminate against a qualified individual."[98] The qualified individual is the equivalent of the Rehabilitation Act's *otherwise qualified* individual.[99]

The ADA is comprised of six titles, each focusing on a specific area of society, thereby attempting to afford greater protection to the disabled.[100] The Act also divides enforcement of the titles among various agencies. Title I[101] is targeted at reducing discrimination in the employment sector[102] and charges the EEOC with implementing regulations and enforcement.[103] Titles II[104] and III[105] prohibit discrimination against disabled individuals in the access to, and supply of, public services. Title II targets government agencies, and Title III encompasses non-governmental agencies.[106] Endeavoring to provide the disabled with greater access to existing telecommunications systems, Title IV was enacted.[107] Title V provides general application rules and specific afflictions or conditions that are not protected under the Act.[108] Homosexuals, transvestites, and bisexuals are expressly deemed not impaired under the act and therefore beyond the ambit of the statute's protection.[109] Individuals currently engaged in illegal use of drugs are also exempted from statutory protection.[110]

It is important to note that the ADA does not replace the Rehabilitation Act; those entities satisfying the jurisdictional elements of each are subject to both statutes.[111] The ADA is significantly analogous to the Rehabilitation Act; consequently, Congress mandates that statutory interpretation arising under the Rehabilitation Act should provide guidance for the ADA.[112] Congress also mandates that the ADA not be interpreted as providing lesser standards or requirements than

97. *See* 29 C.F.R. app. § 1630.1(a) (1996) (recognizing that individuals with disabilities were sensitive to the terminology used to describe them). *See* H.R. REP. No. 101-485, pt. 3, at 25 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 314. Analogizing to racial epithets, the nomenclature applied to these individuals is "overlaid with stereotypes, patronizing attitudes, and other emotional connotations." *Id.* at 333.

98. 42 U.S.C. § 12112(a) (1994).

99. *Compare* 42 U.S.C. § 12111(8) *with supra* notes 31-35 and accompanying text.

100. *See* 42 U.S.C. §§ 12101-12213.

101. *See id.* § 12111.

102. *See id.* §§ 12111-12117.

103. *See id.* § 12117.

104. *See id.* §§ 12131-12165.

105. *See id.* §§ 12181-12189.

106. *See id.* §§ 12182, 12184.

107. *See* 47 U.S.C. §§ 225, 611 (1994).

108. *See* 42 U.S.C. §§ 12201-12213.

109. *See id.* §§ 12208, 12211.

110. *See id.* § 12210.

111. *See id.* § 12201. As an example of a claim under both Acts see *Roth v. Lutheran General Hospital*, 57 F.3d 1446, 1454 (7th Cir. 1995).

112. *See* 42 U.S.C. § 12201 (stating that ADA is not to be construed as imposing lesser standards than those the Rehabilitation Act impose).

those of the Rehabilitation Act.[113] Thus, the concepts of *reasonable accommodation* and *essential functions* are adopted into the ADA.

D. Chandler *and* Coghlan

The following cases are intertwined in reasoning and judgments. In reaching their decisions, the courts often interchange or extrapolate from the precedents and enforcement of the other Act. These cases are at the foundation of many decisions that undermine the goals of the ADA and Rehabilitation Act. These cases, by measuring disabilities *post-mitigation*, adversely impact the scope and goal of providing protection for the disabled.

1. *Chandler v. City of Dallas*

In *Chandler v. City of Dallas*,[114] the city, motivated by safety concerns, instituted a program[115] mandating certain physical requirements for its employees whose job entailed driving on public roads.[116] The program automatically disqualified any employee from a position of primary driver if certain physical requirements were not met.[117] The plaintiffs, two city employees, filed a class action suit claiming, inter alia, violation of the Rehabilitation Act.[118] The complaint attacked several of the program's requirements, specifically, those mandating that drivers: "cannot have an established medical history of diabetes mellitus severe enough to require insulin for control; and [ ] must have 20/40 vision (corrected) and a field of vision of at least 70 degrees in the horizontal meridian in each eye."[119] One plaintiff, Maddox, had vision that was not correctable to the city's standards, and the second plaintiff, Chandler, was insulin-dependent.[120] At trial, judgment was granted to both plaintiffs,[121] but on appeal the decision was overturned.[122] The appellate court set forth standards to prove a prima facie case:

> [t]o qualify for relief under this statute, a plaintiff must prove that (1) he was an "individual with handicaps"; (2) he was "otherwise qualified"; (3) he worked for a "program or activity" that received federal financial assistance; and (4) he was adversely treated solely

113. *See id.*
114. 2 F.3d 1385 (5th Cir. 1993).
115. *See id.* at 1388 (patterning Administrative Directive 3-3 on safety regulations of the U.S. Dept. of Transportation).
116. *See id.* This was designated as a Primary Driver position.
117. *See id.*
118. *See id.* at 1389.
119. *Id.* at 1388.
120. *See id.* at 1388-89.
121. *See id.* at 1389.
122. *See id.* at 1397. The case was remanded to the trial court, and, once reinstated, it was overturned on a second appeal.

> because of his handicap. [And] [t]he burden of proof for each of these elements lies with the plaintiff.[123]

The Act defines a person with handicaps as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities."[124] But the Act does not define "impairment," "substantially limited," or "major life activities." Recognizing that the Rehabilitation Act did not fully define the term *person with handicaps*, the court consulted the Department of Health and Human Services' ("HHS") regulations and definitions, as the Supreme Court had in *Arline*.[125] These regulations define impairment as "any physiological disorder or condition, cosmetic disfiguration, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genitourinary; hemic and lymphatic; skin; and endocrine."[126] Building on the definition, the regulations define *major life activities* as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[127]

In dealing with Maddox's vision claim, the Fifth Circuit referenced its earlier decision in *Collier v. City of Dallas*.[128] In *Collier,* the court found that vision, that is correctable to 20/200, is simply not a handicap.[129] In applying the standard from *Collier*, coupled with Maddox's testimony that he felt unrestricted in the performance of his *major life activities*,[130] the court concluded that his vision, which was correctable

123. *Id.* at 1390 (citing Chiari v. City of League City, 920 F.2d 311, 315 (5th Cir. 1991) (footnote omitted); 29 U.S.C. § 794 (1988)).

124. 29 U.S.C. § 706(8)(B) (1988).

125. *See Chandler*, 2 F.3d at 1390.

126. *Id.* (quoting 45 C.F.R. § 84.3(j)(2)(i) (1992)).

127. *Id.* (quoting 45 C.F.R. § 84.3(j)(2)(ii)).

128. *See id.* (citing Collier v. City of Dallas, 798 F.2d 1410 (5th Cir. 1986) (unpublished).

129. *See id.*

130. *See Chandler v. City of Dallas*, 2 F.3d 1385, 1390 (5th Cir. 1993). Author's note: The sole purpose of these statutes is to provide a method for the disabled to better themselves and to reduce the stigmas associated with their conditions. This group has long battled their afflictions and the preconceived ideas attached to them. Emphasizing the desire and capabilities of the disabled to function in society is the purpose of the legislation. In fact, the legislative history is filled with testimony of the effects on individuals. Powerful and moving statements relating the effects of discrimination include: "Disability does not mean incompetence. The perception that persons with disabilities are dependant by nature is the result of discriminatory attitudes, not the result of disability." H.R. REP. No. 101-485, pt. 3, at 25 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 323. Other testimony explained:

> For far too long . . . disabled people have felt the pain of discrimination, of being held separate, at being looked at as different, as somehow being viewed as lessor . . . [the speaker testified to feeling] the discrimination, the isolation, the sense of helplessness and the sense of no ability to relate to other people because they have shut me out.

Id. at 323.

to 20/60, did not constitute a handicap.[131] Although the city established physical criteria for employment, the court simply denied statutory protection by arbitrarily defining the employee's vision as normal. Importantly, the *Chandler* court, following *Collier*, clearly considered the effects of the disability after a corrective measure.

Unlike the simple application of a predetermined measurement or the cursory analytical approach taken with Maddox's disability claim, the court undertook some analysis when addressing Chandler's diabetes claim. Again, using a post-correction measurement, the court found that Chandler could not establish that any of his *major life activities* were substantially limited, thereby placing him outside the statutory definition.[132]

Next, the court addressed the argument that insulin-dependent diabetes is a disability *per se*. Acknowledging lack of guidance from the Rehabilitation Act, court precedents, and HHS regulations, the court, at the urging of the plaintiffs, consulted EEOC regulations and its interpretive guide to the ADA.[133] These interpretive guidelines, when discussing the term *substantially limited*, state that a diabetic, dependent on insulin, is *substantially limited* because without such medication no major life activities can be performed.[134] The court agreed with the plaintiff and acknowledged the EEOC's determination that insulin-dependent diabetics are disabled *in fact,* but it questioned whether that determination, pursuant to the ADA, mandated a similar adoption under the Rehabilitation Act.[135] The court avoided ruling on this issue and instead dismissed Chandler's claim as failing under the *otherwise qualified* requirement of section 504, finding that the job had valid *essential functions* and no reasonable modification was available.[136] The city's *essential functions* were safety requirements that

Other testimony speaks of being robbed of dignity and self-respect. Swallowing insults on routine basis and attempting to incorporate into society. *See id.* "It is the elimination of dignity associated with being a human being that I am talking about." *Id.* The point is vividly driven home by Judith Heuman's testimony, when she stated, "In the past disability has been the cause of shame. This forced acceptance of second-class citizenship has stripped us as disabled people of pride and dignity . . . . This stigma scars for life." *Id.* at 324 (omission in original). With the long history of oppression and discrimination, it seems odd that a court would assume or expect such an individual to testify in court that he feels disabled or handicapped.

131. *See Chandler*, 2 F.3d. at 1390 (deciding no handicap is possible for 20/60 vision after a previous decision found that 20/200 vision is not a handicap). *See also Collier*, 798 F.2d at 1410.

132. *See Chandler,* 2 F.3d at 1390-91. Although dicta, based on *Collier's* previous post correction measurement of vision the *Chandler* court also measured Chandler's disability *after* mitigating measures were taken. *See id.*

133. *See id.* at 1391 (citing 29 C.F.R. pt. 1630 Appendix to part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act). The similar language and congressional mandate allow courts to interchange the precedent of the two statutes.

134. *See Chandler*, 2 F.3d at 1391 (citing 29 C.F.R. app. § 1630.2(j) (1996)).

135. *See id.*

136. *See id.* at 1389.

were modeled after Department of Transportation regulations.[137] The court found safety was an *essential function* for the city's drivers, thus without the availability of a *reasonable* modification, Chandler failed the *otherwise qualified* requirement. Although it appears *Chandler* passed the first statutory barrier—recognition of a disability, the court jumped to the second obstacle—*otherwise qualified*—and denied relief.[138] The appellate court ultimately ruled in favor of the City of Dallas on all claims.

2. *Coghlan*—ADA

In construing the ADA, a court faced with similar issues found the EEOC's apparent acceptance of diabetes as a disability *per se* contrary to the plain language of the statute.[139] In *Coghlan v. H.J. Heinz Co.*, an insulin-dependent diabetic was terminated from his job and refused employment at a subsidiary company.[140] The plaintiff based his claim on several anti-discrimination statutes,[141] including the ADA.

The court recognized that the ADA's purpose was to prohibit discrimination 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, and privileges of employment."[142] The court consulted the EEOC's interpretive guidelines,[143] as discussed in *Chandler*,[144] that suggested *insulin-dependent* diabetics are disabled *in fact*. The court appeared to acquiesce in the agency's definition of *substantially limited* but found the guidelines overly broad in postulating that all other requirements of the statute were met.[145]

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137. *See id.* at 1388.

138. *See id.* at 1395.

139. *See* Coghlan v. H.J. Heinz Co., 851 F. Supp. 808, 813 (N.D. Tex. 1994).

140. *See id.* at 809-10.

141. *See id.* at 815 (citing 29 U.S.C. §§ 621-634 (1994) (age discrimination)); TEX. REV. CIV. STAT. ANN. art. 5221k (Vernon 1993) (Texas Commission on Human Rights Act [TCHRA]).

142. *Coghlan*, 851 F. Supp. at 811 (citing 42 U.S.C. § 12112(a) (1994)).

143. *See id.* at 813 (citing 29 C.F.R. app. § 1630.2 (j) (1993)).

144. *See supra* notes 133-135 and accompanying text.

145. *See Coghlan*, 851 F. Supp. at 812. It goes unstated that this guideline does not address "qualified individual" or the other elements necessary in defining a disability. But a simple analysis reveals flaws in the court's logic. First, the court need not address "qualified" until a disability is established. *See supra* text accompanying note 123. So, the court should begin with defining disability—a physical or mental impairment substantially limiting a major life activity. *See supra* notes 124-127 and accompanying text.

The court concedes the accuracy of the substantially limited guideline; therefore, any additional arguments based on the *temporary* nature of a coma are not valid. Obviously, there is an impairment. Diabetes is a physical impairment affecting one's pancreas. The only remaining element is to determine if this substantially limiting

Beginning its evaluation of *Coghlan*, the court established the definition of disabled—an individual substantially limited in a major life activity.[146] The court focused on the term *limited* and determined that a properly medicated *functioning* diabetic could not be *limited* for purposes of the Act.[147] Essentially, a medicated and functioning diabetic is not limited; therefore, the court questioned when *limited* applied.[148] Stating that it was a necessary part of the statutory definition, the court chose to apply *limited* to the subsequent mitigated condition.[149] Finding the interpretive guidelines not binding, the court noted that regulations issued under, and in compliance with, properly delegated authority have the force of law, but recognized agency interpretations as simply reminders to the parties of their duties.[150] Dismissing the argument that the EEOC's interpretation was borne out in legislative history of the statute, the court refused to consult legislative history.[151] The court found the EEOC's guidelines in violation of the statutory language, and therefore found the EEOC's interpretation, creating a disability *per se*, invalid.[152] In a near about-face, the court then opined about the possibility of diabetes being a disability *per se*, reasoning it lacked sufficient medical knowledge to refute such a determination.[153] Finally, resting its decision on what it found to be unambiguous statutory language, the court rejected the EEOC's interpretation. Continuing its equivocal pattern and stressing a desire not to make a judgment regarding the plaintiff's affliction, the court dismissed the defendant's motion for summary judgment.[154]

II. ANALYSIS

While the *Chandler* and *Coghlan* decisions are not isolated in their holdings, they significantly threaten the statutes' purpose and goals of protecting disabled individuals from discrimination in the workplace. Congress, in outlining its findings and purposes, intended to establish clear, strong, and enforceable standards to eliminate discrimination

impairment affects a major life activity. It seems highly likely that a coma affects every major life activity.

146. *See* 42 U.S.C. § 12101(b)(1) (1994).

147. *See id.* at 813.

148. *See id.*

149. *See id.*

150. *See id.* at 812 (citing Jerri's Ceramic Arts Inc. v. Consumer Prod. Safety Comm'n, 874 F.2d 205, 207 (4th Cir. 1989)).

151. *See id.* (citing Guilzon v. Commissioner, 985 F.2d 819, 823-24 n.11 (5th Cir. 1993) (paraphrasing Justice Holmes's statement that courts do not inquire what Congress meant; they only ask what it said. The court restated the Fifth Circuit's policy of not deferring to extrinsic aids when statutory language is unambiguous)).

152. *See id.* at 813.

153. *See id.* at 813-14.

154. *See id.* at 814-15. The court found sufficient evidence to survive the motion, since the plaintiff's affliction, even with medication, affected his major life activities. *See id.* Also the court noted that sleeping and eating habits were still affected because of hypoglycemic reactions to the insulin. *See id.*

faced by individuals with disabilities.[155] The *Alexander* Court required following these statutory objectives.[156] *Chandler's* and *Coghlan's* decisions fail to achieve any meaningful balance between the dual objectives set forth in *Alexander*[157] and raise serious obstacles to individuals claiming redress. In order to give meaning to these statutes, it is necessary that courts adopt the EEOC's *pre-mitigation* measurement of a disability.

A. *Mitigated or Not Mitigated*

In determining whether an individual is disabled within the meanings of the statutes, courts must assess whether the impairment substantially limits any major life activity. However, recognition of whether a disability exists determines only *who* may bring a claim. The second barrier of *otherwise qualified* counterbalances the employee's interest with the employer's interest. The answer to the first question, whether disability exists, according to *Coghlan* and other courts, turns on whether the individual was receiving treatment or medication when the employer committed the wrongful conduct. This post-mitigation measurement may penalize a person for seeking treatment because his major life activities may no longer be substantially limited. Conversely, the statutes may protect a person who fails to seek treatment because his major life activities remain substantially limited.

Post-mitigation measurement is short-sighted. It fails to examine the delicate interaction and subtle balance between recognizing an individual with a disability and determining whether an individual is otherwise qualified. Post-mitigation measurement penalizes individuals who attempt to lessen the physical and social impact these impairments have on their lives.[158] In some cases, these mitigating steps may be required in order for the individual to sustain the eventual *otherwise qualified* challenge.

If mitigating steps are necessary to raise the individual to the *otherwise qualified* level, the resulting mitigation of the disability may also foreclose the possibility for redress. On the other hand, if no mitigation is taken, the employer may discriminate, because the individual is not otherwise qualified for the position. The practice of subsequently measuring an impairment's effect ultimately forces an individual to choose which statutory element they prefer to fail. Post-mitigation measurement is obviously inconsistent with the expressed Congressional intent of a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[159]

155. *See* 42 U.S.C. § 12101(b)(1), (2) (1994).
156. *See* Alexander v. Choate, 469 U.S. 287, 299 (1985).
157. *See supra* text accompanying note 64.
158. *See* discussion *infra* Part II.B.
159. 42 U.S.C. § 12101(b)(1) (1994).

B. *Post-Mitigation Penalizes*

Post-mitigation measurement, coupled with the *otherwise qualified* requirement, serves to drastically narrow the class of individuals protected by the statutes. The statutes are written to protect three categories of people: "those with (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[160] However, the disabled individual's desire to better his situation may actually prevent an individual from functioning in employment and from participating in programs or receiving protection. The threshold requirement in any claim is that the plaintiff establish a disability under one of these categories; then, and only then, can the plaintiff provide or meet the necessary functions of the job.[161] Thus, an individual must fit through a narrow stricture to invoke protection. In other words, in order to meet the threshold requirement of being disabled, the plaintiff must show that a major life activity is substantially impaired. Yet, simultaneously the claimant must prove that despite his impairment, he is able to perform the essential functions of the job in order to meet the *otherwise qualified* standard. To complicate matters further, where he falls on this sliding scale is obviously related to, and affected by, whether he is receiving treatment.

As an example, if an insulin-dependent diabetic applies for a position and is discriminated against, in order to seek redress under the statute, he must first prove he is disabled—substantially limited in a major life activity. If that individual does not take insulin, then he will lapse into a coma, and since a coma substantially limits all major life activities, this should establish a disability. But, the second element—essential functions—requires proving he is otherwise qualified to perform the job. To continue the example, an individual in a coma cannot perform any job functions and therefore is denied statutory protection, because he is not *otherwise qualified.*[162] Using a post-mitigation measurement creates a paradox, because, if the individual receives medication, he is able to meet the *otherwise qualified* requirement but is denied protection because he is no longer *substantially limited* by his disability.[163] Therefore, an insulin-dependent dia-

160. *See id.* § 12102(2)(A)-(C); 29 U.S.C. § 706(8)(B) (1988).

161. *See supra* text at Part I.B.4. *See also supra* text accompanying note 123.

162. *See, e.g.,* Rogers v. International Marine Terminals, Inc., 87 F.3d 755, 760 (5th Cir. 1996) (holding that attendance is an essential function); Myers v. Hose, 50 F.3d 278, 283 (4th Cir. 1995) (finding indefinite leave not a reasonable accommodation); Tyndall v. National Educ. Ctr., Inc., 31 F.3d 209, 213 (4th Cir. 1994) (holding that attendance is an essential function); Carr v. Reno, 23 F.3d 525, 530 (D.C. Cir. 1994) (holding that attendance is an essential function).

163. It might be argued that a plaintiff could meet the "record of impairment" standard. However, this argument is specious at best. Regardless, if there is no history of hospitalization, are courts going to require individuals to jeopardize their lives in or-

betic could rarely qualify for statutory protection under the first prong of the definition of disabled. A post-mitigated evaluation, combined with the *otherwise qualified* requirement, places disabled individuals in an untenable stricture, and the only definable standard created by measuring post-mitigation would be the exclusion of legal remedies to disabled individuals attempting to combat their conditions.

To qualify under the statute, the *Chandler* and *Coghlan* decisions require the plaintiff to show some additional limitation after a mitigating measure is taken.[164] While some individuals may prevail by showing additional limitations, this is too narrow an interpretation of the statute. Although the earlier hypothetical may appear remote or unlikely, comparable arguments and reasoning are found in *Schluter v. Industrial Coils, Inc.*[165] The *Schluter* court based its holding on *Coghlan* and similar decisions. Following *Coghlan*, the *Schluter* court states:

> [i]f an insulin-dependent diabetic can control her condition with the use of insulin or a near-sighted person can correct her vision with eyeglasses or contact lenses, she cannot argue that her life is substantially limited by her condition. To say that a person who needs insulin or eyeglasses is disabled in fact is to read out of the act's first definition of disability the requirement that it applies only to those persons who are "substantially limited" in major life activities.[166]

The court also ruled that insulin reactions, the fact question that saved Coghlan from summary judgment, are too remote and vague for a *substantially limited* finding.[167] The court added, that even if a diabetic was currently experiencing sleeping and eating difficulties arising from an insulin reaction, a plaintiff must demonstrate how these diffi-

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der to fit one of the definitions? *Cf.* Schluter v. Industrial Coils Inc., 928 F. Supp. 1437, 1444 (W.D. Wis. 1996) (failing to require plaintiff to demonstrate the effects of insulin deprivation after defendant requested proof of disability).

164. *See* Chandler v. City of Dallas, 2 F.3d 1385, 1390-91 (5th Cir. 1993); Coghlan v. H.J. Heinz, 851 F. Supp. 808, 813 (N.D. Tex. 1994).

165. 928 F. Supp. 1437 (W.D. Wis. 1996).

166. *Id.* at 1445. Following this logic, assume that *X* has extremely poor vision (i.e. sufficient to meet the disabled requirement) but still meets the "essential functions" requirement. *X* is disabled any time his glasses are removed. However, this is not true when *X* wears his glasses, because his vision is corrected to 20/20. This reasoning allows an individual to fluctuate between states of being disabled or not disabled during a single day. Litigation would require a determination of whether plaintiff was wearing lenses when the discrimination actually occurred. The court has created an inverse Superman. His only disguise, the glasses that completely conceal his true identity. While worn, he is strong, capable, functioning and completely invulnerable to discrimination. However, when removed, his true identity is revealed and he becomes susceptible to discrimination. Therefore, employers must recognize *X*'s vulnerability and only discriminate when he is without his glasses.

It is also a little ironic that if *X* is disabled but *not* capable of meeting the "otherwise qualified" element, then the outcome can be summarized as: if his vision is so poor that he cannot *see* you discriminate, then it is not illegal.

167. *See id.* at 1446.

culties are worse than for the average person.[168] Here, the *Schluter* court further restricted a plaintiff's ability to prove even a post-mitigation limitation.

According to *Schluter*, and following the reasoning of *Chandler* and *Coghlan*, when an individual takes steps to alleviate a disability in an attempt to meet the *otherwise qualified* element or simply improve his quality of life, he may also foreclose the possibility of statutory protection.[169] Continuing to follow this reasoning upsets the delicate balance between recognition of a disabled individual and an individual who is *otherwise qualified.*

C. *Deference to EEOC*

The *Coghlan* court followed the well-established principle that no deference is given to an agency's interpretation of a statute if that interpretation is contrary to the statute's plain language.[170] It should be noted that *Coghlan* dealt with interpretative guidelines rather than regulations. While it is accepted that these guidelines are given less weight than regulations,[171] it is implicit in the statement that interpretive guidelines are given *some* measure of deference. *Coghlan* gave none. Only *after* deciding to measure post-mitigation, the court addressed the EEOC's guidelines. The court incorrectly reasoned that the EEOC created a disability *per se.*[172] The guidelines, however, clearly state an intention not to create a "laundry list" of disabilities.[173] The agency lucidly stated that a diagnosis does not establish a disability; only the effects of the impairment on an individual can establish a disability.[174] By stating, "Some impairments may be more disabling for particular individuals than others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors,"[175] it is obvious the agency will make a determination on a case by case analysis. The diabetic example, cited by plaintiffs,[176]

168. *See id. See also* Daley v. Koch, 892 F.2d 212, 215 (2d Cir. 1989) (citing Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986)) (commonplace conditions are not impairments).

169. *See supra* Part II.A.

170. *See Coghlan*, 851 F. Supp. at 812. *See also* Cowart v. Nicklos Drilling Co., 505 U.S. 469, 474 (1992).

171. *See generally* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Jerri's Ceramic Arts, Inc. v. Consumer Prod. Safety Comm'n, 874 F.2d 205 (4th Cir. 1989) (acknowledging regulations pursuant to statutory authority have the force of law but interpretive guidelines do not require equal deference).

172. This is likely based on the dicta found in *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993).

173. *See* 29 C.F.R. app. § 1630.2(j) (1996).

174. *See id.*

175. *Id.*

176. *See Coghlan*, 851 F. Supp. at 812 ("A diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication.").

certainly requires the factfinder to establish that the diabetes is sufficiently advanced and life threatening in order to be *substantially limiting*. According to the guidelines, the diabetes must be sufficiently advanced that, absent medication, a coma is imminent.[177] What the court fails to recognize is that if all insulin-dependent diabetics are substantially limited in a major life activity, the outcome may be identical, but it is not the creation of a disability per se.[178] Based on the court's incorrect determination that the guideline is contrary to the statute, the question becomes how much deference *should* the court afford these guidelines.

The amount of deference given by a court to an agency's guidelines is controlled by factors that include internal consistency, contemporaneous passage of the guidelines and the statute, and the validity of the guidelines' reasoning.[179] The EEOC's guidelines are clearly in harmony with the statutory language and legislative intent. Here, these factors are present, including ample legislative history to support the validity of the agency's interpretation. Such history clearly establishes that disabilities are measured without regard to mitigating measures.[180] It states, "The impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation."[181]

In fact, several of the examples used by the EEOC are nearly identical to those found in the statute's legislative history.[182] As an example, the history states, "persons with impairments, such as . . . diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication."[183] The history indicates that the impairment must substantially limit a major life activity, but that determination is without regard to mitigating measures.[184] Accordingly, the EEOC's determination to measure without regard to mitigation does not read *limitation* out of the statute, as stated in *Coghlan*. The statute is worded appropriately, and the EEOC's interpretation

177. *See* 29 C.F.R. app. § 1630.2(j). This dependency is readily proven by medical testimony. Thus, mild or early stages might not be a disability.

178. It is doubtful that any court would find a paraplegic is not substantially limited in a major life activity. Strictly following *Coghlan's* reasoning, such is the creation of a disability *per se*.

179. *See* Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977); Shalala v. St. Paul-Ramsey Med. Ctr., 50 F.3d 522, 527 n.4 (8th Cir. 1995).

180. *See* H.R. REP. No. 101-485, pt. 2, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 334; H.R. REP. No. 101-485, pt. 3, at 25 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 447.

181. H.R. REP. No. 101-485, pt. 1, at 28, *reprinted in* 1990 U.S.C.C.A.N. 267, 451.

182. *See* H.R. REP. No. 101-485, pt. 2, at 52, *reprinted in* 1990 U.S.C.C.A.N. 267, 334.

183. *Id.*

184. *See supra* notes 180-83 and accompanying text.

traces Congress's intent. According to the EEOC, a court is still required to determine if impairment *substantially limits* a major life activity, before that impairment constitutes a *disability* under the statute.[185] The EEOC simply finds that the determination should be done before any mitigating measures are taken.[186]

D. *Statutory Construction—When Agency Interpretations Are Disregarded*

Like the situation in *Coghlan*, when no deference is afforded to an agency's interpretation, the court must interpret the statute. However, the Supreme Court directs that courts are not to interpret statutes when the legislature's intent is readily apparent from the statutory language.[187] Here, the *Coghlan* court simply declared the language of the statute unambiguous and, therefore, not subject to construction.[188] Under the pretext of following this established canon of construction,[189] the *Coghlan* court erred by its strict adherence to the canon and not consulting the available legislative history.[190] While recognized as the most settled cannon of construction, this cannot be taken literally because statutes are subject to interpretation and review through the entire appellate process.[191] The Supreme Court has also stated:

> while the rule [*ejusdem generis*] is a well-established and useful one, it is, *like other cannons of statutory construction, only an aid to the ascertainment of the true meaning of the statute. It is neither final nor exclusive.* To ascertain the meaning of the words of a statute, they may be submitted to the test of all appropriate cannons of statutory construction . . . .[192]

Although referencing another construction technique, the statement highlights the fact that the Supreme Court finds no single canon or interpretive aid as dispositive. Canons are simply tools, and courts

185. *See* 29 C.F.R. app. § 1630.2(j) (1996). *Compare* Roth v. Lutheran Gen. Hosp., 57 F.3d 1446, 1454 (7th Cir. 1995) (citing Hamm v. Runyon, 51 F.3d 721, 724 (7th Cir. 1995); 29 C.F.R. app. § 1630, §1630.2(h), (j)), *with* Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726 (5th Cir. 1995) (holding that impairment alone is not enough to be a disability—the impairment must substantially limit a major life activity).

186. *See* 29 C.F.R. app. § 1630.2(j) (1996).

187. *See* Caminetti v. United States, 242 U.S. 470, 485 (1917).

188. *See id.*

189. *See* 2A NORMAN J. SINGER, SUTHERLAND'S STATUTORY CONSTRUCTION § 46.01 at 81 (5th ed. 1992).

190. It may appear as if this author is simply choosing one interpretive technique over another; however, courts make such choices on a regular basis. *See* Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 806 (1983) (criticizing strict adherence to canons when there is a "competing canon" that would achieve an opposite result).

191. *See, e.g.*, United States v. Canadian Vinyl Indus., 555 F.2d 806 (C.C.P.A. 1977).

192. Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 89 (1934) (emphasis added).

should use all appropriate tools available. Clearly, if other statutory aids will assist in the interpretation of statutes, courts should never blindly foreclose use of those alternative aids. Several other canons and maxims of construction were available to, but neglected in, *Coghlan's* interpretation of the ADA and EEOC guidelines. Those aids would have guided the court to the appropriate determination of Coghlan's impairment and recognition of the validity of the EEOC's interpretive guidelines.

Furthermore, there are well-established exceptions to the rule of not interpreting statutory language when the meaning of a statute is patently clear.[193] One such exception is when a plaintiff can demonstrate in the legislative history that Congress intended a different meaning.[194] The Court of Appeals for the Ninth Circuit has ruled that even if a statute appears unambiguous on its face, courts may still consult legislative history if the plain meaning is "at variance with the policy of the statute as a whole."[195] Post-mitigation measurement is clearly an example of such an exception; moreover, the language of § 12101 clearly shows a strong intention of the legislature to provide broad coverage.[196] More specifically, the history demonstrates a Congressional intent of determining impairments without regard to mitigation.[197] Although Congress did not enumerate impairments, reasoning a comprehensive list was not possible, the legislative history does address the exact issues in question and supports the EEOC's interpretation.[198] The history specifically mentions several readily apparent conditions, including diabetes, that it reasoned were disabilities.[199] The history certainly demonstrates that the legislature was mindful of and expecting the measure of handicaps to occur without regard to the use of mitigating measures.[200]

Additionally, departure from literal construction is demanded when that construction would produce absurd or unjust results and would clearly be inconsistent with the purposes and policies of the act.[201] *Coghlan's* literal interpretation denies statutory protection to those individuals who have taken necessary measures to improve their condition and thereby increase their chances of employment. Here, the elimination or emasculation of a category of individuals who deserve protection produces an unjust and absurd result. All of these addi-

193. *See* SINGER, *supra* note 189, § 46.01 at 82.
194. *See* Anderson v. Black & Decker Inc., 597 F. Supp. 1298 (E.D. Ky. 1984).
195. Escobar Ruiz v. INS, 838 F.2d 1020, 1023 (9th Cir. 1988) (en banc).
196. *See* 42 U.S.C. § 12101(a)(1) (1994).
197. See *supra* notes 180-83 and accompanying text.
198. *See* H.R. REP. NO. 101-485, pt.2 at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 334.
199. *See id.*
200. See *supra* notes 180-83 and accompanying text.
201. *See* SINGER, *supra* note 189, § 45.12 at 61; *see generally* State of Alaska v. Babbit, 38 F.3d 1068 (9th Cir. 1994); Brown & Root v. Donovan, 747 F.2d 1029 (5th Cir. 1984).

tional canons and statutory construction aids were applicable to *Coghlan's* analysis but were not employed, leading to the court's erroneous construction.

Furthermore, it is not at all obvious that the statutory language is clear and unambiguous. This is the touchstone in determining that a statute is not to be interpreted. There are several factors used to determine whether statutory language is ambiguous. The *Coghlan* court itself cannot define *limits*, stating "Although 'limitation' may carry different shades of meaning, it cannot be meaningless . . . ."[202] By implying that *limits* had to mean something,[203] the court is apparently attempting to apply the maxim that every word be given effect.[204] The court's own inability to pinpoint a meaning arguably establishes that the statute's language did not clearly and unequivocally express congressional intent. Rather than interpreting the statutory language, the court incorrectly perceived the EEOC as trying to eliminate the word and failed to realize the EEOC is still giving the word full effect. The agency, following Congress's expressed intent in the history, ascertained the appropriate meaning of *limits*.

The fact that courts have interpreted the same statutes or regulations differently[205] is also evidence of ambiguity.[206] Although *Chandler* measured limitations after the use of mitigating measures, the court clearly found that the EEOC considers insulin-dependent diabetes a disability in and of itself under the ADA.[207] Other courts have also held that pre-mitigation is the proper time to measure a disability.[208] Obviously, the *Coghlan* court was incapable of defining *limits*, and *Chandler* interpreted the guidelines differently than *Coghlan*, thus demonstrating that the statutory language is not unambiguous. Therefore, the *Coghlan* court was not prohibited by any construction canon from addressing the legislative history.

Finally, the court should have followed the Supreme Court's direction in *Southeastern* when it consulted the legislative history to define a disability. The Court looked at the policy for the statute and determined that excluding a disease was inconsistent with Congressional intent. Just as a contagious disease does not remove an individual from the definition of disabled,[209] neither should a medically treated impairment preclude statutory protection.

202. Coghlan v. H.J. Heinz Co., 851 F. Supp. 808, 813 (N.D. Tex. 1994).

203. *See id.* at 812-13.

204. *See* SINGER, *supra* note 189, § 46.06, at 119.

205. *See* Bentivegna v. United States Dep't of Labor, 694 F.2d 619, 621 (9th Cir. 1982); Sarsycki v. UPS, 862 F. Supp. 336, 340 (W.D. Okla. 1994); Davis v. Meese, 692 F. Supp. 505, 517 (E.D. Penn. 1988), *aff'd*, 865 F.2d 592 (3d Cir. 1989) (per curiam).

206. *See* Marathon Le Tourneau Co. v. N.L.R.B., 414 F. Supp. 1074, 1080 (S.D. Miss. 1976).

207. *See* Chandler v. City of Dallas, 2 F.3d 1385, 1391 (5th Cir. 1993).

208. *See infra* Part II.E.

209. *See* School Bd. of Nassau County v. Arline, 480 U.S. 273, 258-86 (1986).

During its evaluation of HEW regulations, the Court repeated the rule strictly adhered to in *Coghlan* to honor the clear meaning of the statute. Importantly, the Court stated that meaning is revealed by its language, *purpose*, and *history*.[210] Clearly, *Southeastern* sanctions the use of legislative intent and history when interpreting these statutes.

E. *Supporting Case Law*

Statutory construction is only one method to support the proposition that impairments should be measured without regard to aids, medicines, or prosthetics. Ample case law exists contradicting the reasoning found in *Coghlan* and *Chandler*,[211] and provides alternative decisions and reasoning that support the EEOC's position. Rather than framing the issue as the EEOC's creation of a disability *per se*, these courts recognize the distinction and importance of a *pre-mitigation* evaluation. Although the outcome may be identical if all insulin-dependent diabetics are substantially limited, this outcome is precisely the one intended by Congress. The Courts of Appeal for the Third and Seventh Circuits have addressed when to measure an impairment.[212] In *Davis v. Meese*,[213] the court finds that "an insulin-dependent diabetic is clearly a 'handicapped person'" under the Rehabilitation Act.[214] In *Meese*, the nucleus of the action was the FBI's exclusion of all insulin-dependent diabetics as field agents.[215] The *Meese* court ruled that a plaintiff may not be excluded due to a handicap if he is *otherwise qualified*, and that determination requires an individual fact-specific inquiry.[216] The court found blanket exclusions establishing irrebuttable presumptions of disqualification violate the Rehabilitation Act and the Due Process clause, unless the exclusions are founded on narrowly tailored restrictions, based on *essential functions*.[217] The *Meese* court correctly evaluated the plaintiff's condition and then applied the *otherwise qualified* element.

The Seventh Circuit, in *Roth v. Lutheran General Hospital*,[218] clearly stated that courts are not to look at mitigating measures such as medicines or assistive prosthetics when determining impairment.[219] The court distinguished between simply using a device for conven-

210. Southeastern Community College v. Davis, 442 U.S. 397, 411 (1979) (quoting Teamsters v. Daniel, 439 U.S. 551, 566 n.20 (1970)).

211. *See Bentivegna*, 694 F.2d at 621; *Sarsycki*, 862 F. Supp. at 340; *Meese*, 692 F. Supp. at 517.

212. *See* Davis v. Meese, 865 F.2d 592 (3d Cir. 1989) (per curiam); Roth v. Lutheran Gen. Hosp., 57 F.3d 1446 (7th Cir. 1995).

213. 692 F. Supp. 505 (E.D. Penn. 1988), *aff'd*, 865 F.2d 592 (3d Cir. 1989) (per curiam).

214. *Id.* at 517.

215. *See id.* at 506-07.

216. *See id.* at 517.

217. *See id.* at 517-18.

218. 57 F.3d 1446 (7th Cir. 1995).

219. *See id.* at 1454 (citing 29 C.F.R. app. § 1630.2(h), (j) (1995) (amended 1996)).

ience or mitigation of a *non-substantially limiting* impairment and those that are substantially limiting.[220] The court recognized that all impairments do not sufficiently impact a major life activity, thereby rising to the level of a disability.[221] According to *Roth*, "[t]he key is the extent to which the impairment restricts a major life activity; the impairment must be a significant one."[222] The court correctly found that in order for statutory protection to attach, the impairment, and not the mitigating measure, determines a disability.[223] Accordingly, the proper determination for the court is to establish the disability regardless of the use of aids.

This reasoning is further supported by *Ferguson v. Western Carolina Regional Sewer Authority*,[224] in which the plaintiff claimed she was disabled, because she was required to take medication daily.[225] The *Ferguson* court found the EEOC guidelines state that simple diagnosis is insufficient to establish disability; it is the effect on the individual's major life activities that is dispositive.[226] Simply using an aid does not establish the disability. References to an aid have no bearing on determining a disability. The *Ferguson* decision properly recognizes the EEOC's position and its interpretation of the Act.

A disability must substantially limit a major life activity, in order to qualify under the first definition of disability. Obviously, a number of decisions conflict with the analysis undertaken in *Coghlan*. These decisions bolster the EEOC's decision that measuring a limitation should be without regard to mitigation or aids. Accordingly, mitigating measures serve no purpose in determination of a disability, and should only enter into an analysis regarding the availability of a reasonable accommodation and whether the individual is otherwise qualified.

CONCLUSION

Disabled individuals are an insular minority that has been subjected to a history of discrimination.[227] The ADA and Rehabilitation Act were enacted to protect and provide employment opportunities to these individuals. The courts' focus and use of a post-mitigated measurement denies protection to many disabled persons. The courts and the EEOC, by applying different standards, are producing inconsistent

220. *See Roth*, 57 F.3d at 1454.
221. *See id.*
222. *Id.*
223. *See id. See also* Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986); 29 C.F.R. § 1630.2 (j) (1997).
224. 914 F. Supp. 1297 (D. S. C. 1996).
225. *See id.* at 1299.
226. *See id.* at 1298-99.
227. *See* 42 U.S.C. § 12101(a)(7) (1994).

rules for individuals seeking relief.[228] The *otherwise qualified* language, which protects employers from *unreasonable* burdens, coupled with the court's post-mitigation measurement produces a Scylla and Charybdis dilemma.[229] On one side sits the *otherwise qualified* requirement, poised to dash a *disabled* individual's discrimination claim. On the other side, the *post-mitigation* measurement waits to capsize those attempting to navigate Scylla. In order to prevail, the disabled must carefully navigate this narrow stricture. However, the courts have simply made it untenable for the disabled to do so. If the disabled are to reach the shores of equality, courts must widen this stricture by measuring without regard to mitigation. Otherwise, the courts have created an unnavigable passage.

William Brent Shellhorse

228. This area has not remained static. Since the author's initial research, the Eighth and Tenth Circuits have addressed this issue. *See* Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997); Sutton v. United Air Lines, Inc., 130 F.3d 893 (10th Cir. 1997).

In February 1997, the Eighth Circuit issued *Doane*. In this case, a police officer sued the city claiming the city's refusal to rehire him was discrimination in violation of the ADA. *Doane*, 115 F.3d at 625. The plaintiff, Royce Doane, lost his vision in one eye due to glaucoma. *See id.* The city contended that Doane was not limited by his loss of vision. *See id.* at 627. The city alleged that Doane's brain had compensated for the loss of vision; therefore, he was not limited as required by the ADA. *See id.* The court did not accept the employer's assertion and measured the plaintiff's disability without regard to his adjustment. *See id.* The appellate court also refused to apply the Fifth Circuit's reasoning in *Chandler* and found the plaintiff disabled under the ADA's definition. *See id.* at 628.

Later in the year, the Tenth Circuit addressed a claim by sisters, pilots for a regional air carrier, who were denied employment by United Air Lines. *See* Sutton v. United Air Lines, Inc., 130 F.3d 893 (10th Cir. 1997). The defendant claimed the plaintiffs were not covered by the ADA, because their condition, near-sightedness, was a relatively common and minor condition, and any substantial limiting impairment should be measured post-mitigation. *See id.* at 896. The court chose to apply a pre-mitigation standard in evaluating the existence of a "physical or mental impairment." *Id.* at 899. However, the court adopted the post-mitigation standard in analyzing those limitations on a major life activity. *See id.* at 902. The court acknowledged the conflict between the EEOC's Interpretive Guidance and the statutory language of the ADA. *See id.* at 901. The court resolved the conflict in favor of United Air Lines, holding that failure to meet a single requirement set by an employer does not qualify an individual as substantially limited in a major life activity. *See id.* at 905-06. This case exemplifies the tension between interpretation of the regulations.

229. *See* ABRAHAM H. LASS ET AL., THE FACTS ON FILE DICTIONARY of CLASSICAL, BIBLICAL & LITERARY ALLUSIONS 44 (1987).