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Practical Effects of the Sutton Decision: Mitigation, Deference, and the EEOC

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PRACTICAL EFFECTS OF THE *SUTTON* DECISION: MITIGATION, DEFERENCE, AND THE EEOC

I. INTRODUCTION

In June of 1999, the United States Supreme Court handed down three decisions[1] concerning the Americans with Disabilities Act of 1990 (ADA).[2] The focus of these decisions was the relevance of mitigating measures in assessing whether or not an individual's disability falls within the coverage of the Act. Since its enactment in 1990, the ADA has been considered an enigma by the courts, the Equal Employment Opportunity Commission (EEOC), human resource profes-

1. Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2146 (1999) (holding that mitigating measures should be considered in assessing whether or not an individual is "disabled"); Murphy v. United Parcel Serv., Inc., 119 S. Ct. 2133, 2137 (1999) (holding that employee's medicinally controlled hypertension does not "substantially limit" a major life activity); Albertsons, Inc. v. Kirkingburg, 119 S. Ct. 2162, 2169 (1999) (holding that individuals with monocular vision are not per se "disabled" within the meaning of the ADA).

2. 42 U.S.C. §§ 12101–12213 (1994).

sionals, and employees.[3] The language of the Act is amorphous, which creates a need for interpretation by the administrative agencies[4] charged with implementing and enforcing the various provisions of the Act. The ADA lacks guidance on issues, such as who is actually protected under the Act, what is the meaning of disability, and most importantly, what role employers must play when accommodating workers.[5]

This Article will focus on the Court's decision in *Sutton v. United Air Lines, Inc.*,[6] which addressed mitigation of disabilities under the ADA and the accompanying regulations and Interpretive Guidance issued by the EEOC.[7] In a seven-to-two decision, the Court held "that the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment."[8] This holding directly conflicts with the EEOC's interpretation of the Act. The Commission's Interpretive Guidance provided that the determination of whether an individual is disabled (i.e., 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."[9] An impaired individual's choice to enhance his quality of life through the use of corrective devices should be irrelevant. However, *Sutton* makes the corrective measure *relevant* by explicitly making coverage under the ADA determinative on the

3. Peter J. Petesch, *Are the Newest ADA Guidelines "Reasonable?"* HR MAG., June 1999, at 54, 54.

4. *See* 42 U.S.C. § 12116 (authorizing the EEOC to issue regulations with respect to the employment provision in Title I of the ADA); *id.* § 12134 (authorizing the Attorney General to issue regulations with respect to the public services provisions of Title II, Part A); *id.* § 12149(a) (authorizing the Secretary of Transportation to issue regulations with respect to public transportation provisions of Subpart I of Part B of Subchapter II (other than section 12143)); *id* § 12164 (authorizing the Secretary of Transportation to issue regulations with respect to the public transportation provisions of Subpart II of Part B of Subchapter II); *id.* § 12186 (authorizing the Secretary of Transportation to issue regulations with respect to the public accommodations provisions of section 12182(b)(2)(B) and (C)); *see also Sutton*, 119 S. Ct. at 2144–45.

5. Petesch, *supra* note 3, at 54.

6. 119 S. Ct. 2139 (1999).

7. 29 C.F.R. §§ 1630.1–.16 (1998).

8. *See Sutton*, 119 S. Ct. at 2143.

9. 29 C.F.R. app. § 1630.2(j) (1999). When this Article refers to the CFR or its Appendix, it addresses the language available to the Court at the time of its decision. However it should be noted that the Appendix to the 2000 supplement of the CFR has since removed the mitigation language and is in accord with *Sutton*. 29 C.F.R. app. § 1630.2(j) (2000). "An individual is not substantially limited in a major life activity if the limitation, when viewed in light of the factors noted above, does not amount to a significant restriction when compared with the abilities of the average person." *Id.* The 2000 Appendix also includes the facts of *Sutton* as an example in clarifying the "substantially limited" language. The text reads, "an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working." *Id.*

degree of impact the mitigating measure has on the individual.[10] The focus of the employer has been shifted to the individual's disability, not the individual's ability. Thus, many employee advocates feel that *Sutton* will serve to perpetuate discrimination against disabled individuals—the very thing Congress attempted to remedy with the Act.[11]

Prior to *Sutton*, the circuits were split on the position of the EEOC regarding the mitigation issue. Specifically, the divergence centered on the position of the Interpretive Guidance that individuals employing corrective measures fell within the scope of the disability definition.[12] The Fourth, Sixth, and Tenth Circuits disregarded the interpretation of the EEOC and comported with the *Sutton* majority.[13] The First, Third, Seventh, Eighth, Ninth, and Eleventh Circuits have shown deference to the position of the EEOC by disregarding the use of corrective devices in determining an individual's coverage under the Act.[14] Additionally, the Fifth Circuit struck a balance between the divergent opinions.[15] *Washington* considered both the legislative history of the Act and the Interpretive Guidance of the EEOC, and determined that "serious impairments" and impairments comparable to those outlined in the guidance and legislative history should be considered in their uncorrected condition.[16] Conversely, persons employing "permanent" corrective measures, such as artificial implants and organ transplants, should be assessed in their corrected state.[17] Thus, the Fifth Circuit attempted to balance the mitigation issue based on the form of assistance used by the individual rather than the actual use itself.

Unfortunately, the Supreme Court never directly addressed the deference issue. The majority focused on the pure text of the Act, but

10. *See* Jonathan A. Segal, *The* Sutton *Ruling: More Than Meets the Eye*, HR MAG., Sept. 1999, at 48 ("[F]orcing employers to examine how employees manage their conditions, the Supreme Court increases the likelihood that they will become enmeshed in an ADA claim . . . .").

11. *See* Segal, *supra* note 10, at 46, 47 ("[S]ome employee advocates have said that the decision rips the heart out of the ADA.").

12. Susan E. Dallas, Sutton: *Use of Mitigating Measures to Determine Disability Under the ADA*, COLO. LAW. Mar. 1999, at 59, 60; Lauren J. McGarity, *Disabling Corrections and Correctable Disabilities: Why Side Effects Might Be the Saving Grace of Sutton*, 109 YALE L.J. 1161, 1167 (2000).

13. *See* Runnebaum v. NationsBank of Md., 123 F.3d 156 (4th Cir. 1997); Gilday v. Mecosta County, 124 F.3d 760 (6th Cir. 1997); Sutton v. United Air Lines, Inc., 130 F.3d 893 (10th Cir. 1997), *aff'd*, 119 S. Ct. 2139 (1999).

14. *See* Arnold v. United Parcel Serv., Inc., 136 F.3d 854 (1st Cir. 1998); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933 (3d Cir. 1997); Baert v. Euclid Beverage, Ltd., 149 F.3d 626 (7th Cir. 1998); 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).

15. Washington v. HCA Health Servs., Inc., 152 F.3d 464, 470 (5th Cir. 1998), *vacated by* 119 S. Ct. 2338, 2339 (1999) (mem.) (remanding case to appellate court for further consideration in light of the *Sutton* decision).

16. *Id.*

17. *Id.* at 471.

declined to examine the legislative history of the Act. The majority determined that the statute was clear on its face,[18] and therefore did not address the question of what degree of deference was due to the EEOC.[19] While opting not to rule directly on the degree of deference due to the EEOC, the majority was unambiguous in their assessment of the issue, referring to the agency's interpretation of the ADA as "impermissible."[20] This statement appears to foreshadow the answer to the question on degree of deference due to the EEOC. Consequently, Congress must pass new legislation explicitly delineating the full scope and purpose of the ADA since the Supreme Court effectively expunged the primary objective of the ADA and left uncertain the purview of the EEOC in interpreting the Act.

Part II of this Article will begin with a historical background focusing on the ADA, the Interpretive Guidance of the EEOC, legislative history, and a fact summary of *Sutton*. Part III will address the majority's reasoning and the dissent's rebuttal. Next, Part IV will concentrate on how *Sutton* affects employers and human resource professionals when assessing employees claiming coverage under the ADA. Finally, Part V of the Article will address the steps Congress must take to ensure that the focus in disability analysis remains on those individuals whom the ADA was designed to protect.

II. BACKGROUND

A. *Americans with Disabilities Act of 1990*

Congress stated in the ADA that their purpose was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[21] Congress found that persons with disabilities were "a discrete and insular minority" who have faced unequal treatment and have been "relegated to a position of political powerlessness in our society."[22] The ADA served to remedy this discrimination and prejudice by assuring "equality of opportunity, full

18. Justice O'Connor recognizes three points within the provisions of the ADA that lead to this conclusion: (1) Congress uses a "present indicative verb form"; (2) Congress incorporates the phrase "with respect to an individual" to mean that decisions on disability should be made on a case by case basis; and (3) Congress includes in the text of the statute the finding that 43 million people are disabled. Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2146–49 (1999). This Article will elaborate on these three points in subsequent sections. *See* discussion *infra* Parts III.A.1–3.

19. *See Sutton*, 119 S. Ct. at 2145–46.

20. *Id.* at 2146 ("We conclude . . . that the approach adopted by the agency guidelines—that persons are to be evaluated in their hypothetical uncorrected state—is an impermissible interpretation of the ADA.").

21. Americans with Disabilities Act of 1990 § 2(b)(1)–(2), 42 U.S.C. § 12101(b)(1)–(2) (1994).

22. *Id.* § 12101(a)(7).

participation, independent living, and economic self-sufficiency" for disabled persons.[23]

The ADA defined "disability" as "(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."[24] However, there are terms within this definition that need clarification. Subsection (A) does not define the integral terms "physical or mental impairment," "substantially limits," and "major life activity."[25] Additionally, Congress failed to define the "record of such impairment" and "regarded as" prongs of the disability definition.[26] Most importantly, the text of the ADA does not specifically address individuals who mitigate their impairment through the use of corrective measures, such as medication and prosthetic devices.

Because these terms were not defined within the ADA, courts, employers, and human resource professionals have turned to the "regulations promulgated by the EEOC for guidance as to the interpretation of these terms."[27] Herein lies the conflict; the lower courts are split as to the degree of deference due the mitigation rule promulgated by the EEOC.[28] The guidance offered by the majority in *Sutton* is clouded, further adding to the confusion. The statement that the interpretation of the ADA by the EEOC on the mitigation issue was "impermissible"[29] appears to be at odds with an earlier statement by the Court that determining the validity of the regulations of the EEOC is not necessary to decide the case.[30] The drafters of the ADA were remiss in failing to include a section addressing mitigation within the text of the Act as opposed to merely referring to the issue in the legislative history.

23. *Id.* § 12101(a)(8).

24. *Id.* § 12102(2). In order to establish a claim under the ADA, an individual must demonstrate that (1) he or she is disabled within the meaning of the ADA; (2) he or she is qualified, i.e., able to perform the essential functions of the job with or without reasonable accommodation; and (3) the employer discriminated against him or her under circumstances that give rise to an inference that the action was taken based on the employee's disability. Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997).

25. Dallas, *supra* note 11, at 59 (referencing 42 U.S.C. § 12102(2)).

26. Section 12102(2)(B) was not discussed by Justice O'Connor in the *Sutton* and *Murphy* opinions nor in the *Albertsons* opinion by Justice Stevens. The EEOC has defined (B) as meaning "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) (1999).

27. Dallas, *supra* note 11, at 59.

28. *See supra* notes 12–14.

29. *See* Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2146 (1999).

30. *Id.* at 2145.

B. *The EEOC's Interpretive Guidance of Title I of the ADA*

Congress granted the EEOC the authority to "issue regulations" and "carry out" Title I of the ADA in section 12116 of the Act.[31] In section 1630.2 of its regulations, the EEOC reiterated the definitions set forth in the ADA and defined the key terms left out of the ADA's catalog of definitions. The commission interprets that:

> [p]hysical or mental impairment means:
>
> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neuro-logical, 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.[32]

Under the Interpretive Guidance, "[m]ajor [l]ife [a]ctivities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[33] The EEOC defined "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.[34]

Furthermore, the EEOC enumerated the factors that should be considered in determining whether an individual is substantially limited in a major life activity. The factors to be considered are: "(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment."[35]

Since the ADA was silent on the issue of mitigation, the EEOC provided its own guideline for employers to follow. In determining whether a physical or mental impairment substantially limited a major life activity, the Interpretive Guidance stated that such determination must be made "on a case by case basis, without regard to mitigating

31. Americans with Disabilities Act of 1990 § 106, 42 U.S.C. § 12116 (1994). Title I of the ADA encompasses §§ 12111–12117 of the employment subchapter.

32. 29 C.F.R § 1630.2(h) (1999).

33. *Id.* § 1630.2(i).

34. *Id.* § 1630.2(j)(1).

35. *Id.* § 1630(j)(2).

measures such as medicines or assistive or prosthetic devices."[36] This EEOC directive on mitigation comports with the legislative history of the ADA.

C. *Legislative History*

While not explicitly incorporating the words "mitigation" or "amelioration" into the text of the Act, Congress did address the mitigation issue in Committee Reports of both the House and the Senate. "The Committee Reports on the bill that became the ADA make it abundantly clear that Congress intended the ADA to cover individuals who could perform all of their major life activities only with the help of ameliorative measures."[37] In addressing the mitigation issue, The House Education and Labor Committee Report explained:

> Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.[38]

The House Judiciary Committee Report used similar phrasing to explain the first prong of the disability definition: "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."[39] Similar to the House Reports, the Senate Labor and Human Resources Committee Report also addressed the mitigation issue. The Report stated that "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids."[40] However, it has been suggested[41] that an inconsistency appears when the Report further described the purpose of the disability definition's third prong:[42]

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36. Dallas, *supra* note 11, at 59 (quoting 29 C.F.R. § 1630.2(j) (1999)) (internal quotations omitted).

37. Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2145 (1999) (Stevens, J., dissenting).

38. H.R. REP. No. 101-485(II), at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 441, 451.

39. H.R. REP. No. 101-485(III), at 28–29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 451.

40. S. REP. No. 101-116, at 23 (1989).

41. Washington v. HCA Health Servs., Inc., 152 F.3d 464, 468 (5th Cir. 1998), *vacated*, 119 S. Ct. 2388, 2389 (1999) (remanding case to appellate court for further consideration in light of the *Sutton* case).

42. Americans with Disabilities Act of 1990 § 3(2), 42 U.S.C. § 12102(2)(c) (1994).

> Another important goal of the third prong of the [disability] definition is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified. Such denials are the result of negative attitudes and misinformation.[43]

The inference that the definitions are inconsistent may be criticized on two separate points. First, while it does seem that the phrases "under control" and "not currently limit major life activities" suggest that impaired individuals be assessed in their corrected state, that interpretation did not take into account that each prong of the definition was separate and distinct. This statement merely described one of the goals of the definition's third prong and did not definitively state that individuals who have taken ameliorative measures be assessed in a corrected state. As stated in an amicus curiae brief of Senators Harkin and Kennedy, Representatives Hoyer and Owens, and former Senator Dole:

> The "regarded as" prong reflects the "civil rights" approach to disability discrimination, recognizing that problems faced by people with disabilities are often not inherent to the medical condition itself, but are rather the product of ignorance and prejudice.
>
> . . . .
>
> The entire purpose of the third prong is to provide a vehicle for examining exclusionary practices and to provide recognition that these exclusionary practices constitute substantial limitations in the lives of people with a wide variety of medical conditions.[44]

Historically, epileptics were stigmatized as people to be feared and were often ostracized by society.[45] Therefore, to combat these negative stereotypes and perceptions, Congress "provide[d] a clear and

43. S. REP. No. 101-116, at 24 (1989).

44. Brief of Amici Curiae Senators Harkin and Kennedy, et al. at 12–13, Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999) (No. 97-1943), 1999 WL 86500 (footnotes omitted) [hereinafter *Senators Amicus Brief*].

45. *See* Katherine Kam, *History of Epilepsy*, *at* http://www.epilepsy.com/tools/health_library/basics/history_of.html (last updated May, 2000). The ancient Greeks "believed that a deity or demon seized a person and caused the [epileptic's] illness." *Id.* "From the Middle Ages into the Renaissance, people who had epileptic seizures were sometimes accused of being bewitched or possessed by demons." *Id.* During the 19th century, epileptics were shunned and sequestered in insane asylums. *Id.* "Even as recently as 50 years ago, much of the public still regarded those with epilepsy to be 'mentally imbalanced, dull, or frankly mentally defective, liable to progressive mental deterioration, awkward to live with, antisocial or potentially criminal, incurable . . . unemployable, and persons who should be sequestered in institutions . . . .'" *Id.* (quoting RICHARD LECHTENBERG, M.D., EPILEPSY AND THE FAMILY (1999)).

comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[46]

Second, when the bill was considered in the House of Representatives, the Committees reiterated the Senate's basic discernment of the coverage of the Act, with one minor modification: They explained that "correctable" or "controllable" impairments were covered in the first definitional prong as well.[47] The Senate's version of the bill was then amended to include "much of the text of the House Bill, indicating that the House's understanding of the ADA controlled the bill that was passed."[48] Thus, the language of the Senate with respect to the third prong is not controlling when assessing "correctable" or "controllable" disabilities because they are covered under the first prong.

Although Congress did not catalog specific conditions or diseases constituting a physical or mental impairment in the Act,[49] both the Senate and the House made an effort to distinguish trivial impairments in their Committee Reports addressing the mitigation issue. The House Report stated that "person[s] with minor, trivial impairments, such as a simple infected finger, are not impaired in a major life activity."[50] This finding indicated that temporary injuries would not fall within the protection of the Act, but it did not indicate that permanent, yet seemingly commonplace, impairments, such as myopia, would fall outside the protection of the Act.

The Committee on Education and Labor also addressed the second prong of the disability definition—"an individual who has a record of such impairment"—in the House Report. This prong of the definition included "an individual who has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities."[51] The Committee further stated that "[t]his provision is included in the definition in part to protect individuals who have recovered from a physical or mental impairment which previously substantially limited them in a major life activity."[52] The Committee cited examples of those who would fall under the "history of" prong as persons with histories of mental or emotional illness, heart disease, or cancer.[53] The example under the second grouping—those misclassified—included persons misclassified as

46. Americans with Disabilities Act of 1990 § 2(b)(1), 42 U.S.C. § 12101(b)(1) (1994).

47. *See Sutton*, 119 S. Ct. at 2155 n.2 (Stevens, J., dissenting) ("Much of the structure of the House Reports is borrowed from the Senate Report; thus it appears that the House Committees consciously decided to move the discussion of mitigating measures.").

48. Washington v. HCA Health Servs., Inc., 152 F.3d 464, 468 (5th Cir. 1998).

49. H.R. REP. No. 101-485 (III), at 28 (1990), *reprinted in* U.S.C.C.A.N. 445, 451.

50. H.R. REP. No. 101-485 (II), at 52 (1990), *reprinted in* U.S.C.C.A.N. 303, 334.

51. *Id., reprinted in* 1990 U.S.C.C.A.N. 303, 334.

52. *Id., reprinted in* 1990 U.S.C.C.A.N. 303, 334.

53. *Id., reprinted in* 1990 U.S.C.C.A.N. 303, 334–35.

mentally retarded.[54] While the "history of" prong did not receive a comprehensive analysis by the majority, this prong clearly indicated that coverage by the ADA should be construed broadly in order to comport with the remedial purpose of the Act.

D. *The* Sutton *Case*

The petitioners were twin sisters, both of whom suffered from severe myopia.[55] Their uncorrected "visual acuity [was] 20/200 or worse in [the] right eye and 20/400 or worse in [the] left eye, but '[w]ith the use of corrective lenses, each . . . [had] vision that [was] 20/20 or better.'"[56] Without corrective measures such as eyeglasses or contacts, petitioners could not see well enough to perform everyday activities such as driving, shopping, and watching television.[57] However, by utilizing corrective measures they were able to function as if their vision was not impaired.[58]

In 1992, the petitioners applied to respondent United Air Lines (United) for employment as commercial airline pilots. Petitioners met all requirements for the positions except for respondent's minimum uncorrected vision requirement of 20/100 or better. Because each sister had poor uncorrected vision, "both interviews were terminated, and neither was offered a pilot position."[59]

The sisters filed a disability discrimination charge under the ADA and received a right to sue letter from the EEOC. Their complaint alleged that United "discriminated against them 'on the basis of their disability, [severe myopia, or that United] regarded them as having a disability' in violation of the ADA."[60]

The complaint was dismissed by the District Court for failure to state a claim for which relief could be granted. "Because petitioners could fully correct their visual impairments, the Court held that they were not actually substantially limited in any major life activity and

54. *Id., reprinted in* 1990 U.S.C.C.A.N. 303, 335. This second prong of the disability definition was not addressed in *Sutton*, *Murphy* or *Albertsons*. *See* cases cited *supra* note 1. This prong should protect individuals in the employment setting who, for example, are either in remission or are recovering from a bout with cancer. This individual may face discrimination from an employer based on economic factors. The employer is focused on what happens if the cancer returns or has invaded another portion of the body. If this were to come to fruition, the employer would be faced with having to pay for the medical leave as well as having to pay another employee to take his or her position. Thus employers may be reluctant to hire individuals who have cancer or other debilitating diseases in their medical history.

55. Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2143 (1999). Myopia is a "condition of the eye in which parallel rays are focused in front of the retina, objects being seen distinctly only when near to the eye; nearsightedness." WEBSTER'S UNIVERSAL COLLEGE DICTIONARY 529 (Gramercy Books 1997).

56. *Sutton*, 119 S. Ct. at Appellate Appendix 23 (alteration in original).

57. *See id.*

58. *See id.*

59. *Id.*

60. *Id.* (quoting Appellate Appendix 26).

thus had not stated a claim that they were disabled within the meaning of the ADA."[61] "The Court also determined that petitioners had not made allegations sufficient to support their claim that they were 'regarded' by the respondent as having an impairment that substantially limits a major life activity."[62] The statute indicated that an employee was regarded as handicapped in his or her ability to work, only when the impairment "foreclose[d] generally the type of employment involved."[63] Because the petitioners had alleged only that United regarded them as failing to meet the requirements of one specific position, global airline pilot, the court reasoned that they were not "substantially limited in the major life activity of working."[64]

The District Court's decision was affirmed by the Court of Appeals for the Tenth Circuit.[65] At the time of the decision, the circuit courts were split on the mitigation issue.[66] Certiorari was granted to answer the question whether disabilities should have been determined with or without reference to mitigating measures.[67] In a seven to two decision, the Court concluded that the plain meaning of the statute indicated that mitigating factors should be taken into account when addressing whether an individual is disabled under the ADA.[68]

III. THE REASONING AND ANALYSIS OF THE *SUTTON* DECISION

A. *Justice O'Connor's Majority Opinion*

Although the Interpretive Guidance issued by the EEOC and the legislative history of the ADA clearly state that corrective measures should not be the determinative factor in assessing whether someone is disabled within the scope of the Act, the majority in *Sutton* declined to show deference to either position. The Court incorporated three main points in its analysis to illustrate the position that the plain meaning of the statute mandates that impairments should be assessed in their mitigated state.[69] The three main points were: (1) the verb tense utilized by the drafters of the Act; (2) the individual inquiry mandate; and (3) the legislative findings employed to formulate the

61. *Id.* at 2144.
62. *Id.*
63. *Id.* (citing Sutton v. United Airlines, Inc., No. CIV.A.96-S-121, 1996 WL 588917, at *5 (D. Colo. Aug. 28, 1996)); *see also* 29 C.F.R. § 1630.2(j)(3)(i) ("The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.").
64. *Sutton,* 119 S. Ct. at 2144.
65. *Id.*
66. *See supra* notes 12–14 and accompanying text.
67. *Sutton,* 119 S. Ct. at 2146.
68. *Id.* at 2143.
69. *See Sutton,* 119 S. Ct. at 2146 ("We conclude that respondent is correct that the approach adopted by the agency guidelines—that persons are to be evaluated in their hypothetical, uncorrected state—is an *impermissible interpretation* of the ADA.") (emphasis added).

number of impaired individuals in the United States.[70] The majority focused on the "Act as a whole" and concluded:

> [I]t is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is "substantially limited" in a major life activity and thus "disabled" under the Act.[71]

Furthermore, the majority noted that the structure of the Act did not give an administrative agency the authority to define or clarify any of the terms used by the drafters of the ADA, including "disability."[72]

The majority reasoned that because the text of the statute was unambiguous, Congress was not silent on the issue of mitigation.[73] The Court indicated that the analysis of the issue need not go any further—there was no need to address the degree of deference due to the Interpretive Guidance of the EEOC nor the legislative history of the Act.[74] Consequently, this has left many questions unanswered for employers as they attempt to sift through the ADA and EEOC regulations.

1. The Present Indicative Verb Form

The majority utilized a textualist approach in examining the first prong of the disability definition. The majority cited the verb tense as indicative of Congress's intent that disabilities be assessed in their uncorrected state.[75] The opinion stated, "Because the phrase 'substantially limits' appears in the Act in the present indicative verb form, we think the language is properly read as requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability."[76] The word "hypothetically" is key. The majority stressed that "[a] 'disability' exists only where an impairment 'substantially limits' a major life activity, not where it 'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken."[77] If an individual's physical or mental impairment was corrected by medication or other measures, that individual "[would] not have an impairment that *presently* 'substantially limits' a

70. *Id.* at 2146–49.
71. *Id.*
72. *Id.* at 2145; *see also* 42 U.S.C. § 12116 (1994) (The EEOC "shall issue regulations in an accessible format to carry out this subchapter.").
73. *See infra* notes 83–85 and accompanying text.
74. *Sutton*, 119 S. Ct. at 2146.
75. *See id.*
76. *Id.*
77. *Id.*

major life activity."[78] Therefore, the "disability" must presently exist in order for the impairment to fall within the scope of the Act.[79]

While the Act was structured in present indicative form, this interpretation did not consider that the words "mitigation," "amelioration," or "corrective measures" did not appear within the text of the Act. The first question that should be assessed by a court is whether Congress has directly spoken to the precise question at issue.[80] At the very least, the Act should be construed as ambiguous. It is questionable whether verb tense is indicative of Congress "directly speaking" to a precise issue. If it were determined that the language of the Act was at least ambiguous, a court could not substitute its own construction for that of a reasonable interpretation of an administrative agency.[81] However, the majority concluded that the interpretation by the EEOC was contrary to the plain language of the statute, and as stated previously by the Court, "[N]o deference is due to agency interpretations at odds with the plain language of the statute itself."[82] This author disagrees with the premise of the majority that the verb tense was indicative of Congress's intent that mitigating measures be considered when determining whether an individual would be considered disabled under the ADA.

The "presently impairs" requirement might be in conflict with the second prong of the disability definition, which emphasized that a person with a record of impairment was protected under the Act.[83] While there was no clarification of the meaning of this prong within the statute, a definition might be formulated based on the legislative history of the Act.[84] In fact, the EEOC implemented the legislative history regarding this prong in devising their Interpretive Guidance.[85] This prong has been defined to mean that individuals who have a history of impairment would be covered under the Act.[86] If an individual

78. *Id.* at 2146–47 (emphasis added).

79. *See id.* at 2147. It should be noted that the majority does recognize that the individual still has an impairment even if they have taken steps to mitigate; however, "if the impairment is corrected it does not 'substantially limi[t]' a major life activity." *Id.* (alteration in original).

80. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

81. *See id.*

82. Pub. Employees Ret. Sys. v. Betts, 492 U.S. 158, 171 (1989).

83. *See* Americans with Disabilities Act of 1990 § 3(2), 42 U.S.C. § 12101(2)(B) (1994).

84. *See supra* notes 37, 38, 42 and accompanying text.

85. *Compare* 29 C.F.R. § 1630.2(k) (1998) (defining the disability definition's second prong as meaning "has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities"), *with* H.R. REP. NO. 101-485(II), at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334 (including in the disability definition's second prong "an individual who has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities").

86. *See* 29 C.F.R. § 1630.2(k); H.R. REP. NO. 101-485(II).

was in remission or on medication that corrected the impairment, the individual might be perceived as being "cured" and thus outside of prong (A)—the "substantially limits" prong—however, this would not preclude him or her from bringing a claim under (C)—the "regarded as" prong.[87] *Sutton* did not address whether an individual would be precluded under (B)—the "record of" prong. Since the majority did not address prong (B), this Article will not focus on the scope or applicability of its coverage.[88]

2. The Individualized Inquiry Mandate

The disability definition mandated that an impairment be assessed "with respect to an individual" and be determined based on whether an impairment substantially limited the "major life activities of such individual."[89] "Thus, whether a person [had] a disability under the ADA [was] an individualized inquiry."[90]

The majority reasoned that the directive of the EEOC that persons be evaluated in their unmitigated state directly countered the individualized inquiry mandated by the ADA.[91] The majority determined that "[t]he agency approach would often require courts and employers to speculate about a person's condition and would, in many cases, force them to make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition."[92] Justice O'Connor utilized diabetes to illustrate her point by focusing on the degree of the impairment.[93] If an individual's daily activities were not impaired due to diabetes, then he or she should not be considered disabled simply because they were diabetic.[94] Thus, in order to comport with the spirit of the ADA, the majority found that persons should not be treated as members of a group of people with similar impairments, but rather each person's impairment should be assessed on an individualized basis.[95]

However, the majority's position was not different than that of the EEOC on the individualized inquiry mandate issue. The long-standing position of the EEOC was that the determination of whether a

87. Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2149 (1999).

88. While the majority did not address prong (B), Justice Stevens did address the implications of the "record of" prong in his dissent. He writes, "Subsection (B) of the Act's definition, however, plainly covers a person who previously had a serious hearing impairment that has since been completely cured." *Id.* at 2154 (Stevens, J., dissenting) (citing Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 281 (1987)).

89. 42 U.S.C. § 12102(2)(A) (1994).

90. *Sutton*, 119 S. Ct. at 2147 (citing Bragdon v. Abbott, 524 U.S. 624 (1998); 29 C.F.R. app. § 1630.2(j) (1998)).

91. *Id.*

92. *Id.*

93. *Id.*

94. *See id.*

95. *See id.*

person was disabled under the ADA should be made on a case by case basis.[96] The regulation appendix stated, "The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual."[97] The appendix also noted that "[s]ome impairments may be disabling for particular individuals but not for 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."[98] Furthermore, human resource professionals and employers already recognized that the position of the EEOC required case-by-case assessment of disabilities.[99]

The majority also noted that the Interpretive Guidance approach might not allow courts and employers to consider "any negative side effects suffered by an individual resulting from the use of mitigating measures, even when those side effects are very severe."[100] The Society for Human Resources Management (SHRM) addressed this point in its amicus curiae brief.[101] SHRM pointed out that the EEOC contradicted itself by incorporating policies that state side effects from corrective medications should be considered, but the overall "'corrective effects of [the] medication[ ]' should not be considered in deciding if an impairment . . . substantially limits a major life activity."[102] In its March 1999 Policy Guidance the EEOC explained that "[t]he side effects caused by the medication that an employee must take because of the disability are limitations resulting from the disability."[103] The fact that a person could take corrective measures with regard to his or her impairment should not mean that the impairment no longer exists. This would be true whether the ameliorative measures produced negative side effects. Therefore, the position of the EEOC was that the medication's negative side effects were an extension of the disability and not a separate issue. The EEOC was not trying to "have it both ways"[104] as SHRM would suggest; the EEOC merely attempted to

96. *See* Segal, *supra* note 10, at 47.

97. 29 C.F.R. app. § 1630.2(j) (1998).

98. *Id.*

99. *See generally* Segal, *supra* note 10, at 47 (noting the EEOC's long-standing position).

100. *Sutton*, 119 S. Ct. at 2147 (citing numerous medical treatises).

101. Brief of Amicus Curiae for Society for Human Resources Management at 12–13, Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999) (No. 97-1943), 1999 WL 160319 [hereinafter SHRM Amicus Brief].

102. *Id.* at 13.

103. U.S. Equal Employment Opportunity Comm'n, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, (question 38), *at* http://www.eeoc.gov/docs/accommodation.html (last visited Nov. 6, 1999).

104. SHRM Amicus Brief, *supra* note 93, at 13.

afford coverage to those individuals whom the Act was designed to protect.

3. The Congressional Finding of 43 Million Disabled Americans

Finally, the majority concluded that Congress's finding that "some [43 million] Americans have one or more physical or mental disabilities" was indicative of Congress's intent that mitigating measures *should be* considered when determining whether an individual was disabled.[105] The majority found that "[t]his figure is inconsistent with the definition of disability pressed by petitioners" and the EEOC.[106] The majority viewed the 43 million figure as an indication that the scope of the Act was limited, but the language in the findings section might indicate otherwise. While Congress found that "43 million Americans have one or more physical or mental disabilities," the second half of the sentence stated that "this number is increasing as the population as a whole is growing older."[107] Congress did not intend this figure to be a final enumeration of disabled Americans, but merely a starting point in assessing their plight.

Initially, "versions of the bill introduced in 1988 quoted a figure of 36 million . . . ."[108] This figure was derived from the National Council on the Handicapped's conclusion that this was "the most commonly quoted estimate."[109] "The Council's report discusse[d] the variations in estimates and the difficulty in arriving at a single, reliable overall number of individuals with disabilities."[110] In his article analyzing the ADA, Robert Burgdorf noted that "[t]he 43 million figure was not presented by its source as a number of persons with disabilities, but rather as a figure representing the number of persons with impairments or chronic conditions" and found that it was "nonetheless a useful, rough estimate."[111] The operative words were "rough estimate." Certainly Congress did not intend to limit the scope of the ADA based on a "rough estimate" of the number of individuals with physical or mental impairments.

The majority discussed the source for Congress's final figure and examined the shift from the 36 million figure to the 43 million fig-

105. *Sutton*, 119 S. Ct. at 2147 (quoting American with Disabilities Act of 1990, § 2(b)(1)–(2), 42 U.S.C. § 12101(a)(1) (1994)).

106. *See id.*

107. 42 U.S.C. § 12101(a)(1).

108. Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 434 n.117 (1991). "Burgdorf . . . drafted the original Americans with Disabilities Act bill," which was introduced to Congress in 1988. *Id.* at 413, n.*.

109. *Id.* at 434 n.117 (citing NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE, at 3 (1986)).

110. *Id.*

111. *Id.*

ure.[112] The Court first analyzed the National Council on Disability's approach at examining the issue. The Council found that the number of disabled Americans ranged from 160 million under a "health conditions approach," which included all conditions that impaired the health or normal functions of an individual, to an underinclusive 22.7 million under a "work disability approach," which concentrated on an individual's ability to work.[113] The majority concluded that the "work disability approach" was utilized to reach the 36 million figure.[114] Conversely, if the Council had incorporated a nonfunctional approach, the final figure would have been significantly higher.[115] Approximately two years later, the report was updated and the figure rose to 37.3 million.[116] The majority viewed the updated report as the likely source for the final finding of 43 million. Because the report "include[ed] only noninstitutionalized persons with physical disabilities who are over age 15," the ADA raised the figure in order to capture those excluded from the Council's findings.[117] Therefore, the Court concluded that by including the "43 million" finding in the text of the Act, Congress could not have intended that the ADA's coverage extend to those "whose impairments [were] mitigated by corrective measures."[118]

Although the majority's argument logically deduced that the finding's figure had the potential to grow to astronomical proportions under the interpretation of the EEOC, it was equally logical to deduce that Congress did not mean to set a "fixed cap" on all disabled persons in America.[119] "By including the 'record of' and 'regarded as' categories, Congress fully expected the Act to protect individuals who lack[ed], in the Court's words, 'actual' disabilities."[120] Congress incorporated examples of discrimination in the ADA Committee Reports and specifically detailed an incident involving a woman who was fired from her job "because her son, who lived with her, had contracted AIDS."[121] Obviously, this woman did not have an impairment that "substantially limit[ed]" a major life activity; however, based on the Committee Reports, she should have been covered under the Act. The ADA was designed to protect individuals from discrimination re-

112. *See* Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2148 (1999).

113. *See id.* at 2147–48 (citing NATIONAL COUNCIL ON DISABILITY, TOWARD INDEPENDENCE, 10–11 (1986)).

114. *See id.*

115. *See id.* at 2148–49. The Court cites impaired vision and hearing as examples noting that more than 100 million are visually impaired and more than 28 million suffer from hearing impairments. *Id.*

116. *See id.* at 2148.

117. *Id.*

118. *Id.* at 2149.

119. *Id.* at 2160 (Stevens, J., dissenting).

120. *Id.*

121. Burgdorf, *supra* note 100, at 419 (citing S. REP. NO. 101-116, at 8 (1989); H.R. REP. NO. 101-485, pt. 2, at 30 (1990)).

sulting from erroneous perceptions about diseases such as AIDS. Therefore, Congress did not intend to use the 43 million figure as a boundary for coverage under the Act, but rather utilized the number to illustrate the pervasive reach of discrimination in American society when it was confronted by horribly debilitating diseases such as AIDS.

The extensive analysis of the 43 million figure was inconsistent with the determination of the Court that legislative history was not needed to clarify the text of the Act with respect to mitigation. The Court developed a comprehensive argument detailing the origin and evolution of the 43 million figure and included the perspective of the author of the original draft of the Act, along with a report prepared by the National Council on Disability.[122] Additionally, the majority cited outside sources to bolster their position that Congress could not have conceivably intended to cover impairments such as hearing, vision, and hypertension because individual statistics on these impairments exceeded the 43 million finding.[123] The analysis of the Court on this point was perplexing. The majority conducted a historical survey examining the congressional finding that 43 million Americans were disabled, yet ignored "the documents reflecting Congress's contemporaneous understanding of the [disability definition]: the Committee Reports on the actual legislation."[124] Consequently, the majority's analysis was contradictory because it selectively incorporated the history of the Act to reinforce its own position.

4. The EEOC Has Not Been Delegated the Authority to Interpret the Disability Definition

In section 12116 of the Act, Congress delegated to the EEOC the authority to "issue regulations in an accessible format to carry out [the employment] subchapter,"[125] which encompassed sections 12111–12117 of the ADA. However, the majority reasoned that the findings and disability definitional provisions of the Act were enumerated in sections 12101–12102,[126] which fell outside the parameters of the authority of the EEOC. There was no indication that the drafters purposefully structured the Act to achieve this result, nor was there evidence in the history to indicate that the agencies could interpret the

122. *Sutton*, 119 S. Ct. at 2147–48 (citing NATIONAL COUNCIL ON DISABILITY, TOWARD INDEPENDENCE, at 10 (1986)).

123. *Id.* at 2149 (citing NAT'L ADVISORY EYE COUNCIL, U.S. DEPT. OF HEALTH AND HUMAN SERVS., VISION RESEARCH—A NATIONAL PLAN: 1999–2003 7 (1998) ("[M]ore than 100 million people need corrective lenses to see properly.") (alteration in original); NAT'L INSTS. OF HEALTH, NATIONAL STRATEGIC RESEARCH PLAN: HEARING AND HEARING IMPAIRMENT V (1996) (estimating that "28 million Americans have impaired hearing"); Tindall, *Stalking a Silent Killer; Hypertension*, BUS. & HEALTH, Aug. 1998, at 37 ("Some 50 million Americans have high blood pressure . . .")).

124. *Id.* at 2160–61 (Stevens, J., dissenting).

125. Americans with Disabilities Act of 1990 § 106, 42 U.S.C. § 12116 (1994).

126. *See Sutton*, 119 S. Ct. at 2145.

disability definition. Consequently, the majority reasoned that "no agency has been delegated authority to interpret the term 'disability.'"[127]

However, this particular interpretation of the text of the Act presents a conundrum for the EEOC and other administrative agencies charged with enforcing the ADA.[128] The majority essentially required the agencies to implement the ADA without a clarification of the word "disability," the key term of the Act. Because the three-prong disability definition was cumbersome and ambiguous, it was necessary for the agencies charged with implementing the Act to elucidate its meaning for organizations[129] that fall within the coverage of the ADA. The EEOC formulated its interpretation of the disability definition from the legislative history of the Act,[130] thus furthering the premise that the Interpretive Guidance of the EEOC comported with the intent of Congress.[131]

5. The Degree of Deference Due to the EEOC

While the majority did not resolve the issue of deference in *Sutton*, the Court labeled the interpretation of the EEOC "impermissible."[132] Nevertheless, the Court recognized that although agency interpretations were not binding, they did "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[133] However, because its Interpretive Guidance was

127. *Id.* at 2145; *see also* Washington v. HCA Health Servs., Inc., 152 F.3d 464, 469 (5th Cir. 1998) (finding that "the EEOC's Interpretive Guidelines are not . . . promulgated pursuant to any delegated authority to define statutory terms").

128. Furthermore, this finding is another instance that may foreshadow that minimal deference, if any, is due to the EEOC's Interpretive Guidance. However, because both parties accepted the guidelines as binding and were merely in disagreement on their persuasive authority, the court declined to address the deference issue. *Sutton*, 119 S. Ct. at 2145–46.

129. Examples of organizations that fall within the Act's "covered entity" definition include employers, employment agencies, labor organizations, or joint labor-management committees. 42 U.S.C. § 12111(2) (1994).

130. *Compare* H.R. REP. NO. 101-485(II), at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334 ("A person is considered an individual with a disability for purposes of the first prong of the definition when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people."), *with* 29 C.F.R. § 1630.2(j)(1)(ii) (1998) (defining "substantially limits" as "[s]ignificantly 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."). *See also Washington*, 152 F.3d at 468 ("The EEOC also seems to have given greater weight to the House Reports and followed their explicit language . . . .").

131. *See generally Washington*, 152 F.3d at 468 ("The EEOC also seems to have given greater weight to the House Reports and followed their explicit language . . . .").

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

133. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); *see also* Bragdon v. Abbott, 118 S. Ct. 2196, 2207 (1998) (citing *Skidmore*).

"not subject to the notice and comment procedure like regulations are, they are not entitled to the high degree of deference that is accorded to regulations under the *Chevron*doctrine [sic],[134] but the interpretations are given some deference."[135] As the Fifth Circuit noted in *Washington*, the degree of deference given to administrative agency interpretation should depend on several factors, including "the circumstances of their promulgation, the consistency with which the agency has adhered to the position announced, the evident consideration which has gone into its formulation, and the nature of the agency's expertise."[136] Applying these factors to the interpretation by the EEOC, it is possible to conclude, as did the Fifth Circuit, that more than a minimal amount of deference is due to the agency. The Fifth Circuit in *Washington* reasoned:

> Applying these factors to the current dispute, we find that: (1) the EEOC's Interpretive Guideline has been a part of its regulations since the regulations were promulgated; (2) they have consistently interpreted "disability" to mean "without regard to mitigating measures"; (3) the legislative history supports the agency's interpretation; and, finally, (4) the EEOC has significant expertise and authority to interpret and promulgate regulations under the ADA. In light of this, we find that we must give more than minimal deference to the EEOC's Interpretive Guidelines.[137]

Conversely, *Sutton* did not focus on the deference issue and simultaneously opted against considering the legislative history of the Act. Therefore, the "impermissible" label, coupled with the premise that "no agency has been delegated authority to interpret" the disability definition, could foreshadow that a minimal degree, if any at all, is due to the interpretation of the EEOC.

B. *The Dissent Analysis*

Unlike the majority, the dissenting Justices detailed the importance of incorporating the legislative history of the ADA into their analysis of *Sutton*.[138]

134. *Washington*, 152 F.3d at 469. "The Chevron doctrine dictates that a court must defer to an agency regulation if the agency's interpretation of an ambiguous statute flows naturally from a permissible construction of the statute." *Id.* at n.6 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)).

135. *Id* at 469–70.

136. *Id.* at 470 (quoting Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1014 n.20 (5th Cir. 1996)) (internal quotations omitted).

137. *Id.* at 470 (footnote omitted).

138. *See generally*, *Sutton*, 119 S. Ct. at 2152–62. The dissenting justices are Justice Stevens and Justice Breyer. Justice Breyer joins Justice Stevens's opinion and authors a separate opinion. *See generally id.* Justice Stevens and Justice Breyer also dissent in Murphy v. United Parcel Serv., Inc., 119 S. Ct. 2133, 2137 (1999). *Murphy* is a companion case to *Sutton*. *See supra* note 1.

1. Justice Stevens's Dissenting Opinion

Justice Stevens recognized that Congress probably did not anticipate that coverage of the ADA would be extended to a seemingly trivial impairment such as nearsightedness. Nevertheless, he maintained that "in order to be faithful to the remedial purpose of the Act . . . a generous, rather than a miserly, construction" should be employed.[139] Justice Stevens noted that the disability determination issue has two parts—first, whether Congress intended to address an individual's impairment in its mitigated or unmitigated condition; and second, whether that rule should be applied to seemingly "minor" or "trivial" disabilities.[140] Statutory construction was fundamental to Justice Stevens's first question as he addressed the purpose and text of the Act. To bolster this point, Justice Stevens relied on the established statutory interpretation precedent of the Court: "As in all cases of statutory construction, our task is to interpret the words of [the statute] in light of the purposes Congress sought to serve."[141] Justice Stevens reiterated that the purpose of Congress in enacting the ADA was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[142]

Upon interpreting the construction of the disability definition, Justice Stevens rejected the premise of the majority that "'[a] disability exists only where' a person's 'present' or 'actual' condition is substantially impaired . . . ."[143] He utilized the text of the Act to illustrate his point: if "'present' or 'actual' condition[s]" were requisite for coverage, "there would be no reason to include in the protected class those who were once disabled but who are now fully recovered."[144] Justice Stevens noted that the majority's interpretation could result in "treatable" impairments being denied coverage, reinforcing this position.[145] Therefore, Justice Stevens concluded that the plain language of Congress in subsection (B) indicated that mitigating measures need not be considered in determining coverage under the Act.

Justice Stevens also criticized the majority's decision to disregard the legislative history of the Act.[146] Writing for the majority, Justice Rhenquist emphasized the importance of the committee reports in di-

139. *Sutton*, 119 S. Ct. at 2152 (Stevens, J., dissenting).

140. *Id.* at 2153.

141. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608 (1979), *quoted in Sutton*, 119 S. Ct. at 2153 (Stevens, J., dissenting) (alteration in original).

142. Americans with Disabilities Act of 1990 § 2(b)(1), 42 U.S.C. § 12101(b)(1) (1994), *quoted in Sutton* 119 S. Ct. at 2153 (Stevens, J., dissenting).

143. *See Sutton*, 119 S. Ct. at 2154 (quoting the majority (Stevens, J., dissenting)) (alteration in original) (internal quotations omitted).

144. *Id.*

145. *See id.* (noting "one who continues to wear a hearing aid that she has worn all her life might not be covered—fully cured impairments are covered, but merely treatable ones are not. The text of the Act surely does not require such a bizarre result.").

146. *See id.* (applying Garcia v. United States, 469 U.S. 70 (1984)).

vining legislative intent: "In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying [the] proposed legislation.'"[147] Furthermore, Justice Stevens explained that "[t]he Committee Reports on the bill that became the ADA make it abundantly clear that Congress intended the ADA to cover individuals who could perform all of their major life activities only with the help of ameliorative measures."[148] While it is true that Congress is comprised of many members and it would be impossible to secure insight on each congressman's stance, the discussions in the Committee Reports were deliberate when addressing mitigation. Clearly, congressional intent dictated that individuals be assessed in their uncorrected state in determining whether they fall within the scope of the Act.[149]

2. Justice Breyer's Dissenting Opinion

Justice Breyer rejected the majority's position that the EEOC and other administrative agencies were not granted authority to interpret the definition section of the ADA.[150] The majority correctly noted that the disability definition was not contained in the employment subchapter. However, Justice Breyer observed that the employment subchapter contained other provisions that utilized the defined terms, for example, a provision that forbids "discriminat[ing] against a qualified individual with a disability because of the disability."[151] Justice Breyer concluded that the EEOC would have the authority to expand through regulations the meaning of the disability definition because the term was used within the employment subchapter;[152] therefore, the EEOC could have clarified the disability term if doing so would augment its ability to "carry out" the provisions of the employment subchapter. Furthermore, Justice Breyer deduced that Congress could not have possibly intended to deny the EEOC the power to issue regulations and interpretive guidance based on the physical placement of the definitional provision.[153] The actual arrangement of the sections "seems to reflect only drafting or stylistic, not substantive, objectives."[154] Moreover, it would be unduly prohibitive to systematically divest the agency of the authority to interpret some terms but not

147. *Garcia*, 469 U.S. at 76 (quoting Zuber v. Allen, 396 U.S. 168, 186 (1969)) (alteration in original).
148. *Sutton*, 119 S. Ct. at 2154.
149. *See supra* notes 37 and 38.
150. *Sutton*, 119 S. Ct. at 2161 (Breyer, J., dissenting).
151. *Id.* (citing American with Disabilities Act of 1990, 42 U.S.C. § 12112(a) (1994)).
152. *See id.* at 2161–62.
153. *See id.* at 2162.
154. *Id.*

others. This would be especially true when addressing the heart of the Act—the disability definition.

IV. WHAT DOES THE *SUTTON* DECISION MEAN FOR EMPLOYERS?

While the Court adopted the position of the Society for Human Resource Management on the mitigation issue, employers and human resource professionals are still faced with issues not addressed by the decision. First, *Sutton* only concentrated on "employees who were able to *completely* mitigate their conditions."[155] Second, *Sutton* "[did] not address correctable disabling conditions that employees [chose] not to correct."[156] Finally, the Court did not address the degree of deference due to the EEOC. These three concerns confronting employers require clarification.

Because *Sutton* did not address partially corrected impairments, an employer or manager cannot assume that employees who partially control their impairments would be outside of the protection of the Act.[157] Moreover, employers and human resource professionals may face the task of evaluating the degree of effectiveness of an individual's ameliorative measure, thus "forc[ing] employers to become medical diagnosticians."[158] Additionally, a mitigation rule is problematic for individuals taking medication that may need periodic adjustments.[159] For example, a diabetic may need to adjust his insulin intake to combat external factors such as stress, allergies, and illness.[160] While a diabetic may know the amount of insulin to administer to sustain a healthy blood sugar level for a normal day, an individual cannot know the amount to administer to combat the effects of these uncontrollable external factors.[161] Accordingly, employers may face the task of reassessing the status of an employee under the Act. Again, this places the employer or human resource manager in the role of "medical diagnostician."[162] This new role could prove costly to employers who may need to consult legal or medical advice in assessing the employee's impairment and its effect on his or her capacity to perform "major life activities."[163] Furthermore, this analysis forces the employer to focus on the employee's "disability" rather than his or

155. Segal, *supra* note 10, at 47.

156. *Id.* at 48.

157. *See id.* at 47.

158. *Id.*

159. *See* Senators Amicus Brief, *supra* note 43, at 10.

160. *See id.* at 10–11.

161. *Id.*

162. Segal, *supra* note 10, at 47; *see also supra* text accompanying note 149.

163. Segal, *supra* note 10, at 48 (noting that medical experts may be needed to assess "how the condition affects the employee's ability to perform major life activities").

her ability to perform certain "major life activities."[164] Clearly, this does not comport with the spirit and purpose of the ADA.

Sutton also failed to address the "correctable but not corrected" disability issue.[165] "As a matter of common sense, correctable disabling conditions that are not corrected should not be afforded greater protection than disabling conditions that are corrected."[166] However, if human resource professionals and employers apply the decision to employees whose injuries are less trivial than that in *Sutton*, this absurd result could occur.[167] This anomalous result occurs when individuals are not proactive in alleviating their impairment. The majority stated that the "use or non-use of a corrective device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual with an impairment actually faces are in fact substantially limiting."[168] Thus, if employers can only assess actual limitations rather than potential ones, employees have an incentive to avoid taking proactive measures to correct their condition.[169]

This set of circumstances has the potential to create animosity among employees in the workplace. Other employees may view any accommodations by the employer as preferential treatment rather than adherence to the law.[170] Likewise, a decline in morale among the workforce may affect other facets of the company, including productivity, customer service, and staffing. Staffing may become difficult and costly as absenteeism and turnover increase with the advent of poor morale. All three of these factors interact and directly impact the company's expenditures and profits. Additionally, employers face the fear of setting a bad precedent by accommodating a correctable impairment. Other employees may view the accommodation as a means of avoiding an undesirable work assignment and either stop correcting an existing impairment or disclose a previously unreported impairment.[171] Therefore, employers and human resource professionals need clear and manageable guidelines in addressing all aspects of the ADA.

Finally, the Court failed to address the degree of deference due to the EEOC, which also creates problems for employers and human resource departments. While declining to consider the deference issue, the majority held that the interpretation by the EEOC of mitigation is "impermissible."[172] This finding could create the presumption that

164. *Id.*
165. *Id.*
166. *Id.*
167. *See id.*
168. Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2149 (1999).
169. Segal, *supra* note 10, at 48.
170. *See* Petesch, *supra* note 3, at 58.
171. *See id.* at 48–49.
172. *See Sutton*, 119 S. Ct. at 2146.

deference may not be due to the EEOC on the mitigation issues, yet may be appropriate on other issues, such as what constitutes a reasonable accommodation under the ADA. Human resource managers are therefore left to decipher which EEOC interpretations should receive more weight, which could potentially generate considerable confusion at the human resource level.

V. Recommended Modifications to the Act

It is imperative that Congress amend the ADA to comport with the initial intention of the legislators who passed the Act—"to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[173] The EEOC and "covered entities" need guidance if they are to properly enforce and interpret the Act. Congressional intent may be drawn from the legislative history of the ADA; however, that is not enough. The Supreme Court, relying on the plain language of the statute, found that impaired persons should be evaluated in their corrected state.[174] This ruling by the Court appears contrary to the spirit and purpose of the ADA. Thus, in order to comport with the purpose of the Act, Congress must amend the language of the Act to include such terms as "mitigation," "ameliorative measures," and "corrective measures" within the text of the Act and not rely on their incorporation from Committee Reports.

Congress must clarify which portions of the ADA may be interpreted by the administrative agencies charged with enforcing the terms and promulgating the regulations of the Act. The definitions used in section 12102 need clarification by Congress—specifically the "disability" definition because the three prong definition is vague. If Congress chooses to leave interpretation to administrative agencies such as the EEOC, that mandate needs explicit clarification within the structure of the Act. Explanation in Committee Reports alone is futile if the Court utilizes a strict textual analysis. Individuals seeking protection under the Act should not have their fate dependent on the syntax, verb tense, and paragraph structure preferences of the drafters. Consequently, if the intent of Congress is to assess impairments without the use of ameliorative measures, it must amend the ADA to include a separate mitigation provision. Furthermore, an amendment would eliminate questions regarding agency deference and reliance on legislative history.

Most would concede that Congress did not intend the ADA to cover seemingly trivial impairments such as myopia. However, that fact should not serve as a limitation on individuals suffering from diseases or physical and mental impairments that are clearly within the scope of the ADA. It would be impractical for Congress to catalog

173. 42 U.S.C. § 12101(b)(2) (1994).
174. *See Sutton*, 119 S. Ct. at 2146.

every possible impairment or corrective measure to ensure that the Act is covering those individuals whom the ADA was designed to protect. Congress could narrow the individualized inquiry mandate to prevent abuse of the statute. In his dissenting opinion in *Gilday v. Mecosta County*,[175] Judge Guy found this middle ground:[176] "In my view, the impact of mitigation measures must be decided on a case-by-case basis."[177] Judge Guy's proposal reasoned that:

> [i]n some cases a person with a "controlled" medical problem or condition will be completely functional and should be evaluated as such. In other cases a person with a controlled medical condition may still be under a disability as defined by the Act. Indeed, what is necessary to "control" the condition may be part of what makes the person disabled.[178]

The position of the Court did not distinguish between people who have controlled their disabilities and those who have not.[179] An individual should not be denied the protections of the Act because he or she has independently taken measures to bring the impairment under control. It is hard to imagine that Congress wished to provide protection to workers who leave it to their employer to accommodate their impairments but to deny protection to workers who act independently to overcome their disabilities, thus creating a disincentive to overcome obstacles created by their condition. Because the Court has interpreted the plain language of the statute to create this anomalous result, Congress must step in and amend the ADA to cover such individuals.

In drafting a mitigation provision for the ADA, Congress should consider the position of the Fifth Circuit. In *Washington*, the court combined the Interpretive Guidance of the EEOC with common sense. The court reasoned:

> [O]nly serious impairments and ailments that are analogous to those mentioned in the EEOC Guidelines and the legislative history—diabetes, epilepsy, and hearing impairments—will be considered in their unmitigated state. The impairments must be serious in common parlance, and they must require that the individual use mitigating measures on a frequent basis, that is, he must put on his prosthesis every morning or take his medication with some continuing regularity. In order for us to ignore the mitigating measures, they must be continuous and recurring; if the mitigating measures

175. 124 F.3d 760, 768 (6th Cir. 1997).

176. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 147 (1999) (analyzing the divergent opinions of *Gilday*).

177. *Gilday*, 124 F.3d at 768 (Guy, Circuit J., concurring in part and dissenting in part).

178. *Id.*

179. *See* Segal, *supra* note 10, at 48.

> amount to permanent correction or ameliorations, then they may be taken into consideration.[180]

The Fifth Circuit cited an artificial joint or pin and a transplanted organ as examples of permanent corrections. Obviously, that individual "cannot claim that he is disabled because he would be 'substantially limited in a major life activity' if he had *not* had his hip joint replaced."[181] Accordingly, this position comported with the individualized inquiry mandate of the EEOC and ADA by assessing impairments on a case-by-case basis.[182]

VI. CONCLUSION

While the decision of the Supreme Court dramatically decreased the number of individuals covered under the ADA, it may likely deny coverage to those impaired persons for whom the Act was formulated. Perhaps the outcome of *Sutton* would have been different had the injury involved not been something as commonplace as nearsightedness. As it now stands, persons who mitigate their disability by controlling the effects of the impairment by medication or devices may forfeit coverage under the Act. This is the antithesis of the intent of Congress as illustrated in the findings of the Act and extensive legislative history. Thus, the only means available to remedy the Court's adverse ruling is for Congress to amend the Act.

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180. Washington v. HCA Health Servs., Inc., 152 F.3d 464, 470–71 (5th Cir. 1998). It should also be noted that the Washington opinion references Judge Guy's opinion in *Gilday*. *See id.* at 471 n.11 (citing *Gilday*, 124 F.3d at 768).

181. *Id.* at 471 (citing Ray v. Glidden Co., 85 F.3d 227 (5th Cir. 1996) (evaluating a plaintiff with hip and shoulder replacements in his mitigated state)) (emphasis in original).

182. *See id.* at 471 (declining to address mitigating measures such as eyeglasses and laser surgery).