Florida Law Review

Volume 52 | Issue 4 Article 5

September 2000

Civil Rights: Narrowing the Scope of the Americans with Disabilities Act

Christopher M. Sacco

CASE COMMENTS

CIVIL RIGHTS: NARROWING THE SCOPE OF THE AMERICANS WITH DISABILITIES ACT

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

*Christopher M. Sacco***

Petitioners, severely myopic twin sisters, were denied positions as global airline pilots because they failed to meet respondent airline's minimum visual requirements.[1] Petitioners filed suit against United Airlines in the United States District Court for the District of Colorado, alleging that the minimum visual requirements discriminated against their disability and violated the Americans with Disabilities Act (ADA, or Act).[2] The District Court dismissed the petitioners' claim for failure to prove that their condition qualified as a disability under the Act.[3] On appeal, the Court of Appeals for the Tenth Circuit affirmed the judgement of the District Court.[4] The Supreme Court of the United States granted petitioners' request for certiorari[5] and in affirming the lower courts, HELD

---

* *Editor's Note*: This Case Comment won the George W. Milam Outstanding Case Comment Award for the Spring 2000 semester.

** To my wife, Sharon, whose constant love and support serves as my inspiration.

1. *See* Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2143 (1999).

2. *See id.* The critical portion of the ADA defines a 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." AMERICANS WITH DISABILITIES ACT, 42 U.S.C.A. § 12102 (West Supp. 1999).

3. *See* Sutton v. United Air Lines, Inc., No. 96-S-121, 1996 WL 588917, at *6 (D. Colo. Aug. 28, 1996), *aff'd*, 130 F.3d 893 (10th Cir. 1997), *aff'd*, 119 S. Ct. 2139 (1999). The Court held that since petitioners' visual impairment could be fully corrected, they were not substantially limited in any major life activity and thus had not stated a claim that they were disabled within the meaning of the ADA. *See id.*

4. *See* Sutton v. United Airlines, 130 F.3d 893, 895 (10th CIR. 1997). The Circuit Court held that although the pilots' uncorrected vision was a physical impairment under the ADA, when determining whether the impairment substantially limits a major life activity, mitigating measures should be considered. *See id.* at 906. The pilots' corrected vision did not limit their major life activity of seeing. *See id.* at 903.

5. *See Sutton*, 119 S. Ct. at 2139. In addition to *Sutton*, the Supreme Court decided two other ADA cases on the same day. *See also* Albertsons, Inc. v. Kirkingburg, 119 S. Ct. 2162 (1999) (holding that a former supermarket employee with monocular vision was not per se "disabled" under the ADA, but had to prove his particular impairment substantially limited a major life activity); Murphy v. United Parcel Serv., Inc., 119 S. Ct. 2133 (1999) (holding that employee's high blood pressure did not substantially limit his major life activities when he was medicated, and

that mitigating measures should be considered in determining whether an individual is disabled under the ADA, and therefore petitioners were not disabled under the Act.[6]

A controversial issue in determining whether an individual is considered disabled and thus granted protection under the ADA is whether mitigating or corrective measures should be taken into account.[7] The ADA itself is silent on this issue.[8] Courts must turn to legislative history as well as interpretive regulations set forth by the Equal Employment Opportunity Commission (EEOC) and the Justice Department for guidance.[9]

Plaintiffs attempting to make a discrimination claim under the ADA insist that the courts should disregard mitigating measures because otherwise the protective purpose of the Act would be defeated.[10] They urge that the issue should be whether, in their non-medicated state, they are unable to perform a major life activity[11] and are thus disabled. Defendants claim that mitigating measures should be taken into account because corrective procedures will often allow an impaired individual to function as competently as a non-impaired individual.[12]

It appeared initially that the Supreme Court was receptive to the plaintiffs' argument. In *School Board of Nassau County v. Arline*,[13] the Court held that a person suffering from a contagious disease can be a

---

therefore he was not disabled under the ADA).

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

7. *See id.* at 2146.

8. *See, e.g.*, Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937 (3d Cir. 1997) (Considering whether a person is disabled under the ADA when they have epilepsy but medication allows them to function normally. The court gave deference to legislative history and agency interpretation and held that a determination of petitioner's disability status should not be considered while in his medicated state.).

9. *See* 29 C.F.R. § 1630.2(1999). Rule 14.2 p.94. This regulation defines critical words used in the ADA and provides factors to consider in individual analysis. An often-cited interpretation of the ADA originated as part of a congressional report when the act was being legislated: "[A] disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." H.R. REP. NO. 101-485 (1990), *quoted in* Bartlett v. New York State Bd. of Law Exam'rs., 156 F.3d 321, 329 (2d Cir. 1998).

10. *See, e.g.*, Harris v. H & W Contracting Co., 102 F.3d 516, 520 (11th Cir. 1996) (arguing that, although the manifest symptoms of Graves' disease are temporary in nature with proper medication, the impairment itself is both chronic and permanent. Thus, the petitioner urged, she should be considered disabled under the ADA).

11. "Major Life Activities" are functions such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(h)(2)(i) (1999).

12. *See, e.g.*, *Harris*, 102 F.3d at 520 (arguing that when petitioner was properly medicated, her condition did not substantially limit any major life activity, thus she should not be treated as disabled under the ADA).

13. 480 U.S. 273 (1987).

handicapped person within the meaning of the Rehabilitation Act.[14] The respondent, a school teacher, brought suit against the school board, alleging that they fired her solely because of her susceptibility to tuberculosis.[15]

The Court determined that the plaintiff's condition fell within the statutory and regulatory framework of the Act.[16] The tuberculosis affected the plaintiff's "major life activity" of breathing.[17] Therefore, plaintiff was "handicapped" under the guidelines set forth in the Act.[18]

One of the Court's main goals was to effectuate the basic purpose of the Rehabilitation Act,[19] that purpose being to ensure that handicapped people were not denied jobs or benefits because of prejudiced attitudes of others.[20] The Court's sweeping declaration concerning "contagious diseases" guaranteed that the Act would afford broad protection against potential discrimination.[21]

This trend continued in the Supreme Court's first major decision under the new ADA, *Bragdon v. Abbott*.[22] Petitioner, a dental patient with human immunodeficiency virus (HIV), brought action under the ADA against her dentist who refused to treat her in his office.[23] The Court in this case held that HIV infection was a "disability" under the Act and that it affected petitioner's "major life activity" of reproduction.[24] The Court reasoned that HIV was a physical impairment because it followed an unalterable course that leads inevitably to full-blown AIDS followed by death.[25] They found that this impairment substantially affected respondent's major life activity of reproduction because of the possibility of transmission to males or

---

14. *See id.* at 285-86. The Rehabilitation Act was the ADA's predecessor and contained almost exactly the same language as the ADA. *See id.* at 279.

15. *See id.* at 276. The School Board's defense was that they fired the plaintiff because she was contagious, not because of the condition itself. *See id.* at 281. The Court held that the contagiousness could not be "meaningfully distinguished" from the physical effects of the disease. *Id.* at 282.

16. *See id.* at 281.

17. *See id.*

18. *See id.*

19. *See id.* at 284.

20. *See id.*

21. *See id.* at 285-86. In so holding, the Court essentially opened the door wide for claimants infected by a relatively new disease at the time, HIV. *See* Bragdon v. Abbott, 118 S. Ct. 2196 (1998), discussed later in the text.

22. 118 S. Ct. 2196 (1998).

23. *See id.* at 2201. The ADA prohibits discrimination against any individual "on the basis of disability in the . . . enjoyment of . . . services . . . of any place of public accommodation by any person who operates . . . [such] a place." AMERICANS WITH DISABILITIES ACT, 42 U.S.C. § 12182(a) (1990), *quoted in* 118 S. Ct. at 2198.

24. *See Bragdon*, 118 S. Ct. at 2198-99.

25. *See id.* at 2202-05.

unborn children.[26] Thus, respondent was entitled to protection against discrimination by the ADA.[27]

The Court does not go so far as to classify HIV as a per se disability under the Act.[28] However, although analysis in ADA cases is to be conducted on a case-by-case basis,[29] in practical application the Court acknowledges it is likely that lower courts will treat all HIV-infected claimants as "disabled" under the Act.[30] The Court was seemingly following the same trend set by *Arline* of expanding the "list" of per se disabilities and affording wide classifications of individuals protection under the ADA.

A significant turning point in the approach courts were taking in "disability" analysis began to occur in a minority of federal circuit courts. The Fifth Circuit took a particularly bold stance in *Washington v. HCA Health Services, Inc.*[31] The court held that, contrary to EEOC interpretive guidelines, some impairments should be assessed with regard to mitigating measures.[32]

The petitioner in *Washington* sued his former employer alleging that his employer discriminated against him in violation of the ADA because he suffered from Adult Stills Disease.[33] The court ultimately decided to read the agency's interpretive guidelines narrowly and concluded that only serious impairments should be considered in their uncorrected states.[34] Though this particular petitioner's condition was held to be serious enough to merit consideration without regard to corrective medication, the court's decision potentially narrowed the Act's scope of protection.[35]

In the instant case, the Supreme Court went further to narrow the ADA's application.[36] The instant Court decided that the EEOC guidelines on the issue of mitigating measures were an impermissible interpretation

---

26. *See id.* at 2206. The Court noted that the Act only requires a showing of a substantial limitation on major life activities, not an utter inability to reproduce. *See id.*

27. *See id.* at 2213.

28. *See id.* at 2208.

29. *See* Americans with Disabilities Act, 42 U.S.C.A. § 12102(2) (West Supp. 1999). The Act expresses this mandate clearly by defining "disability" "with respect to an individual." *See id.*

30. *See Bragdon*, 118 S. Ct. at 2208. The Court itself acknowledged that once HIV was considered a "handicap" under the Rehabilitation Act, no Court held otherwise. *See id.*

31. 152 F.3d 464 (5th Cir. 1998).

32. *See id.* at 470.

33. *See id.* at 465. The disease is a degenerative rheumatoid condition that affects bones and joints. *See id.*

34. *See id.* at 470. The Court held that only impairments "analogous to those mentioned in the EEOC Guidelines and the legislative history—diabetes, epilepsy and hearing impairments—will be considered in their unmitigated state." *Id.*

35. *See id.* at 471. The Court made it clear that they were unwilling to join other Courts in a "broad pronouncement that all impairments must be considered in their unmitigated state." *Id.*

36. *See Sutton*, 119 S. Ct. at 2146 (1999).

of the ADA.[37] The instant Court read the plain statutory language of the ADA and issued its own interpretation.[38]

The instant Court concluded that the phrase "substantially limits major life activities" means presently limited, not potentially or hypothetically limited, in major life activities.[39] Therefore, evaluating individuals without their corrective medications or devices is contrary to this definition.[40] The instant Court also indicated that the statute requires case-by-case analysis. Therefore judging persons in their uncorrected state runs "directly counter to individualized inquiry."[41]

Citing congressional findings on the growing number of Americans with disabilities,[42] the instant Court concluded that Congress "did not intend to bring under the [ADA] statute's protection all those whose uncorrected conditions amount to disabilities."[43] The petitioners' myopia was correctable to nearly perfect vision with lenses, thus their condition was not a disability under the Act.[44] The instant Court ultimately held that mitigating measures should be considered in disability analysis.[45]

In dissent, Justice Stevens stressed the importance of being faithful to the remedial purpose of the ADA—to protect a broad class of disabled individuals.[46] The plain language of the Act makes it clear that Congress intended to inquire only into the existence of an impairment, past or present, which substantially limits a major life activity.[47] Justice Stevens urged that making distinctions between those impaired and those "cured" will result in neglecting some of the class of people Congress intended to

---

37. *See id.*

38. *See id.*

39. *See id.*

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

41. *Id.* at 2147.

42. *See* Americans with Disabilities Act, 42 U.S.C.A. § 12101(1) (West Supp. 1999). About 43 million Americans have one or more disabilities, and this number is growing as the population ages. *See id.*

43. *Sutton*, 119 S. Ct. at 2147. But, is there not the possibility that the instant Court is misconstruing the findings of Congress? Did Congress cite these statistics to warn the Court to limit the scope of the ADA, or, alternatively, were these findings merely the justification for the Act itself? *See id.* at 2156-57 (Stevens, J., dissenting).

44. *See id.* at 2149.

45. *See id.* at 2146-47. The instant Court spoke in broad terms on how this holding would apply outside of the instant case. "[Any] person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not 'substantially limit' a major life activity." *Id.*

46. *See id.* at 2152 (Stevens, J., dissenting).

47. *See id.* (Stevens, J., dissenting). Justice Stevens' initial argument is that the statutory language of the Act itself is unambiguous on the issue of mitigating measures, contrary to the majority's interpretation. *See id.* at 2154 (Stevens, J., dissenting).

protect.[48] Justice Stevens would have also given great deference to agency interpretive guidelines in respect to the ADA.[49] He submitted that, even if authorized agencies could arbitrarily choose which impairments were meant to be included or excluded from the Act's protection, surely Congress did not authorize the Court to make such determinations.[50]

In light of the instant Court's ruling, critical questions remain. The foremost issue is the decision's effect on the scope of the ADA's protection power. The Court's interpretation may narrow the protective power of the Act.[51] The instant Court stated that mitigating measures should be taken into account when analyzing an individual's right to protection,[52] which is a position contrary to those expressed in *Arline* and *Bragdon*.[53]

The instant Court's decision may have been in response to a concern that courts were engaging in over-classification of disabilities.[54] Extensive classification of impairments into "per se" disabilities broadens the scope of the Act.[55] There was a concern that certain conditions were classified as disabilities once a higher court ruled as such, and thus lower courts were not making individualized inquiries.[56]

---

48. *See id.* (Stevens, J., dissenting). As an illustration, "Subsection (B) of the Act's definition . . . plainly covers a person who previously had a serious hearing impairment that has since been completely cured." *Id.* (Stevens, J., dissenting).

49. *See id.* at 2154-57 (Stevens, J., dissenting). Justice Stevens cites EEOC and Department of Justice interpretive guidelines as well as House and Senate reports. *See id.* Both the guidelines and the legislative history indicate that disabilities should be assessed without regard to mitigating measures. *See id.* (Stevens, J., dissenting).

50. *See id.* at 2157 (Stevens, J., dissenting).

51. *See, e.g., id.* at 2153 (Stevens, J., dissenting) (arguing that although the Act clearly was intended to protect individuals with severed limbs, under the majority interpretation such individuals would no longer be protected under the Act if in their *present* state they could function normally in society with the aid of prostheses).

52. *See id.* at 2139.

53. *See Bragdon*, 118 S. Ct. at 2206; *Arline*, 480 U.S. at 282-83. Note that the instant Court was not explicitly overruling these cases. Ignoring mitigating measures in ADA analysis had become a generally accepted principle based on legislative history and agency interpretive guidelines, but no Court had ruled that mitigating measures could not be considered. The instant Court's ruling is compelling because they *held* that mitigating measures should be considered in analysis. *See Sutton*, 119 S. Ct. at 2139.

54. *See Sutton* 119, S. Ct. at 2148. The approach recommended by the EEOC would "create a system in which persons often must be treated as members of a group of people with similar impairments, rather than individuals." *Id.*

55. *See id.* at 2148-49; *see* also Scott Carlson, *ADA Redefined; Does Court Decision Narrow Law or Rein It In?*, CHI. TRIB., Dec. 12, 1999, at 3 (proponents of the instant Court ruling argue that the ADA was "being stretched too far").

56. *See Bragdon*, 118 S. Ct. at 2208; *see also supra* text accompanying note 30; Harris v. H & W Contracting Co., 102 F.3d 516, 522 (11th Cir. 1996) (holding that, in an ADA claim, the Court of Appeals would take judicial notice that Graves' disease is a condition "capable of

The danger in the instant Court's change in position is that it may lead to an opposite, but equally problematic situation. As appellate courts rule on certain impairments and classify them as non-disabling, lower courts may treat their decision on each condition as dispositive.[57] This will prevent juries from hearing these claims.[58]

Another possible ramification the instant Court's decision is that it may defeat an alternative purpose of the ADA—to protect individuals from being discriminated against because of fear or misunderstanding of certain disabilities.[59] The instant Court indicated that it is reasonable to take into account mitigating measures because Congress did not intend to protect those individuals whose conditions are fully correctable.[60] But, as technology advances, it is possible that impairments that fall clearly within the collective perception of "disability" will be practically "cured." If a claimant with such a condition is passed over for a job solely because of an employer's misperception of her capabilities, is she no longer protected by the ADA when her corrected impairment fails to satisfy the Court's definition of disability?

This raises another critical question. Will reviewing courts, on a case-by-case basis, consider the economic situation of a claimant and the claimant's ability to afford the corrective measures that supposedly mitigate their condition?[61] Economic status should be a factor if courts adhere to individualized inquiry. But, no court thus far in ADA litigation has considered whether a claimant can afford the corrective procedures. Failing to consider this factor may limit the class of people Congress intended to protect as well as discourage potential claimants.[62]

---

substantially limiting major life activities if left untreated by medication").

57. *See, e.g.*, Carlson, *supra* note 55, at 3 (suggesting that extreme application of the instant Court's ruling "means more than 100 million Americans with correctable impairments are not covered by anti-discrimination law").

58. *See, e.g.*, Leonard H. Glantz, *Disability Definition Mess*, NAT'L L.J., Aug. 23, 1999, at A15 (reasoning that, after *Murphy*, an individual with high blood pressure that is "controlled by medication is not eligible for ADA protection").

59. *See Sutton*, 119 S. Ct. at 2159 (Stevens, J., dissenting). "[Another] purpose of the ADA is to dismantle employment barriers based on society's accumulated myths . . . ." *Id.* (Stevens, J. dissenting). In light of this purpose, Stevens felt it "ironic to deny protection for persons with substantially limiting impairments that, when corrected, render them fully . . . employable." *Id.* (Stevens, J., dissenting).

60. *See id.* at 2147.

61. To illustrate: An epileptic who cannot afford the medication to control her infrequent seizures is denied a job based solely on her condition. Will a court evaluate her in her unmitigated state even though a higher court has ruled that epilepsy, when medicated, is not a disability under the ADA?

62. This is not meant to suggest that the instant Court intended to inhibit consideration of this factor, only to bring to light a critical component that has thus far gone unmentioned.

Coupled with the instant Court's substantive ruling on ADA litigation is the broader issue concerning the scope of a court's decision making power. Do courts infringe on the powers of Congress and its agencies when they interpret legislation in a manner seemingly contrary to agency interpretation?[63] The instant Court boldly chose its own interpretation of the ADA over the EEOC and the Justice Department's interpretations on the issue of mitigating measures.[64]

A key function of federal courts is to interpret the ambiguities of statutory language.[65] Courts are generally free to choose the amount of deference to give to legislative history and agency interpretation of statutes.[66] Here, the instant Court chose the extreme option of no deference.[67] The instant Court's actions may be construed as railroading the intentions of Congress that were implicitly set forth in EEOC and Justice Department interpretive guidelines.[68]

The heart of this issue is whether the public wants the courts or Congress dictating the scope of the ADA.[69] Congress drafted the Act and has played a pivotal role in its interpretation.[70] One argument is that the ADA was being stretched too far, and the instant Court was merely trying to rein it in.[71] But the alternative analysis is that the Act was functioning exactly as Congress intended, protecting broad classes of persons, and the

---

63. The issue of the amount of deference due agency interpretations is hotly contested. The *Chevron* doctrine requires courts to grant a high degree of deference to agency regulations. *See* Washington v. HCA Health Servs., Inc., 152 F.3d 464, 470 n.6 (5th Cir. 1998). But, interpretations are not regulations because they are not subject to notice and comment procedure. *See id.* at 469. A generally accepted notion is that interpretations are given "some" deference. *See id.* at 470.

64. *See Sutton*, 119 S. Ct. at 2146. The justification for the instant Court's interpretation is that the agency interpretation is at odds with the plain language of the statute itself. *See id. But cf. id.* at 2153-54 (Stevens, J., dissenting) (reasoning that the plain language of the Act is congruent with agency guidelines. Both discourage consideration of mitigating measures).

65. *See id.* at 2153. (Stevens, J., dissenting) ("[O]ur task is to interpret the words of [the statute] in light of the purposes Congress sought to serve." (quoting Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608 (1979))).

66. *See supra* note 63 and accompanying text.

67. *See id.* at 2146.

68. *But see id.; see also supra* text accompanying note 64. The instant Court's justification certainly does not reflect an *intention* to railroad Congress.

69. *See generally The Disability Decisions*, WASH. POST, June 24, 1999, at A26 (suggesting that, although the instant Court was correct in its conclusion that the ADA should not apply to minor disabilities, it should serve as a call to arms to Congress and the enforcement agencies to resolve the issue).

70. *See, e.g.*, Gilday v. Mecosta County, 124 F.3d 760, 764-65 (6th Cir. 1997) (illustrating the importance of legislative history in interpreting the Act).

71. *See* Carlson, *supra* note 55, at 3. Employers argue that the instant Court's decision was a preventive measure to ensure that the Act's protection would not become overly broad. *See id.* It was also, proponents contend, a reaction to the abuse of the ADA through frivolous lawsuits. *See id.*

instant Court has now narrowed its application to the point of rendering it ineffective.[72]

The instant Court's abrupt change of position on the issue of mitigating measures has narrowed the protective power of the ADA.[73] Accounting for mitigating measures in every case may hinder claims by those who are victims of discrimination resulting from misperceptions of their disability.[74] Despite the requirement of case-by-case analysis, lower courts may dismiss claims that involve impairments previously labeled as "non-disabilities" by higher courts. This is an assumption based on practicality and history. Courts treated a number of conditions as "per se" disabilities prior to the instant Court ruling, so it is not unreasonable to expect the same results in regards to non-disabilities.[75] Finally, the outcome in the[76] instant case seems to contradict the intentions of Congress and could essentially render the ADA ineffective. Considering that "We the People" elect members of Congress to legislate on our behalf, it is doubtful that the public would prefer the Court having the final say on the level of protection granted by the ADA.

---

72. *See id.* Critics believe that the instant Court's decision was an overreaction to a perception that the Act was being stretched too far. The frivolous suits, they contend, were the exception and not the rule. *See id.*

73. *See supra* note 57, at 3 and accompanying text.

74. *See Sutton*, 119 S. Ct. at 2159 (Stevens, J., dissenting); *see also supra* text accompanying note 59.

75. The mere suggestion of this reasoning will, at the least, discourage potential litigation.