Florida Law Review

Volume 52 | Issue 4 | Article 6

September 2000

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Recommended Citation
Robin L. Henderson, *Civil Rights: The Americans with Disabilities Act: Turning a Blind Eye Towards Legislative Intent*, 52 Fla. L. Rev. 849 (2000).
Available at: https://scholarship.law.ufl.edu/flr/vol52/iss4/6

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CIVIL RIGHTS: THE AMERICANS WITH DISABILITIES ACT: TURNING A BLIND EYE TOWARDS LEGISLATIVE INTENT

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

*Robin L. Henderson**

Petitioners, twin sisters and commercial airlines pilots, had severe myopia that was fully correctable by contact lenses.[1] Respondent, a commercial airline, refused to hire petitioners as pilots because their uncorrected vision was below the airline's required minimum.[2] Petitioners filed suit, alleging that respondent violated the Americans with Disabilities Act (ADA).[3] The ADA prohibits employers from "discriminat[ing] against a qualified individual with a disability because of the disability . . . ."[4] The district court granted summary judgment for respondent, reasoning that petitioners were not disabled under the ADA because, with corrective lenses, they were not substantially limited in any major life activities.[5] The

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* To my parents, for teaching me that the fear of the Lord is the beginning of knowledge.

1. *See* Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2143 (1999). The Petitioners each had 20/200 or worse in one eye and 20/400 or worse in the other eye. *See id.* Without contact lenses, they could not effectively see to drive, watch television, or shop in public stores. *See id.* However, with contact lenses, their vision was 20/20, the standard perfect vision. *See id.*

2. *See id.* Respondent airline had a policy of requiring pilots to have at least 20/100 uncorrected visual acuity in both eyes. *See id.*

3. *See* Sutton v. United Air Lines, Inc., No. 96-S-121, 1996 WL 588917, at *1 (D. Colo. Aug. 28, 1996), *aff'd*, 130 F.3d 893 (10th Cir. 1997), *aff'd*, 119 S. Ct. 2139 (1999). Petitioners alleged that they were disabled because they were substantially limited in the major life activity of seeing. *See Sutton*, 130 F.3d at 895. Also, petitioners alleged that respondent rejected them based on that disability, or because the airline regarded them as having a disability, in violation of the ADA. *See id.*

4. 42 U.S.C.A. § 12112(a) (West Supp. 1999). The general rule on discrimination under the ADA states in full, "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.* Proving "disability" within the meaning of the ADA is the first element in a plaintiff's prima facie case. *See Sutton*, 1996 WL 588917, at *2. The second element is that "he is qualified . . . with or without reasonable accommodation . . . to perform the essential functions of the job." *Id.* The final element is that the employer terminated the plaintiff because of the disability. *See id.* There are three alternative definitions of "disability" available under the ADA. *See* 42 U.S.C.A. § 12102(2) (West Supp. 1999). The first prong, which is discussed in this Comment, defines actual disability as an impairment that substantially limits a major life activity of an individual. *See id.* The second prong embraces individuals with a "record of" such substantially limiting impairments. *Id.* The third prong protects individuals who have been "regarded as" having such disabilities by employers. *Id.* Petitioners claimed to be "disabled" under the first and third prongs. *See Sutton*, 130 F.3d at 895.

5. *See Sutton*, 1996 WL 588917, at *3-5. The district court also held that petitioners failed

United States Court of Appeals for the Tenth Circuit affirmed.[6] The United States Supreme Court granted certiorari and HELD, whether an individual is disabled should be determined with reference to the corrective measures used to mitigate the impairment.[7]

The ADA defines "disability," in pertinent part, as "a physical or mental impairment that substantially limits one or more of the major life activities" of an individual.[8] However, the ADA does not specify whether courts must consider mitigating measures used by the individual when determining whether an impairment "substantially limits" a major life activity.[9] As a result, federal circuit courts were divided on the question.[10]

A major player in the controversy over mitigating measures is the Equal Employment Opportunity Commission (EEOC), which has the authority to issue regulations to implement the ADA's employment provisions.[11] Seeking to define proper disability analysis, the EEOC issued an "Interpretive Guidance."[12] It provided that "[t]he determination of whether an individual is substantially limited in a major life activity must be made . . . without regard to mitigating measures . . . ."[13] However, this interpretive rule was not dispositive because defining the term "disability" was beyond the EEOC's authority,[14] and courts were split on whether to adopt the EEOC rule.[15] For example, in *Gilday v. Mecosta County*, the

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to state a claim that respondents regarded them as disabled. *See id.* at *5.

6. *See* Sutton v. United Air Lines, Inc., 130 F.3d 893, 895 (10th Cir. 1997), *aff'd*, 119 S. Ct. 2139 (1999).

7. *See Sutton*, 119 S. Ct. at 2143. The Supreme Court held that petitioners were neither actually disabled nor "regarded as" disabled under the ADA. *See id.* Justice Stevens, joined by Justice Breyer, dissented, stating that the Court should have deferred to legislative history and the EEOC guidelines. *See id.* at 2155-56 (Stevens, J., dissenting).

8. 42 U.S.C.A. § 12102(2)(A) (West 1999). In the instant case, the Supreme Court cited the EEOC regulations defining "physical impairment," "substantially limits," and "major life activities" under the ADA. *See Sutton*, 119 S. Ct. at 2145 (citing 29 CFR § 1630.2(h)-(j) (1998)). Under the EEOC regulations, impairments include disorders affecting body systems such as neurological, respiratory, cardiovascular, and reproductive organs. *See id.* Substantially limited means, *inter alia*, that an individual is unable to perform, or is significantly restricted from performing "a major life activity that the average person in the general population can perform." *Id.* Major life activities include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.*

9. *See Sutton*, 130 F.3d at 900.

10. *See* Gilday v. Mecosta County, 124 F.3d 760, 762 (6th Cir. 1997).

11. *See Sutton*, 119 S. Ct. at 2144. The ADA granted the EEOC authority to issue regulations regarding Title I of the ADA §§ 12111-12117. *See id.* at 2144-45.

12. *See id.* at 2145. The Interpretive Guidance was in the appendix to the EEOC's regulations, and thus, was not binding law. *See Gilday*, 124 F.3d at 766.

13. Sutton, 119 S. Ct. at 2145. (quoting 29 C.F.R. § 1630, App. § 1630.2(j) (1998)).

14. *See id.* at 2145.

15. *See id.* at 2153 (Stevens, J., dissenting). The Supreme Court stated in the instant case that the term at issue, "disability," was undefined and the EEOC was not authorized to interpret such

Sixth Circuit Court of Appeals found that the EEOC's disability analysis contradicted the plain language of the ADA.[16]

In *Gilday*, the appellant had diabetes which was controllable through a strict diet and exercise regimen.[17] The appellant, who was an emergency medical technician, brought suit against his former employer after he was fired for "conduct unbecoming a paramedic," which included rudeness.[18] At trial, the appellant testified that his irritability resulted from fluctuations in blood sugar—a result of him departing from his strict regimen.[19] The district court granted summary judgment against appellant, holding that the diabetes was not significantly limiting when controlled.[20] On appeal, the issue was whether the court should evaluate the appellant's condition with regard to mitigating measures, or without regard to those measures, as recommended by the EEOC.[21] The *Gilday* court held that mitigating measures should be considered, but reversed, reasoning that the strict

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general provisions. *See id.* at 2145. The majority of courts followed the EEOC Interpretive Guidelines and held that disabilities should be evaluated without regard to mitigating measures. *See id.* at 2143. *See, e.g.*, Arnold v. United Parcel Serv., 136 F.3d 854, 866 (1st Cir. 1998) (holding that a person's disability status is based on his underlying medical condition whether or not it is ameliorated by treatment or medication); Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 630 (7th Cir. 1998) (holding that the determination of whether something is an impairment and whether that impairment limits major life activities is made without consideration of available mitigating measures); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937 (3d Cir. 1997) (determining that the EEOC interpretive guidelines which recommend that disability determination should be made without considering mitigating measures should be given deference); Roth v. Lutheran Gen. Hosp., 57 F.3d 1446, 1454 (7th Cir. 1995) (stating that determination of impairment must be made without regard to available measures that could mitigate the impairment); Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997) (following the EEOC interpretive guidelines which do not consider mitigating measures); Holihan v. Lucky Stores, Inc., 87 F.3d 362 (9th Cir. 1996) (following the EEOC interpretive guidelines); Harris v. H & W Contracting Co., 102 F.3d 516 (11th Cir. 1996) (holding that the EEOC interpretive guidelines which disregard mitigating measures should be followed).

16. *See Gilday*, 124 F.3d at 766 (Kennedy, J., concurring in part and dissenting in part) (arguing that courts making disability determinations should consider mitigating measures). Although Judge Moore's opinion appears as the lead opinion, Judge Kennedy provides the court's opinion with respect to mitigating measures and the EEOC's interpretive guidelines. *See id.* at 761; see also Chmielewski v. Xermac, Inc., 580 N.W.2d 823 n.16 (Mich. 1998) (noting that Judge Kennedy's opinion is controlling regarding the court's treatment of the EEOC guideline). Judges Kennedy and Guy, a majority of the court, determined that the ADA requires courts to consider an individual's impairment in light of mitigating measures, in contrast to Judge Moore who accepted the EEOC guideline approach, which disregards mitigating measures. *See Chmielewski*, 580 N.W.2d at 823 nn.16,17.

17. *See Gilday*, 124 F.3d at 761.

18. *Id.*

19. *See id.*

20. *See id.*

21. *See id.* at 762.

regimen itself might substantially limit the appellant's major life activities.[22]

In his concurrence, which is presented as the opinion of the court with respect to mitigating measures, Judge Kennedy relied on the long recognized principle that an agency's interpretive rule is entitled to "some deference" only if it was a "permissible construction of the statute."[23] The *Gilday* court held that courts should not defer to the EEOC rule because it misinterpreted the ADA's definition of disability.[24] First, the court asserted that the EEOC approach, in effect, eliminated the statute's "substantially limit[ing]" requirement.[25] Specifically, the *Gilday* court reasoned that, by overlooking mitigating measures, an individual could be disabled even if no major life activity was, in fact, substantially limited.[26] Second, the court stressed that the statute required an inquiry into the individual's present ability to perform major life activities.[27] Yet, instead, the EEOC approach evaluated a hypothetical person: the plaintiff minus any treatments.[28] While recognizing that the ADA's legislative history supported the EEOC's position,[29] the *Gilday* court explained that it was unnecessary to consult that history because the ADA's text was clear.[30] The *Gilday* court concluded that the EEOC's approach contradicted the plain language of the ADA and held that no effect should be given to the EEOC's interpretive rule.[31]

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22. *See id.* at 767. (Kennedy, J., concurring); see also *supra*, note 16, for a discussion of the importance of Judge Kennedy's concurrence.

23. *Gilday*, 124 F.3d at 767 (quoting Reno v. Koray, 515 U.S. 50, 61 (1995)).

24. *See id.* Judge Kennedy concluded that because the EEOC's approach would provide protection for persons with impairments that were not "substantially limit[ing]," the court should not give effect to the EEOC's interpretive rule. *Id.*

25. *Id.*

26. *See id.* An example of such a scenario is the diabetic who uses insulin injections. With the injections, the individual may suffer from no limitations in life activities. However, without the insulin, the individual could die. Thus, with the insulin, the diabetic is not "substantially limited," and thus, is not disabled. However, if the use of insulin is disregarded, the diabetic would be considered disabled because of the risk of death.

27. *See id.* The ADA states, "The term 'disability' means, with respect to an individual—a physical or mental impairment that substantially limits one or more of the major life activities of such individual . . . ." 42 U.S.C.A. § 12102(2)(A) (West 1999). Judge Kennedy explained that, "[w]hether a plaintiff is disabled is an individualized inquiry which depends upon the particular circumstances at issue." *Gilday*, 124 F.3d at 767.

28. *See Gilday*, 124 F.3d at 767. Judge Kennedy reasoned, "I do not believe that Congress intended the ADA to protect as 'disabled' all individuals whose life activities would hypothetically be substantially limited were they to stop taking medication." *Id.*

29. *See id.*

30. *See id.* Judge Kennedy stated that, "[w]here the statutory text is unambiguous, however, as I believe it is here, that ends the matter. '[We] do not resort to legislative history to cloud a statutory text that is clear.'" *Id.* (quoting Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994)).

31. *See id.* Judge Kennedy noted, "Of course, no deference is due to agency interpretations

Unlike the *Gilday* court, the First Circuit Court of Appeals adopted the EEOC's approach in *Arnold v. United Parcel Service, Inc.*[32] In *Arnold*, the appellant was also a diabetic but effectively controlled the condition with insulin injections.[33] The *Arnold* court noted that the plain language of the statute was the starting point for interpretation,[34] but that where the text is unclear, it must turn to other sources to discern the legislature's meaning.[35] Concluding that the ADA was silent as to whether courts should consider an impairment with or without regard to mitigating measures,[36] the *Arnold* court resorted to the Act's legislative history.[37] The *Arnold* court found that the House and Senate Committee Reports explicitly stated that determining whether impairment substantially limits an individual should not be with regard to mitigating measures.[38] Also, the reports stated that impairments such as epilepsy or diabetes are disabilities "even if the effects of the impairment are controlled by medication."[39]

Furthermore, the *Arnold* court emphasized the principle of statutory construction where remedial legislation, such as the ADA, should be construed broadly to achieve its purposes.[40] In reasoning that Congress

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at odds with the plain language of the statute itself." *Id.* at 767 (quoting Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 171 (1989)).

32. 136 F.3d 854, 866 (1st Cir. 1998).

33. *See id.* at 856.

34. *See id.* at 857 (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).

35. *See id*, at 858. "If the text is not unambiguously clear, however, we are obliged to turn to other sources to discern the legislature's meaning. One important source, of course, is the legislative history." *Id.* (citing Strickland v. Commissioner, Maine Dep't of Human Servs., 48 F.3d 12, 17 (1st Cir. 1995) (applying the test of Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984))).

36. *See id.* at 858-59. The *Arnold* court found that the statutory language in the instant case was "far from clear." Id. at 858. The *Arnold* court explained that the statute is unclear because it does not indicate whether ameliorative treatments should be considered by the court in determining whether an impairment substantially limits a major life activity. *See id.* at 859. The court stated, "The statute certainly does not say 'impairment plus treatment' or 'impairment after treatment' or 'treated impairment;' it just says 'impairment.'" *Id.* (quoting Sicard v. City of Sioux City, 950 F. Supp. 1420, 1436 (N.D. Iowa 1996)).

37. *See id.* at 859-61.

38. *Id.* at 859-60. (quoting H.R. REP. NO. 101-485, pt. III, at 28 (1989), *reprinted in* 1990 U.S.C.C.A.N. 445, 451; S. Rep. No. 101-116, at 23 (1989)).

39. *Id.* (quoting H.R. REP. NO. 101-485 pt. II, at 52(1990); S. REP. NO. 101-116, at 22). The *Arnold* court noted that both the House and Senate Committee reports specifically include diabetes as an impairment under the first prong of the ADA's definition of disability. *See id.* at 860 n.4 (quoting H.R. REP. NO. 101-485, at 51-52; S. REP. NO. 101-116, at 22).

40. *See id.* at 861. "It is a 'familiar canon of statutory construction that remedial legislation,' such as the ADA, 'should be construed broadly to effectuate its purposes.'" *Id.* (quoting Tcherepnin v. Knight, 389 U.S. 332, 336 (1967)). The *Arnold* court reasoned that the purpose of the ADA was to protect individuals with an underlying medical condition, but who are still capable of doing the job, with or without the help of mitigating measures. *See id.* (citing, e.g., 42 U.S.C. § 12101(a)(7)

intended for the ADA's protections to be administered liberally, the *Arnold* court noted Congress' finding of an estimated 43 million disabled Americans.[41] The court concluded from this statistic that Congress apparently intended that the ADA's protections cover a significant portion of the American populace.[42] Thus, the *Arnold* court accepted the EEOC's broad approach, finding it consistent with the legislative history and broad remedial purposes of the ADA.[43] Holding that the disability analysis must disregard mitigating measures,[44] the *Arnold* court reversed the district court's summary judgment against the appellant, reasoning that diabetes was a substantially limiting impairment.[45]

In *Washington v. HCA Health Services of Texas, Inc.*,[46] the Fifth Circuit Court of Appeals considered whether a court must regard mitigating measures in the disability analysis. Like the *Gilday* court, the *Washington* court believed that the most reasonable reading of the ADA was that mitigating measures must be considered.[47] However, like the *Arnold* court, the *Washington* court found the statute ambiguous on its face.[48] Thus, the *Washington* court concluded that principles of statutory interpretation required some deference to the ADA's legislative history and the EEOC guidelines.[49] Yet, neither of those authorities suggested that every

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(1994)).

41. *See id.* at 862 (quoting 42 U.S.C. § 12101(a)(1) (West Supp. 1999)).

42. *See id.*

43. *See id.* at 866.

44. *See id.* However, the *Arnold* court briefly added that it might hold differently in a case where the impairment was trivial and easily remedied such as myopia. *See id.* at 866 n.10. The court cited a Senate Report which suggested that a "minor, trivial impairment" would not be considered a disability under the ADA. *See id.* (quoting S. REP. NO. 101-116, at 23).

45. *See id.* at 866.

46. 152 F.3d 464, 467 (5th Cir. 1998).

47. *See id.* at 470; Gilday v. Mecosta County, 124 F.3d 760, 767 (6th Cir. 1997)(Kennedy, J., concurring opinion as the opinion of the court with respect to mitigating measures). The *Washington* court noted that "had Congress intended that a substantial limitation be determined without regard to mitigating measures, it would have provided for coverage under § 12102(2)(A) for impairments that have the potential to substantially limit a major life activity." *Washington*, 152 F.3d at 469 n.5. (quoting its previous dicta in Ellison v. Software Spectrum, Inc., 85 F.3d 187, 191-92 n.3 (5th Cir. 1996)).

48. *See id.* at 469.

49. *See id.* at 470 n.6 (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)). The *Chevron* doctrine requires courts to defer to an agency regulation for guidance in the interpretation of an ambiguous statute. *See id.* However, the court is not required to defer to an agency interpretation if it is not a permissible construction of the statute. *See id.* The *Washington* court noted that the EEOC Interpretive Guidelines were not authorized under the ADA; therefore, they were not entitled to the full degree of deference in the *Chevron* doctrine. *See id.* at 469-70 (construing Batterdon v. Francis, 432 U.S. 416 (1977)). However, the court concluded that, although the EEOC's interpretations were not controlling, they were a body of "experience and informed judgment to which courts and litigants may properly resort for guidance." *Id.* at 470

impairment must be considered in its unmitigated state.[50] The *Washington* court decided that whether an impairment should be evaluated in its mitigated or unmitigated state should depend on the nature of the impairment and the mitigating measures utilized.[51]

Therefore, the *Washington* court held that only "serious" impairments requiring the use of mitigating measures on a frequent basis, comparable to those identified by the EEOC and in legislative history such as diabetes, epilepsy, and hearing impairments, should be considered in their unmitigated state.[52] The appellant in *Washington* had Adult Stills Disease and controlled the effects through daily medications.[53] The court reasoned that the appellant's disease was "serious," and thus, held that mitigating measures should not be taken into account in assessing whether the appellant was disabled under the ADA.[54]

In the instant case, the Supreme Court addressed, for the first time,[55] the issue of mitigating measures in the disability analysis under the ADA.[56] Like the *Gilday* court, the instant Court reached a conclusion based on the statute's plain language.[57] The Court held that the statute's terms required that mitigating measures be a factor in the disability analysis.[58] The Court's

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(quoting Skidmore v. Swift & Co., 65 S. Ct. 161, 164 (1944)). Because it concluded that the EEOC was entitled to some amount of deference, the *Washington* court balanced several factors to determine what was the appropriate degree of deference. *See id.* The factors included "the circumstances of their promulgation, the consistency with which the agency adhered to the position announced, the evident consideration which has gone into its formulation, and the nature of the agency's expertise." *Id.* (quoting Rowinsky v. Bryan Indep. School Dist., 80 F.3d 1006, 1014 n.20 (5th Cir. 1996)). Applying the test, the *Washington* court found that the EEOC's Interpretive Guide had been a part of its regulations since they were promulgated, and have consistently interpreted "disability" to mean "without regard to mitigating measures." *Id.* Further, the legislative history supported the EEOC's disability analysis, and the EEOC has significant expertise and authority to promulgate ADA regulations. *See id.* Thus, the court concluded that the EEOC's Interpretive Guidelines deserved more than minimal deference. *See id.*

50. *See id.*

51. *See id.* at 470-71.

52. *See id.* at 470.

53. *See id.* at 466. Without the medications, the appellant would be bedridden and unable to work. *See id.*

54. *See id.* at 471.

55. *See* Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999); *Washington*, 152 F.3d at 467 n.1. The *Washington* court noted that the issue of whether to regard mitigating measures in a disability analysis was "a novel question that has not been explicitly resolved by . . . the Supreme court." *Id.*

56. *See Sutton*, 119 S. Ct. at 2146. The instant Court stated that the "decision turns on whether disability is to be determined with or without reference to corrective measures." *Id.*

57. *See id.* at 2146-47; Gilday v. Mecosta County, 124 F.3d 760, 767 (6th Cir. 1997) (Kennedy, J., concurring opinion as the opinion of the court with respect to mitigating measures).

58. *See Sutton*, 119 S. Ct. at 2149.

reasoning rested on three main arguments.[59] First, because the phrase "substantially limits" was in present indicative verb form, the Court reasoned that the substantial limitations must actually and presently exist.[60] The Court deduced that a corrected or controlled impairment which is not substantially limiting merely has the potential to be substantially limiting.[61] Thus, the Court concluded that such an impairment is not a disability.[62]

Second, the instant Court found that evaluating an individual's corrected impairment in a hypothetical, uncorrected state defies the statutory command to examine the major life activities "of such individual."[63] Determining whether a disability would exist if the impairment was not corrected would require general facts about the usual effects of that impairment on the average person.[64] The instant court reasoned that this type of analysis would create per se disabilities, thereby nullifying any possible attempt of an individualized inquiry.[65]

Finally, the instant Court considered the statistical findings, which Congress enacted as part of the ADA, estimating that 43 million Americans have disabilities.[66] Whereas the *Arnold* court considered the figure evidence of Congress' intent to provide broad coverage, the instant Court concluded just the opposite.[67] Examining various reports, including one authored by the ADA's original drafters,[68] the Court emphasized Congress' knowledge that 100 million Americans had vision impairments alone.[69] The court reasoned that Congress' inclusion of the 43 million figure in the ADA's text revealed an understanding that the "disabled" population excluded individuals with largely corrected impairments.[70] In

59. *See id.* at 2146.

60. *See id.*

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

62. *See id.*

63. *See id.* at 2147. The instant Court reasoned that the EEOC approach would create a system in which persons were treated as members of a group. *See id.* For example, courts would find almost all diabetics disabled because without treatment they would almost certainly be substantially limited. *See id.* Thus, a diabetic would be considered disabled simply because he or she has diabetes, even if the illness did not impair any daily activities. *See id.* The instant Court stated, "This is contrary to both the letter and the spirit of the ADA." *Id.*

64. *See id.*

65. *See id.*

66. *See id.* (quoting 42 U.S.C.A. § 12101(a)(1) (West Supp. 1999)).

67. *See* Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 862 (1st Cir. 1998); Sutton, 119 S. Ct. at 2148.

68. *See Sutton*, 119 S. Ct. at 2147-50 (citing 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)).

69. *See id.* at 2149 (citing from NATIONAL ADVISORY EYE COUNCIL, U.S. DEPT. OF HEALTH & HUMAN SERV., VISION RESEARCH—A NATIONAL PLAN: 1999-2003, at 7 (1998)).

70. *See id.* at 2148.

sum, the Court concluded that Congress would have cited a much higher number than 43 million if it intended to include all correctable impairments.[71] The Court added, however, that the mere use of mitigating measures did not disqualify an impairment from ADA protection.[72] Rather, a disability would exist if an individual was substantially limited in a major life activity, notwithstanding the corrective device.[73]

The instant Court rejected petitioners' argument that the Court should defer to the EEOC's disability analysis since the ADA was silent on the issue of mitigating measures.[74] The Court reasoned that it was unnecessary to consider agency guidelines and legislative history because it found the statute's language unambiguous.[75] Moreover, the Court ruled that the EEOC's disability analysis was impermissible because it contradicted the statute by disregarding mitigating measures.[76] Therefore, because petitioners admitted that their vision was not substantially limited with contact lenses, the Court affirmed the summary judgment for respondent.[77]

The Supreme Court's holding in the instant case drew a bright line rule in an area of law that was previously unsettled.[78] The decision mandated that, in all ADA cases, the disability analysis must consider mitigating measures.[79] Plaintiffs with correctable impairments must prove that the impairment substantially limits a major life activity, even when corrected.[80] Potentially, even a life-threatening impairment will not be a disability if either medicine or a device controls the debilitating effects.[81] Thus, more ADA claims will be dismissed at the threshold stage for failure to show that the individual is substantially limited in a major life activity in spite of mitigating measures.[82]

Apparently, the instant Court's primary concern was that federal circuit courts and the EEOC were construing the ADA's protection too broadly by treating correctable impairments as disabilities.[83] This was evident in

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71. *See id.* at 2149. In concurring, Justice Ginsburg noted that the findings included in the ADA that 43 million Americans were disabled and that individuals with disabilities are a discrete and insular minority were inconsistent with petitioners' "enormously embracing" definition of disability which included corrected disabilities. *Id.* at 2152.

72. *See id.*, at 2149.

73. *See id.*

74. *See id.* at 2146.

75. *See id.*

76. *See id.* at 2147.

77. *See id.* at 2149.

78. *See id.*, at 2149. The Court held that "disability under the Act is to be determined with reference to corrective measures." *Id.*

79. *See id.*

80. See id.

81. *See id.* at 2160 (Stevens, J., dissenting).

82. *See id.* at 2156 (Stevens, J., dissenting).

83. *See id.* at 2149.

the Court's focus on the statute's plain language.[84] Similar to the *Gilday* court, the instant Court concluded that the statute was unambiguous, thereby avoiding the need to consult either legislative history or agencies for interpretive guidance.[85] The Court could have followed the *Arnold* or *Washington* courts and concluded that the statute was ambiguous because it left "substantially limits" undefined and was silent regarding mitigating measures.[86] Under this approach, the Court could not have ignored the Act's legislative history, which reveals Congress' intent to exclude mitigating measures from the disability analysis.[87] In order to narrow the ADA's coverage, therefore, the Court had to sidestep the statute's legislative history.[88]

Although the instant Court avoided confronting any legislative history averse to the objective of narrowing the statute's scope, the Court did resort to some favorable legislative history.[89] Specifically, the Court discussed Congress' finding that there were 43 million disabled Americans.[90] The Court relied heavily on the background of the figure to prove that Congress intended to exclude correctable impairments from the ADA's protection.[91] Yet, the court neglected to reference the Committee Reports and other records which specifically demonstrate that Congress envisioned quite the opposite scope of coverage.[92]

Regardless of the instant Court's goal, the result of their decision was greater protection of employers' interests, rather than the interests of the truly disabled.[93] For instance, respondent denied jobs to petitioners because

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

85. *See id.* at 2155 (Stevens, J., dissenting); Gilday v. Mecosta County, 124 F.3d 760, 767 (3rd Cir. 1997) (Kennedy, J., concurring opinion as the opinion of the court with respect to mitigating measures). In the instant case, Judge Stevens noted that "[w]e have traditionally accorded respect to . . . the agencies." *Sutton,* 119 S. Ct. at 2155; *see also* Bragdon v. Abbott, 118 S. Ct. 2196, 2207 (1998) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944) (reasoning that courts should defer to agencies implementing a statute for guidance)).

86. *See* Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 859 (1st Cir. 1998); Washington v. HCA Health Servs. of Tex, Inc., 152 F.3d 464, 469 (5th Cir. 1998).

87. *See Arnold,* 136 F.3d at 860 (citing H.R. REP. NO. 101-485 at 52; S. REP. NO. 101-116 at 22).

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

89. *See id.* at 2147-49.

90. *See id.*

91. *See id.* at 2149.

92. *See Arnold,* 136 F.3d at 860 (citing H.R. REP. NO. 101-485 at 52; S. REP. NO. 101-116 at 22).

93. *See* Leonard H. Glantz, *Disability Definition Mess,* NAT'L L.J., Aug. 23, 1999, at A15. Glantz notes in his article that the result in the instant case ignores the Supreme Court's prior approach to disability cases. *See id.* He writes that in *Bragdon,* about a year before *Sutton,* the court ruled that a person infected with the human immunodeficiency virus (HIV) is not disabled under the ADA. *See id.* (citing Bragdon v. Abbott, 118 S. Ct. 2196, 2197 (1998)). The plaintiff in *Bragdon* had not reached the "full-blown" AIDS stage of the illness and was living without any

of their poor, uncorrected vision.[94] The court, however, evaluated their corrected vision and found that no disability existed.[95] The resulting anomaly was that petitioners denied employment solely because of a physical impairment, yet were not entitled to protection from disability discrimination.[96] Evidently, the Court wanted to preserve free reign for employers to make employment decisions based on the physical attributes germane to a particular job without the fear of an ADA lawsuit.[97]

The instant Court could have chosen a different means of protecting employer discretion by emphasizing the "qualified individual" aspect.[98] Petitioners would have been required to prove that in spite of a disability they were otherwise qualified to perform the job.[99] This would have compelled respondent to show a legitimate reason for its vision policy.[100] Such an approach would avoid forcing employers to hire truly unqualified persons, while also furthering the ADA's aim of ridding the workplace of unfair discriminatory practices.

Yet another option the Court declined was the approach taken by the *Washington* court.[101] The instant case was an opportunity for the Court to follow *Washington* by differentiating between trivial and serious impairments.[102] The Court could have ruled that petitioners' myopia was the type of trivial, easily correctable impairment that should be viewed with reference to mitigating measures.[103] This would have narrowed the scope of ADA coverage, without eliminating many serious yet controllable disabilities.[104] Such an approach acknowledges Congress' intent manifested

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manifested symptoms at the time of the ADA action. *See Bragdon*, 118 S. Ct. at 2200-01. The court in *Bragdon* was willing to expand "major life activities" to include "reproduction," because that was the only life activity that Abbott claimed was substantially limited. *See id.* at 2205. In *Sutton*, however, the court was unwilling to read the statute in a way that provided protection for petitioners, even though without correction, they were substantially limited in the major life activity of seeing. *See Sutton*, 119 S. Ct. at 2149.

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

95. *See id.* at 2149.

96. *See id.* at 2143-44.

97. *See id.* at 2150.

98. *Id.* at 2156-57 (Stevens, J., dissenting).

99. *See id.*

100. *See id.* at 2158 (Stevens, J., dissenting).

101. *See* Washington v. HCA Health Servs. of Tex., 152 F.3d 464, 470-71 (5th Cir. 1998). The *Washington* court ruled that some impairments should be analyzed with regard to mitigating measures and some should not. *See id.* The instant Court did not make this compromise. *See Sutton*, 119 S. Ct. at 2149.

102. *See Sutton*, 119 S. Ct. at 2161-62 (Breyer, J., dissenting).

103. *See id.*

104. *See id.* at 2160-61 (Stevens, J., dissenting).

in legislative history and also gives some deference to the EEOC's approach.[105]

The Supreme Court resolved the split in the circuits by siding with the minority trend.[106] The result was a sharp turn in the practical force of the statute. Seemingly, the Court had in mind a goal to narrow the scope of the ADA's protection and shaped its reasoning to accomplish that end.[107] The Court circumvented the Congressional intent documented in the legislative history and relied on the Act's plain language in authoring a fictional version of Congressional intent to better suit the Court's purposes.[108] Had the Court desired to interpret the statute broadly, it could have easily done so by conducting a more principled analysis of the instant case.[109] As the *Arnold* court noted, the ADA is remedial legislation which, historically, the courts have construed broadly.[110] Additionally, the Court could have followed well-established principles of statutory construction by deferring to legislative history and agency interpretations when statutory language is unclear. Instead, the Court deferred to its own opinion in a rush to close the floodgates of the ADA.

105. *See* 42 U.S.C.A. § 21201 (a)(5) (West Supp. 1999). Congress found that "individuals with disabilities continually encounter various forms of discrimination, including . . . overprotective rules and policies . . . ." *Id.* The purpose of the ADA was "to provide a clear . . . standard[] addressing discrimination against individuals with disabilities." 42 U.S.C.A. § 12101(b)(1) & (2).

106. *See Sutton*, 119 S. Ct. at 2153 (Stevens, J., dissenting).

107. *See id.* at 2149.

108. *See id.* at 2160-61 (Stevens, J., dissenting).

109. *See id.* at 2154 (Stevens, J., dissenting). Justice Stevens reasoned that "[t]o the extent that there may be doubt concerning the meaning of the statutory test, ambiguity is easily removed by looking at the legislative history." *Id.* at 2155. "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.'" *Id.* (quoting Garcia v. United States, 469 U.S. 70, 76 (1984)). Justice Stevens stated that the Committee Reports on the ADA bill 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. *See id.*

110. *See Arnold*, 136 F.3d at 861.