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COMMENT

SUTTON v. UNITED AIR LINES, INC.: THE SUPREME COURT APPLIES “CORRECTIVE” AND “MITIGATING” COMMON SENSE TO THE ADA

INTRODUCTION

Imagine that it has been your lifelong dream to one-day work as a global airline pilot. You get your pilot’s license. You log thousands of hours of flight time. You obtain the requisite licenses and medical certificates to fly passenger flights, and you get experience as a commercial airline pilot. But when your big day comes to interview for a global airline pilot position, the interviewer informs you that your uncorrected vision does not meet airline standards, and although you can see 20/20 with your glasses, your impairment prevents you from fulfilling your dream. “That is nonsense!” you think to yourself, and in the pursuit of happiness, and in the grand spirit of American resolve, you do what any red-blooded, good-hearted American would do when dreams are dashed—you consult an attorney. And the comforting words of the attorney assure you that, although life may have dealt you a bad hand in having to wear glasses, Congress has re-dealt the cards in your favor by creating what is known as the Americans with Disabilities Act of 1990 (“ADA” or “Act”). In other words, you can file a lawsuit claiming that you are disabled because of your poor eyesight, and that the airline discriminated against you based on that disability.

If a hint of sarcasm is detected, it is intended. After all, before the early 1990’s, who among us thought of a person who wore glasses as being disabled? Although the above-described person is a sympathetic character and has a legitimate grievance regarding the airline’s questionable policy, it seems disingenuous for such a person to claim to be disabled when she can simply slide on a pair of glasses and eliminate the effects of her impaired vision. When the ADA was under consideration, Congress heard testimony from people who were considerably limited in their ability to perform basic, essential activities and who experienced extensive discrimination because of those limitations. Those people

2. This is the essence of an employment discrimination claim under Title I of the ADA, i.e. the existence of a disability and discrimination based on such disability. See discussion infra notes 27–31 and accompanying text.
3. See infra note 154 and accompanying text.
were not able to easily and significantly mitigate the effects of their impairments, as a person who simply needs glasses can.

Nevertheless, many courts have considered whether the ADA covers correctable or treatable impairments such as poor eyesight, high blood pressure, depression, asthma, and poor hearing, when treatment considerably or completely diminishes their limiting effects. Corrective and/or mitigating measures are available to control such impairments for many, if not most people afflicted by them. It is often possible to mitigate the effects of such impairments to a level where the afflicted individual functions equivalently to a person without the impairment. For example, a person with poor eyesight can achieve 20/20 vision by wearing prescription eyeglasses. Nonetheless, courts have generally concluded that the ADA requires them to consider whether an individual is disabled without reference to such mitigating measures. Stated another way, these courts have ignored the actual effect of the treated impairment on the individual; instead, they have focused on how the impairment would normally affect an untreated person. This was the issue presented in a suit brought by twin sisters Karen Sutton and Kimberly Hinton (Petitioners). Their case, *Sutton v. United Air Lines, Inc.*, involved facts similar to the scenario described above, and is the focus of this Comment.

Approximately forty-three million Americans suffer from some form of physical or mental disability. The author of the 1988 version of

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4. See, e.g., infra notes 66, 68.
5. For example, it is common knowledge that the use of prescription eyeglasses or contact lenses corrects vision completely when worn, just as the use of a hearing aid may dramatically improve the effects of hearing loss. These remedies are readily available to most Americans. Similarly, various prescribed medications are capable of controlling high blood pressure, asthma or depression.
6. See, e.g., infra note 68 and accompanying text.
8. The author admittedly took some creative liberties with the facts of the case in the opening paragraph of this Comment. For a complete account, see infra text accompanying notes 79–90.
9. In addition to *Sutton*, the Court addressed the issue in two other cases decided the same day. See *Murphy v. United Parcel Serv., Inc.*, 119 S. Ct. 2133 (1999); *Albertsons, Inc. v. Kirkingburg*, 119 S. Ct. 2162 (1999). All three cases involved the issue of whether corrective and/or mitigating measures should be considered in determining whether an individual is disabled under the ADA. *Sutton* expresses the court’s reasoning, and the *Albertsons* and *Murphy* opinions cite to that reasoning as resolving the respective cases. Further discussion of the *Albertsons* and *Murphy* opinions is beyond the scope of this Comment.
10. See 42 U.S.C. § 12101(a)(1) (1994). The Supreme Court in *Sutton* traced the likely origin of this number to a report by the National Council on Disability. See *Sutton*, 119 S. Ct. at 2147 (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)). The 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. The author has elsewhere discussed the dubious derivation of this figure, along with his reasons for concluding that it is nonetheless a useful, rough estimate.
the ADA stated, "[b]y almost any definition, Americans with disabilities are uniquely underprivileged and disadvantaged. They are much poorer, much less well educated and have much less social life, have fewer amenities and have a lower level of self-satisfaction than other Americans." For centuries, people afflicted with varying forms of disability faced discrimination in almost every conceivable aspect of public life. Since 1990, the ADA has provided disabled people with a weapon to combat discrimination. The ADA, however, has also proven fruitful for people with conditions not commonly regarded as disabilities or with conditions easily and effectively treated to a degree where the practical limitations caused by the condition become less restrictive or even nonexistent. Claimants and courts have stretched the statutory definition of disability to absurd lengths compelling employers to expend resources litigating frivolous claims and/or retaining unproductive employees. At the end of its 1999 term, the Supreme Court decided Sutton, narrowing the definition of "disability," and thus limiting the number of people to which it applies. Sutton held that when a court decides whether a claimant is disabled under the ADA, that court must consider the extent to which any measures, employed by the claimant to mitigate or correct an impairment, diminish the effects of the impairment.

Part One of this Comment presents the background necessary for an effective examination of Sutton v. United Air Lines, Inc. Part Two summarizes the majority, the concurring, and dissenting opinions in the case. Part Three analyzes critical parts of the case and argues that the congressional intent behind the ADA's definition of disability is not clearly defined, and therefore, the Supreme Court properly disregarded agency guidance that required courts to make disability determinations without


12. Disabled people have endured centuries of antipathy, segregation, and cruelty. See Fredrick Watson, Civilization and the Cripple 1-2 (1930) (discussing the history of disabled people in society). Examples date back to ancient Greece where, under the law, "defective" children were put to death under the assumption that they could never contribute to society. Id. This assumption endured for centuries and still exists in some societies. Id. The influence of the Old Testament marked deformity and mental and physical handicap as the "curse of God" and a sure indication of "spiritual degradation" and evil. See id. at 2. Most enduring, however, has been the prevalent practice of segregating disabled people from the rest of society. See id. at 4-5. Whether this was accomplished legally through the mandated admittance to institutions such as almshouses, or by the simple public wont of treating disabled people with disdain and cruelty so as to discourage them from venturing forth from their own seclusion, depended on the prevailing notions and presumptions of the age. See id. at 2. No matter the age, however, the message was clear: if you were considered disabled, you were unfit for society and, moreover, you were a burden on society. See id. at 4-5. See also 42 U.S.C. § 12101(a)(2), (7). See generally Symposium, Historical Overview: From Charity to Rights, 50 Temp L.Q. 953 (1977) (discussing the development of rights for people with disabilities).


14. See e.g., infra notes 177-183 and accompanying text.

reference to mitigating measures. Furthermore, this part suggests that an adequate remedy exists for those with such impairments not rising to the level of disability, but who have nevertheless experienced discrimination in the employment context. Part Four concludes that the Supreme Court provided a rational and reasoned interpretation of the ADA’s definition of disability resulting in a narrowed protected class that more closely identifies the intended beneficiaries of the Act.

I. BACKGROUND

I. The Americans with Disabilities Act of 1990

Over the course of the last three decades, society’s perception of the physically and mentally disabled has changed rapidly. Rapid, at least when compared to the thousands of years through which disabled people were automatically assumed unable to contribute in a meaningful way to society, and worse, to be a drain on society’s resources. In 1990, Congress passed the ADA. Congress enacted this comprehensive legislation in response to a shift in the public consciousness. The ADA recognizes that disabled people have been the target of discrimination; discrimination perhaps more subtle than for other minority groups, yet nonetheless carrying the same insidious and devastating results that accompany the deprivation of basic human rights recognized in American society.

Having its genesis in the civil rights movement, the ADA builds upon and reflects many of the concepts and language of antidiscrimination legislation enacted during the preceding three decades.
The ADA, however, extends beyond animus-based discrimination to prohibit discrimination based on cost considerations, as for instance, when an employer refuses to hire a disabled person because it will cost more to accommodate that person’s disability. Professor Erica Worth Harris describes this effect of the ADA as “a form of supplemental disability insurance” by allowing disabled people to remain in the workforce rather than forcing them to collect disability benefits.

The ADA imposes reform in the following four areas where disabled people endure pervasive discrimination: employment, public services and transportation, public accommodations and services operated by private entities, and telecommunications. The principal purpose of these various provisions is to provide disabled people access to the same opportunities and services that are generally available to the non-disabled population.

The employment provisions of the ADA seek to deter discrimination against disabled people by giving those who are qualified for the position they seek or hold a legal cause of action against employers who discriminate on the basis of a disability in their employment-related decisions, or who fail to reasonably accommodate disability-related needs. In general, Title I prohibits employers with fifteen or more employees from discriminating against qualified job applicants and employees who are or become disabled. The Act, however, is not a mandate for affirmative action. In fact, to qualify for the ADA’s protections, a dis-


24. Id. at 596.

25. This Comment focuses on the definition of “disability” in the context of employment discrimination, although the same definition is uniformly applied to the other areas covered by the ADA. See 1 HENRY H. PERRITT, JR., AMERICANS WITH DISABILITIES ACT HANDBOOK 36-37 (3rd ed. 1997). Congress separated these areas in the Act by title. Id. at 1. Title I relates to employment. 42 U.S.C. §§ 12111-12117. Title II covers public services and transportation. 42 U.S.C. §§ 12131-12165. Title III applies to public accommodations. 42 U.S.C. §§ 12181-12189. Title IV contains technologically oriented provisions related to telecommunications. 47 U.S.C. §§ 225, 711. Title V covers miscellaneous provisions of the Act such as enforcement, exemptions, liability for attorneys’ fees in ADA litigation and governmental immunity. 42 U.S.C. §§ 12201-12213. Further discussion of Titles II-V is beyond the scope of this Comment.

26. See 42 U.S.C. § 12101(a)(8)-(9); id. § 12101(b).


29. See Christopher & Rice, supra note 27, at 763 (“The general principle underlying the employment provisions of the Act is that, as long as an individual with a disability is able to perform the essential functions of a job, with or without reasonable accommodation of his impairments, he should not be barred from employment opportunities because of his disability.”) (emphasis added)
abled person must be capable of performing the essential functions of a particular job with or without the employer's accommodation of any such disability. An employer must provide reasonable accommodations for qualified disabled employees, unless those accommodations would impose an undue hardship on the employer. The protected class under the employment provisions of the ADA, therefore, includes any "qualified individual with a disability." Before a court determines whether an individual is qualified, it must determine if such an individual is disabled.

II. The Statutory Meaning of "Disability"

To establish a claim of employment discrimination under the ADA, plaintiffs must first demonstrate that they are disabled within the meaning of the Act. The Act does not necessarily require, however, that a plaintiff actually be disabled or even be presently impaired. This is because it is possible for an employer to regard an individual as disabled based on a past or perceived impairment that does not actually disable the individual in a substantial way. The ADA recognizes that many impairments do not rise to the level of "disability" on their own. Often the stereotypes, myths, and fears associated with various impairments are
more disabling than the actual impairment.\textsuperscript{36} With that in mind, the ADA defines “disability,” with respect to an individual, 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,\textsuperscript{37} or (C) being regarded as having such an impairment.”\textsuperscript{38} The definition of “disability” focuses on the effect of an actual or perceived impairment, and not the impairment itself.\textsuperscript{39} Thus, a particular impairment (or set of impairments) rises to the level of disabling only if its effect is substantially limiting.

The first prong of the definition identifies the presence of a disability stemming from an actual impairment. The second and third prongs recognize the discriminatory effect that negative stereotypes can have on an individual resulting from a history of,\textsuperscript{40} or another’s misperception of,\textsuperscript{41} a disability.\textsuperscript{42} The second and third prongs require a heavier evidentiary burden on a plaintiff because it is typically more difficult to prove what an employer perceived or thought, than it is to prove the actual state of an individual’s impairment.

\begin{itemize}
\item \textsuperscript{36}“Such an impairment might not diminish a person’s physical or mental capabilities, but could nevertheless substantially limit that person’s ability to work as a result of the negative reactions of others to the impairment.” 29 C.F.R. pt. 1630, app. § 1630.2(l) (1999) (quoting Nassau County v. Arline, 480 U.S. 273, 283 (1987)); see also Wright, supra note 29, at 146 (stating that “the severity of a disability is thus partly a matter of impairment of functioning and crucially of public response”).
\item \textsuperscript{37}Because subsection (B) was not at issue in \textit{Sutton}, it is not extensively discussed in this Comment. However, one result of the Court’s holding in \textit{Sutton} (limiting the application of subsection (A)) may be an increased reliance by plaintiff’s on subsection (B) as a way of establishing a disability for purposes of an ADA cause of action. The purpose and application of subsection (B) is described in the following:
\begin{itemize}
\item The intent of this provision, in part, is to ensure that people are not discriminated against because of a history of disability ... This provision also ensures that individuals are not discriminated against because they have been misclassified as disabled ...
\item This part of the definition is satisfied if a record relied on by an employer indicates that the individual has or has had a substantially limiting impairment. The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual’s major life activities. There are many types of records that could potentially contain this information, including but not limited to, education, medical, or employment records.
\end{itemize}
29 C.F.R. pt. 1630, app. § 1630.2(k).
\item \textsuperscript{38}42 U.S.C. § 12102(2)(A)-(C) (1994). This is the same definition as used in the ADA’s predecessor, the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 394 (codified as amended at 29 U.S.C. § 794 (1994)). See also Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979). This case, decided under the Rehabilitation Act of 1973, determined that “[a] person who has a record of, or is regarded as having, an impairment may at present have no actual incapacity at all.” \textit{Id.}
\item \textsuperscript{39}See 29 C.F.R. pt. 1630, app. § 1630.2(j).
\item \textsuperscript{40}See 29 C.F.R. pt. 1630, app. § 1630.2(k). An example would include a former cancer patient fired because of a fear of recurrence. \textit{Id.}
\item \textsuperscript{41}See 29 C.F.R. pt. 1630, app. § 1630.2(l).
\item \textsuperscript{42}“Congress acknowledged that society’s accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment.” \textit{Id.} (quoting Nassau County v. Arline, 480 U.S. 273, 284 (1987) (referring to the third prong of the disability definition)).
\end{itemize}
While an actual impairment may or may not presently exist under the second and third prongs of the “disability” definition, the individual must still be substantially limited in a major life activity. This might occur under the third prong, for example, if an individual with a disfiguring facial scar is unable to obtain a job because, although fully qualified for the position, the employer is concerned about its customer’s negative reactions. In this case, if the employer thus regards the individual as disabled and decides not to hire the individual based on the perceived disability, the denial of opportunity resulting from the employer’s fear of customer’s reactions is the disabling factor.

What constitutes a physical or mental impairment under the Act is defined broadly. The pivotal inquiry under each prong of the “disability” definition is whether a major life activity is substantially limited by the impairment (first prong of the definition) or the perception of impairment (second and third prongs). Major life activities include such functions as “caring for one self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” Note that courts and agencies commonly regard “working,” however, as a claim of last resort. Proving that one is substantially limited in the major life activity of working is typically more difficult than proving the same for other major life activities. This is because “[a]n individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes, when compared with the ability of the average person with com-

43. See Burgdorf, supra note 10, at 450.
44. See 29 C.F.R. pt. 1630, app. § 1630.2(l).
45. See id. The Equal Employment Opportunity Commission (EEOC), the federal agency responsible for implementing and enforcing Title I of the ADA, uses this example to illustrate an instance where an individual’s impairment is only substantially limiting because of the attitudes of others. Id. This section of the EEOC Interpretive Guidance describes two instances where an individual might be regarded as having a disability: (1) an individual’s impairment, which is not substantially limiting, is believed to be substantially limiting by the employer, or (2) an individual has no impairment whatsoever, but is regarded by an employer has having a substantially limiting impairment. Id.
46. See supra notes 36 and 42 and accompanying text; Burgdorf, supra note 10, at 449.
47. The EEOC defines “physical or mental impairment” as:
   (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
   (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
29 C.F.R. § 1630.2(h).
48. 29 C.F.R. § 1630.2(i). “This list is not exhaustive. For example, other major life activities include, but are not limited to, sitting, standing, lifting, reaching.” 29 C.F.R. pt. 1630, app. § 1630.2(i).
49. 29 C.F.R. pt. 1630, app. § 1630.2(j) (“If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working.”).
parable qualifications to perform those same jobs." Therefore, a plaintiff making a claim under the major life activity of working must show that he or she was substantially limited or regarded as substantially limited in more than the particular job he or she held or desired.

The extent to which the major life activity is limited determines whether such an individual is "substantially limited" in that activity. Under the second and third prongs of the definition, limitations result from the employer's perceptions. Under the first prong, limitations are direct results of the impairment. In determining the extent of a limitation under the first prong of the definition, courts are instructed to consider such factors as the nature and severity of the impairment; the duration of the impairment; and the expected long-term impact of or resulting from the impairment.

Whether courts should consider the effects of corrective or mitigating measures on the individual's impairment is the source of considerable disagreement. Obviously, the use of such measures diminishes the extent to which a particular impairment limits an individual. The question therefore becomes whether the claimant possesses a disability under the ADA if mitigating measures largely alleviate the claimant's impairment. When a court, in its disability determination, ignores an individual's use of mitigating measures, it increases the likelihood that it will find that a particular impairment substantially limits a major life activity. Therefore, it is less likely that a plaintiff will have to rely on the more difficult to prove second or third prongs of the definition. Likewise, the odds increase that a plaintiff's claim will survive summary judgment.

III. The EEOC's Position on the Question of Mitigating Measures

The Equal Employment Opportunity Commission (EEOC) is the federal agency charged with the responsibility of implementing and enforcing Title I of the ADA. In accordance with its directive, the EEOC issued regulations exactly one year after the enactment of the ADA. The EEOC supplemented these regulations with the concomitant publication of interpretive guidance to assist covered entities' understanding of the employment provisions. Agency issued regulations are generally bind-

50. Id. (emphasis added).
51. See 29 C.F.R. § 1630.2(j)(3)(i).
52. See 29 C.F.R. § 1630.2(j)(1)(i)-(ii); 1 PERRITT, supra note 25, at 41.
53. See 29 C.F.R. § 1630.2(j)(2)(i)-(iii).
54. See infra notes 66-69 and accompanying text.
55. See Walsh, supra note 33, at 931.
56. See Walsh, supra note 33, at 932; Harris, supra note 23, at 584-94.
57. See 42 U.S.C. § 12116 (1994) ("Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter . . . ").
ing on courts if the regulations are congressionally mandated and represent a permissible statutory construction. Interpretive guidance, on the other hand, is not binding, but afforded great deference due primarily to the specialized nature of agency authority.

The EEOC regulations are silent on the issue of mitigating measures. The interpretive guidance, however, specifically provides that "[t]he existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices." This directive makes it possible for certain claimants who would only qualify as disabled under the third prong of the definition (because their impairment does not, by itself, limit a major life activity) to claim protection under the first prong of the definition as well. For instance, an individual with medicinally controlled high blood pressure might suffer from discrimination, even though his doctor gives him clearance to work, because his employer regards his condition as dangerous in relation to the position he holds. This circumstance would qualify him as disabled under the "regarded as" prong of the definition under any interpretation of the Act. Courts that follow the EEOC's guidance ignore the mitigating effects of the medicine and consider how the limiting effects of high blood pressure would hypothetically affect or limit the individual. This results in a court finding that such individual is also disabled under the first prong of the Act's definition because of a substantial limitation, albeit hypothetical, on a major life activity.

Courts that do not follow the EEOC guidance consider the effects of the medicine on the impairment, and if sufficiently controlled, likely find that the impairment does not substantially limit a major life activity of the individual. This prevents the impairment from qualifying under the first prong of the definition. This is significant because qualifying under the first prong reduces the evidentiary burden upon the claimant when compared to that of the third prong. The first prong demands only a showing that the impairment substantially limits a major life activity. A showing of disability under the third prong requires evidence that the employer knew of the impairment, or believed one existed, and thought that such impairment substantially limited a major life activity.

62. 29 C.F.R. pt. 1630, app. § 1630.2(j); see also 29 C.F.R. pt. 1630, app. § 1630(2)(i).
63. See Walsh, supra note 33, at 927.
64. See Harris, supra note 23, at 583.
65. See id. (citing Hamm v. Runyon, 51 F.3d 721, 724-25 (7th Cir. 1995)).
IV. Discord Among the Circuits and Lower Courts in Interpreting the Meaning of “Disability”

Before the Sutton decision, a divisive antinomy developed among the circuits on the question of whether courts should consider the effects of ameliorative measures in making the disability determination. The Sixth and Tenth Circuit Courts of Appeals, and consequently the district courts within their respective jurisdictions (as well as district courts within the Fifth and Eighth Circuits), concluded that, when determining the extent of limitation caused by an impairment, the ADA requires examination of the effects of any ameliorative measures utilized by the individual. These courts typically relied on the plain language of the ADA and concluded that the EEOC interpretation is inconsistent with other sections of the interpretive guidance and with proper construction of the Act.

The First, Second, Third, Seventh, and Eleventh Circuit Courts of Appeals, and the district courts within their respective jurisdictions, chose to follow the EEOC interpretive guidance and concluded that a disability must be determined without reference to the effects of mitigating measures. Courts relying on the EEOC’s position generally cited


67. See Walsh, supra note 33, at 942.

portions of the ADA’s legislative history in order to support this interpretation.  

A cursory review of the relevant portions of the Act’s legislative history educes apparent support for the EEOC’s interpretation. For instance, a commonly cited House Committee on Education and Labor Report (Report) discussing the first prong of the disability definition explicitly states that “[w]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids.” A more thorough analysis of this report, however, uncovers internal inconsistencies that ultimately detract from the legislative history’s usefulness on the issue of mitigating measures.  

For example, the reference to the “availability” of mitigating measures suggests that courts should ignore the fact that such measures may be available, and disregard whether or not an individual chooses to utilize them. In other words, the court should not question a person’s decision not to utilize available mitigating measures. However, when an individual does decide to employ available mitigating measures, courts should consider such use. This interpretation is consistent with the EEOC’s mandate that courts consider an individual’s limitation on a case-by-case basis. Additionally, the Report suggests that the inquiry is to focus on the factual and present effect of the impairment on the individual’s life. This is made clear by the report’s provision that “[a] person is considered an individual with a disability for purposes of the first prong . . . 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.” Lastly, this Report describes a purpose of the “regarded as” prong of the definition as ensuring “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.” Taken as a whole, one can interpret the Report as prohibiting a court’s generalized, hypothetical

69. See infra note 70 and accompanying text. See, e.g., Arnold, 136 F.3d at 859; Matczak, 136 F.3d at 937; Harris, 102 F.3d at 521; Wilson, 964 F. Supp. at 905–06; Sicard, 950 F. Supp. at 1437.  
72. See id. (citing 29 C.F.R. pt. 1630, app. § 1630.2(j) (1997)).  
analysis of whether a plaintiff would be disabled if not for the use of mitigating measures.

Courts have noted similar internal inconsistencies in the EEOC's interpretive guidance. For instance, in describing the "regarded as" prong, the EEOC uses an example of an individual with "controlled high blood pressure that is not substantially limiting" but who was nevertheless reassigned to a less strenuous position by his or her employer. The EEOC guidance indicates that such an individual would not actually be disabled under the first prong, but would be "regarded as" disabled under the third prong. How is a court to determine that an individual's high blood pressure is "controlled" if it is to ignore mitigating measures?

II. SUTTON v. UNITED AIR LINES, INC. 78

1. Facts and Procedural History

In 1992, Petitioners applied and interviewed for passenger pilot positions with United Air Lines, Inc. ("United"). Petitioners met or exceeded the requirements qualifying them for the position. United terminated their interviews, however, because their uncorrected vision was below that required by United of a minimum of 20/100 or better in each eye. In response, Petitioners filed suit, alleging that United violated the ADA by discriminating against them in the hiring process because of their disability, or alternatively, because United regarded them as disabled. Petitioners claimed to be qualified applicants with a disability under the ADA because their uncorrected vision substantially limited their major life activity of seeing. Additionally, Petitioners claimed United regarded them as substantially limited in the major life activity of working because United's policy has "no rational job-related basis," and effectively removes them from consideration for global airline pilot po-

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77. See id. "If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled." Id.


79. Sutton, 119 S. Ct. at 2143.

80. Petitioners are twin sisters, both having fulfilled the Federal Aviation Administration's requirements necessary to fly all classes of passenger planes. See Brief for Petitioner at 3, Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999) (No. 97-1943). At the time of the interview, Petitioners were experienced pilots with regional commuter airlines. See id.

81. Neither Petitioners' uncorrected vision was better than 20/200. See Sutton, 119 S. Ct. at 2143.


The district court found that with corrective measures, Petitioners were "able to function identically to individuals without a similar impairment." The district court thus granted United's motion to dismiss, ruling that the Petitioners did not fall within the statutory meaning of "disabled," because they were neither actually, nor regarded as, substantially limited in a major life activity.

The Tenth Circuit Court of Appeals unanimously affirmed the district court decision, and reasoned that when corrective and mitigating measures are considered, Petitioners are not substantially limited in the major life activity of seeing. Further, the Tenth Circuit found that United did not regard Petitioners as substantially limited in the major life activity of working. The Supreme Court of the United States granted certiorari and affirmed the decision of the Tenth Circuit Court of Appeals.

II. Supreme Court Opinion

1. Majority Opinion

The Supreme Court majority, in deciding whether courts should consider a plaintiff's use of corrective or mitigating measures, focused on the plain meaning of three separate provisions of the ADA. Petitioners argued that because the ADA does not address the issue of mitigating measures, the Court should defer to the regulatory guidance, which provides that courts should evaluate an individual's impairment without reference to mitigating measures. The Court, however, sided with United's arguments that the agency interpretations conflict with the plain meaning of the ADA and the ADA's intent that the determination of disability is made on an individualized basis. Because it concluded that reference to the ADA itself resolved the issue, the Court did not consider

84. See Sutton, 130 F.3d at 895.
85. Id. at 896 (quoting Sutton v. United Airlines, Inc., No. 96-S-121, 1996 WL 588917, at *3 (D. Colo. Aug. 28, 1996)).
86. Id. (citing Sutton v. United Airlines, Inc., No. 96-S-121, 1996 WL 588917, at *6 (D. Colo. Aug. 28, 1996)).
87. See Sutton, 130 F.3d at 906. On appeal, Petitioners asserted that "they alleged sufficient facts to establish that: (1) they were qualified applicants with a disability because they are substantially limited in the major life activity of seeing, and (2) United regarded them as having a substantially limiting impairment [in the major life activity of working]." Id. at 896.
88. See id. at 906.
90. See Sutton, 119 S. Ct. at 2152. Justice O'Connor delivered the majority opinion in which Chief Justice Rehnquist and Justices Scalia, Kennedy, Souter, Thomas, and Ginsburg joined. See id. Justice Ginsburg filed a concurring opinion. See id. at 2152. Justice Stevens filed a dissenting opinion, in which Justice Breyer joined. See id. Justice Breyer also filed a separate dissenting opinion. See id. at 2161.
91. See id. at 2146.
92. See id. See also 29 C.F.R. pt. 1630, app. § 1630.2(j) (1999).
93. See Sutton, 119 S. Ct. at 2146.
the Act’s legislative history, nor decide what deference is due the agency interpretations.\textsuperscript{94}

The Court first examined the statutory definition of “disability.”\textsuperscript{95} The Court concluded that because the phrase “substantially limits” is in the present indicative verb form, the Act mandates that a major life activity be “presently—not potentially or hypothetically” substantially limited.\textsuperscript{96} In other words, although an individual with poor eyesight is physically impaired, once that impairment is corrected, it does not substantially limit a major life activity and a court should not be forced to speculate as to the potential extent of limitations in the absence of such utilized measures.\textsuperscript{97}

Second, the Court recognized that the ADA’s phrase “with respect to an individual” commands an individualized inquiry as to whether a plaintiff is disabled under the Act.\textsuperscript{98} Reference to an individual’s uncorrected or unmitigated state is in diametrical opposition with this mandate because, according to the Court, it would often “force [courts and employers] to make the disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual’s actual condition.”\textsuperscript{99} This would produce outcomes based on group generalizations rather than individual considerations.\textsuperscript{100}

Finally, the Court found the legislative finding, published in the “[findings and purpose” section of the Act,\textsuperscript{101} that approximately forty-three million Americans are disabled to be conclusive evidence that Congress did not intend to bring people with correctable impairments, such as the Petitioners, within the purview of the ADA.\textsuperscript{102} The Court reasoned that the cited number would be substantially larger if it included, among others, the 100 million Americans with vision impairments, the twenty-eight million hearing impaired, and the fifty million with high blood pressure—all conditions for which corrective or mitigating measures are largely available.\textsuperscript{103} Based on this, the Court concluded that had

\textsuperscript{94} See id.
\textsuperscript{95} Id. at 2146–47.
\textsuperscript{96} Id.
\textsuperscript{97} See id.
\textsuperscript{98} Id. at 2147.
\textsuperscript{99} Id.
\textsuperscript{100} See id. The Majority further noted that disregard of an individual’s utilization of mitigating or corrective measures would preclude courts and employers from considering any negative side effects caused by such measures and contributing to a claimed limitation. See id.
\textsuperscript{101} 42 U.S.C. § 12101 (1994).
\textsuperscript{102} See Sutton, 119 S. Ct. at 2147.
\textsuperscript{103} See id. at 2148–49. The Court noted that the source of the 43 million figure is uncertain, but that in earlier proposed legislation, Congress relied on a 1986 report by the National Council on Disability which estimated the number of disabled Americans to be approximately 36 million. See id. at 2147. When it passed the ADA in 1990, it is likely that Congress relied, in part, on an updated version of this report, which estimated the number to be 37.3 million. See id. at 2148. This updated
Congress intended to include individuals with corrected physical impairments, it would have included them in the figure cited in the congressional findings.\footnote{104}

Considering these three sections\footnote{105} of the Act together, the Court concluded that the ADA requires that mitigating measures be considered in making the disability determination.\footnote{106} Thus, the Petitioners could not, "in fact," be considered \textit{substantially} limited in their ability to see under the first prong of the definition.\footnote{107}

The Court next considered the petitioner's alternative allegation that, even if not actually disabled under the first prong of the definition, United "regarded" them as disabled because it erroneously assumed that Petitioners' impairment substantially limits them in the major life activity of working.\footnote{108} This assumption constitutes a disability under the third prong of the ADA's definition.\footnote{109}

The Court first noted that the ADA allows employers to establish physical criteria for its various positions of employment.\footnote{110} An employer "is free to decide that some limiting, but not \textit{substantially limiting}, impairments make individuals less than ideally suited for a job."\footnote{111} The Court adopted the reasoning of the EEOC on this issue and determined that to be substantially limited in the major life activity of working, an employer's erroneous assumption must effectively preclude the plaintiff

\footnote{104} See \textit{id.} at 2149.
\footnote{105} (1) The definition, (2) the individualized basis mandate, and (3) the legislative findings.
\footnote{106} See \textit{id.} at 2146. In addressing concerns of Justice Steven's dissent, the Court elaborated on its holding stating that "[t]he use or nonuse 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 \textit{in fact} substantially limiting." \textit{Id.} at 2149 (emphasis added).
\footnote{107} \textit{Id.} at 2149.
\footnote{108} \textit{Id.} at 2150. Interestingly, the Court noted that Petitioners did not "make the obvious argument" that United regarded them as substantially limited in the major life activity of seeing. \textit{Id.} The major life activity of working, in effect, requires plaintiffs to meet a higher standard. \textit{See supra} notes 49--50 and accompanying text. Furthermore, the EEOC discourages consideration of "working" as a major life activity, except as a last resort; i.e., unless no other major life activity is substantially limited. \textit{See} 29 C.F.R. pt. 1630, app. § 1630.2(j).
\footnote{109} \textit{See supra} notes 41--46 and accompanying text.
\footnote{110} \textit{See Sutton}, 119 S. Ct. at 2150.
\footnote{111} \textit{Id.} (emphasis added).
from "either a class of jobs or a broad range of jobs in various classes." The Court found the position of a global airline pilot to be a "single job," and that United's barring of Petitioners from that position did not support a finding that United regarded the two sisters as substantially limited in their ability to work because of their impairment. The Supreme Court affirmed the Tenth Circuit conclusion that the Petitioners had not stated a claim that they were actually, or were regarded as being, substantially limited in a major life activity.

2. Justice Ginsburg's Concurrence

Justice Ginsburg agreed with the Court that the legislative findings are evidence of Congress's intention that the ADA's coverage be limited to a "historically disadvantaged" class. The Justice added that the large number of Americans with corrected impairments could hardly be considered part of a "discrete and insular minority," as Congress described the position of disabled Americans. Nor have they been "subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society."

3. Justice Steven's Dissent

Justice Stevens acknowledged that Congress likely did not intend that every person who wears glasses be protected by the ADA. He asserted, however, that the Court should generously construe the ADA to give effect to its remedial nature.

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112. Id. at 2151 (quoting 29 C.F.R. § 1630.2(j)(3)(i)). Although it noted a "conceptual difficulty" with the inclusion of "working" in the definition of "major life activity," the Court deferred to the EEOC because the parties did not dispute the validity of its inclusion. Id.

113. Id. Ironically, a significant illustration noted by the Court was provided by the EEOC's Interpretive Guidance stating that "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. (citing 29 C.F.R. pt. 1630, app. § 1630.2).

114. Id. The Court also addressed Petitioners' argument that if the vision requirement were adopted by all airlines, Petitioners would be substantially limited in their ability to work. See id. at 2152. The Court declared that simply imputing a valid job requirement to all other employers does not invalidate the requirement. See id.

115. See id.

116. Id. at 2152 (Ginsburg, J., concurring (relying on the language of 42 U.S.C. § 12101(a)(7))).

117. Id. (quoting 42 U.S.C. § 12101(a)(7)).

118. Id.

119. See id. (Stevens, J., dissenting).

120. See id.
He argued that Title VII of the Civil Rights Act of 1964 is a clear example of this canon, as its initial and intended focus on protecting African-Americans from discrimination in employment opportunities has been enlarged to prohibit other forms of discrimination, and discrimination against other classes. Justice Stevens also questioned the Majority’s analysis of the subparts of the definition as mutually exclusive categories. He argued that courts should consider the three prongs of the definition together to determine whether a claimant is, or once was, substantially limited in a major life activity and that, therefore, courts should not refer to ameliorative measures, presumably because it does not change the fact that the individual was impaired at some point. Justice Stevens determined that the legislative history and agency guidance support this interpretation.

Justice Stevens further disputed the Court’s contention that the EEOC approach creates a system in which courts assess individuals with reference to groups with similar impairments. He pointed out that “[i]t is just as easy individually to test Petitioners’ eyesight with their glasses on as with their glasses off.” Moreover, the Justice contended that the Court’s approach condoned group stereotypes by allowing employers to discriminate against individuals who control their impairments by some means.

4. Justice Breyer’s Dissent

Justice Breyer wrote in dissent to note his broad interpretation of the definition of “disability,” a reading that Breyer argued would ensure that none of Congress’s intended beneficiaries be excluded from ADA coverage. He explained that should this interpretation result in an unacceptable number of baseless lawsuits, the EEOC could issue more explicit definitional regulations excluding classes whom Congress did not intend to be within the protections of the ADA.

121. See id. at 2157.
122. See id. (noting that Hispanic-Americans, Asian-Americans, and as early as 1976, Caucasians have been included under the protection of Title VII, and that recently same-sex sexual harassment was ruled to be conduct prohibited by Title VII).
123. See id. at 2153.
124. See id. at 2153–54. (observing that subsection (B) of the disability definition “include[s] in the protected class those who were once disabled but who are now fully recovered”).
126. See id. at 2159.
127. Id.
128. See id. (explaining that “the Court’s approach would seem to allow an employer to refuse to hire every person who has epilepsy or diabetes that is controlled by medication, or every person who functions efficiently with a prosthetic limb”).
129. See id. at 2161.
130. See id. at 2161–62.
III. ANALYSIS

Many commentators perceive the Supreme Court's decision as a victory for employers and as a major setback for the rights of disabled Americans. While the decision will likely decrease the number of unmeritorious claims and the resulting cost to employers, it is doubtful that it will adversely affect the rights of people who experience employment discrimination based on an actual or perceived disability. The Supreme Court's decision merely clarifies the definition of "disability," and imbues the determination of disability with a necessary dose of reality.

After Sutton, a disability produced by a substantially limiting impairment still falls within the first prong of the definition. It is recognized, however, that fully corrected impairments are not disabling but for the misinformed, mistaken, or unjustly biased beliefs of others. In other words, a fully corrected impairment is only disabling if an employer regards it as such. Indeed, how else could a fully corrected impairment substantially limit a person?

A court properly classifies a mitigated impairment under either the second or the third prong depending on the facts of the case. If the treated impairment still results in an actual and substantial limitation, it is a disability under the first prong of the definition. If an impairment no longer substantially limits an individual, but a record of such limitation exists, and an employer has discriminated against the individual based on a perceived limitation resulting from the corrected impairment, then a claim exists under the second prong. Similarly, if an existing, but treated, impairment does not result in an actual and substantial limitation, it is still a disability under the third prong if an employer bases an adverse employment action on the perception that the impairment does constitute a substantial limitation. If no adverse employment action has occurred based on the perceived disability, then no cause of action exists.

Arguments that favor disregarding mitigating measures are often based on the contention that the Court's interpretation fails to give effect to congressional intent and the regulatory guidance based on that expressed intent. As previously discussed, however, the legislative history is ambiguous at best. Moreover, the agency guidance, which is argua-

131. See Robert S. Greenberger, Supreme Court Narrows Scope of Disability Act, WALL ST. J., June 23, 1999, at B1; Marcia Coyle, ADA: Clarified or Ruined? Disabled Community is Dismayed: Business Gives a Sigh of Relief, NAT'L L.J., July 5, 1999, at A1 (quoting Professor Chai Feldblum stating "[i]t's as devastating a cut to the ADA as one could imagine"); Joan Biskupic, Supreme Court Limits Meaning of Disability, WASH. POST, June 23, 1999, at A1 (quoting attorney Michael A. Green stating "[y]ou're damned if you don't medicate, but you're damned if you do, because you lose your legal rights").
132. See, e.g., infra note 205 and accompanying text.
133. See supra notes 36–42 and accompanying text.
134. See infra note 202 and accompanying text.
135. See supra notes 70–74 and accompanying text.
bly based on misinterpreted congressional intent, is not binding on courts.\textsuperscript{136}

1. \textit{Congressional Intent and a Reasonable Reading of the Definition of "Disability"}

Although Senate and House committee reports expressly state that the disability determination be made without reference to the availability of mitigating measures, this apparent mandate must be reviewed in the context in which it is made and with regard to Congress's clearly expressed purpose in enacting the ADA. For instance, Congress follows or precedes these express statements with examples of diabetics, epileptics, or people using prosthetic devices.\textsuperscript{137} It is arguable that these were the situations Congress contemplated when making this declaration, and not situations where an impairment is completely, or almost completely, corrected with treatment or other means.\textsuperscript{138}

This becomes more obvious as the committee reports describe the purpose of the third prong of the disability definition as ensuring "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.").\textsuperscript{139} This language suggests that Congress intended that those whose impairments are controlled, and are therefore not limited in any significant way by such impairments, be protected under the third prong.\textsuperscript{140} Congress seemingly also intended that those with substantial limitations that are, however, mitigated to a certain extent, still be protected under the first prong if they remain substantially limited by the impairment notwithstanding the treatment.\textsuperscript{141} The Court's holding effectuates this intent. Justice Stevens

\textsuperscript{136} See supra note 61 and accompanying text.


\textsuperscript{138} See, e.g., H.R. Rep. No. 101-485, pt. 2, at 52 (1990), stating:

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.

\textit{Id.} (emphasis added).

It is arguable from this language that Congress intended that impairments that "may be corrected" by available remedies, but that are not corrected for whatever reason, shall still be considered disabilities if substantially limiting. Likewise, it is plausible that Congress intended courts to consider impairments that "are controlled," but which are still substantially limiting disabilities.


\textsuperscript{140} See Bridges, supra note 71, at 1077-78.

argued that the Court's holding precludes people with disabilities that are treatable to any extent (such as epileptics, those utilizing a prosthetic device, or those suffering from hypertension) from obtaining the ADA's protection. Clarifying its holding, however, and addressing the concerns of the dissenting opinions, the Court stated the following:

The dissents suggest that viewing individuals in their corrected state will exclude from the definition of 'disab[led]' those who use prosthetic limbs, or take medicine for epilepsy or high blood pressure. This suggestion is incorrect. The use of a corrective device does not, by itself, relieve one's disability. Rather, one has a disability under [the first prong of the definition] if, notwithstanding the use of a corrective device, that individual is substantially limited in a major life activity. For example, individuals who use prosthetic limbs or wheelchairs may be mobile and capable of functioning in society but still be disabled because of a substantial limitation on their ability to walk or run . . . . Alternatively, one whose high blood pressure is 'cured' by medication may be regarded as disabled by a covered entity, and thus disabled under [the third prong of the definition]. The use or nonuse 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.

Furthermore, Congress's ideological foundation for the ADA also does not support the over-expansive interpretation urged by the dissenters. The Court undertook a lengthy analysis of the meaning behind the number of disabled Americans cited by Congress in the "[findings and purpose]" section of the ADA. Although there are inherent difficulties in obtaining an accurate estimate of the number of people with disabilities in America, the forty-three million figure is generally regarded as a "useful, rough estimate." Justice Stevens cited National Organization for Women, Inc. v. Scheidler, for the proposition that "a 'statement of congressional findings is a rather thin reed upon which to base' a statutory construction." The full quote from Scheidler, however, reads: "We also think that the quoted statement of congressional findings is a rather thin reed upon which to base a . . . motive neither expressed nor, we think, fairly implied in the operative sections of the Act." The Court in Scheidler referred to a specific quote; not congressional findings in general. In fact, the Supreme Court, in Dole v. United Steelworkers of

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142. See supra note 128 and accompanying text.
144. See Sutton, 119 S. Ct. at 2147-49.
145. See supra note 103 and accompanying text.
146. See supra note 10 and accompanying text.
noted that when a court is attempting to interpret or clarify a statutory phrase, "[p]articularly useful is the provision detailing Congress' purposes in enacting the statute."151

It is clear when one considers the language used in the legislative "[f]indings and purpose" section that Congress had a particular, although difficult to define, class of eligible individuals in mind for coverage under the ADA. Congress described individuals "isolate[d] and segregate[d]" by society.152 Congress further described the intended beneficiaries of the ADA as "a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society."153 These congressional findings echo from a stream of testimonials delivered by disabled people before Congress.154 Conspicuously absent from the congressional record is testimony from individuals with fully treated hypertension, or wholly corrected myopia. No such individuals were present before Congress to relate their experience of "purposeful unequal treatment," or their consequent "isolat[ion] and segregat[ion]" from society.

Aside from not being the object of animus-based discrimination, Professor Harris makes the point that the insurance justification155 for the ADA does not explain why people with controlled impairments should have ADA protection.156 As explained, this justification is based on the rationale that if disabled people are accommodated, they will stay employed, and collect less in disability benefits.157 As for people with corrected impairments:

[these individuals would not be unemployed without the ADA. They do not face any barriers (physical or intangible) to equal opportunity in the workplace. Their impairments do not impede them because their impairments are controlled. Because they suffer no substantial limitation on any major life activity, individuals with controlled im-

151. Id. at 36.
155. See text accompanying notes 23–24.
156. See Harris, supra note 23, at 596.
157. See text accompanying notes 23–24.
Thus, people with fully corrected impairments cannot rationally be included in the first prong of the definition. People with mitigated impairments, on the other hand, may be included in the first prong depending on the extent of their limitation. Further, people with either corrected or mitigated impairments may be included under the third prong of the definition, and thus afforded ADA protection, if they have experienced discrimination due to any such impairment (either real, imagined, corrected, mitigated, or otherwise).

Sections of Justice Stevens' dissent demonstrate a particular misunderstanding of the mechanics of the statutory definition. For example, in describing the plight of a man with a prosthetic limb and arguing that such an individual, under the majority opinion, will have no recourse under the ADA, Justice Stevens wrote "[i]n my view, when an employer refuses to hire the individual 'because of' his prosthesis, and the prosthesis in no way affects his ability to do the job, that employer has unquestionably discriminated against the individual in violation of the Act." This is a blinding glimpse of the obvious considering the legislative history, and the EEOC's regulations and guidance describing the third prong of the definition, notwithstanding the fact that courts may still consider such an individual disabled under the first prong if the disabled person's life activities are still substantially limited. The employer has "unquestionably" discriminated against the individual based on a disability because such individual can perform the essential functions of the job with or without reasonable accommodation ("the prosthesis in no way affects his ability to do the job"). However, the individual is disabled under the third prong of the definition because the employer "regarded" him as disabled. The employer's fear and/or stereotyping disable the individual, not the actual impairment, at least as it relates to the essential functions of the job. If the prosthesis "in no way affects his ability," then he is not substantially limited under the first prong of the definition. Justice Stevens omitted any discussion of the third prong of the disability definition. His dissent leaves unacknowledged the fact that an entire section of the statutory definition is devoted to people whose impairments do not substantially limit them but who are treated as such and are thus limited because of the denial of opportunity.

Justice Stevens next contended that, under the majority's interpretation, no reason would exist for the second prong of the definition. In attempting to demonstrate this, however, the Justice examined language

158. Harris, supra note 23, at 596.
161. See id.
162. See id. at 2153-54; supra note 37.
from the majority's opinion, but taken out of context. The dissent reads, "[i]f the Court is correct that '[a] disability exists only where' a person's 'present' or 'actual' condition is substantially impaired, there would be no reason to include in the protected class those who were once disabled but who are now fully recovered." First, courts are not to examine whether one's "condition is substantially impaired"; they are to examine whether a major life activity is substantially impaired. Justice Stevens seemed to focus on the impairment instead of the effect of the impairment on the individual's life. Moreover, the second prong of the definition 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." The actual "disability" essentially arises as a result of people's fears, perhaps of recurrence for example, that effectively preclude the individual from engaging in a major life activity. In other words, the individual's past disability is presently disabling, not because of the impairment (which has since been cured, treated, or has otherwise disappeared), but because of other people's attitudes regarding the past disability. The distinction between the impairment and the effect of the impairment is a crucial one in understanding the mechanics of the ADA's definition of disability.

Justice Stevens further asserted that:

"the three prongs of the statute . . . are most plausibly read together not to inquire into whether a person is currently 'functionally' limited in a major life activity, but only into the existence of an impairment—present or past—that substantially limits, or did so limit, the individual before amelioration. This reading avoids the counterintuitive conclusion that the ADA's safeguards vanish when individuals make themselves more employable by ascertaining ways to overcome their physical or mental limitations."

The EEOC language, however, points to the independence of each part of the definition. The interpretive guidance, upon which Justice Stevens relied, describes how the definition is "divided" into three parts, how an

163. Id. at 2154 (internal reference omitted). The portion of the majority opinion from which Justice Stevens derives the phrase "a disability exists only where" reads in full as "[a] 'disability' exists only where an impairment 'substantially limits' a major life activity, not 'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken." Id. at 2146.

164. See quoted material supra note 163.

165. The EEOC has acknowledged the importance of making the disability determination based on the effect of the impairment. 29 C.F.R. part 1630, app. § 1630.2(j) (1999). "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." Id.


167. Sutton, 119 S. Ct. at 2154.
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individual must "satisfy at least one of these parts" and that an individual is considered disabled "if that individual either [falls into category (1), (2)], 'or,' (3) . . . ." This language is not indicative of mutually dependent subsections. Justice Stevens' conclusion that the ADA's safeguards will vanish for some individuals under a conventional reading of the definition is based on his flawed understanding of the separate definitional prongs themselves.160

II. The EEOC Interpretation – Deference Due and Practical Effects

Notwithstanding the problematic language expressing congressional intent on the mitigating measures issue, the EEOC adopted the position that courts should disregard the effect of mitigating or corrective measures on the impairment. The EEOC, perhaps recognizing the ambiguous congressional intent, appended this position to the regulations instead of including it within its provisions. Such a position, relegated to the appendix, is decidedly not binding on courts.170 Moreover, the guidance provided by the EEOC contains many of the same internal inconsistencies as the congressional record.171 Even if the EEOC had included its interpretation in the regulations, a court could decline to follow it if the court found its' mandates contradictory to the statute.172

The ADA distinctly describes its protected class in its "[f]indings and purpose" section and presents the definition of disability in such a way as to preclude those with controlled impairments unless their disability results from the irrational perceptions of another.173 Furthermore, the ADA clearly mandates an individualized determination of disability based on the reality of the plaintiff's circumstances.174 The Supreme Court's interpretation on the mitigating measures issue is reasonable in light of this mandate and the ambiguously expressed congressional intent. The EEOC, on this point, seems to have ignored the statutory mandate. As stated by the Supreme Court, an alternative interpretation violates the plain meaning of the ADA.175 Not to mention that such an expansive interpretation is simply unreasonable when its practical effects are considered.176

168. 29 C.F.R. pt. 1630, app. § 1630.2(g) (emphasis added).
169. See supra notes 159–166.
171. See supra notes 75–77 and accompanying text.
176. Justice Stevens alluded to many employers' fear that the EEOC's interpretation might encourage a "flood of litigation." Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2159 (1999). Justice Stevens presented a narrow argument as to why he believes that the EEOC interpretation should not create such anxiety. See id. at 2158–60. However, it appears obvious that tripling or quadrupling the size of any protected class will result in increased litigation.
Indeed, many problems with the EEOC interpretation involve its practical effects. One illustration is the protection it would afford at-will employees against termination. Employers would be forced to absorb additional (real or threatened) costs to fire an employee who claims the termination is based on discrimination. Most employer-employee relationships continue on an at-will basis. When confronted with a discrimination claim, however, an employer must rebut the claim with evidence of one or more legitimate, justifiable reasons for the termination. Professor Harris describes a typical situation:

Suppose an employee senses he is about to be fired. If the employee notifies the employer that he is protected under the ADA, he forces the employer to accumulate a documented record supporting a just cause dismissal before the employer can take action against him. When creating a record for just cause termination is too difficult, costly, or time consuming, an employer may abandon or delay a decision to discharge the employee. Thus, the power to claim protection amounts to extra protection from adverse employment action.

The increased likelihood that an unmeritorious claim will survive summary judgment increases the value of “nuisance suits” to claimants. The EEOC interpretation drastically expanded the class of people afforded ADA protection and thus, increased the cost to employers exposed to frivolous claims and nuisance suits.

Justice Stevens argued in his dissent that courts should broadly construe remedial legislation to encompass similar situations. He illustrated his point by showing that Title VII of the Civil Rights Act of 1964 has evolved from protecting only African-Americans to protecting several races and varying forms of discrimination. The difference, however, is that the protected classes of the Civil Rights Act are not subject to manipulation; that is, you either are or are not African-American. The protected class under the ADA, however, is naturally amorphous and thus ambiguously defined. This makes the ADA unlike other antidiscrimination legislation and therefore encourages manipulation of the

177. See Harris, supra note 23, at 584. Ms. Harris refers to this as “just cause” protection. Id.
178. See id.
179. See id.
180. See id.
181. Id.
182. See id.
183. See id. at 581–94 (presenting clear reasoning as to exactly how and why a plaintiff’s chances of surviving summary judgment increase under the EEOC interpretation).
184. See supra notes 119–122 and accompanying text.
185. See supra note 122 and accompanying text.
186. See Harris, supra note 23, at 586 (describing the unique nature of the ADA’s protected class).
definition/protected class.\textsuperscript{187} Application of the EEOC interpretation exacerbated this situation.

Congress designed the ADA to operate based on reality as opposed to requiring courts and employers to speculate on the effects of hypothetically untreated impairments. The ADA’s mandate to consider disabilities on a case-by-case basis and the EEOC’s express endorsement of this mandate provide evidence of this operative basis.\textsuperscript{188} Employers lack the necessary expertise to speculate on how untreated impairments would hypothetically affect an employee.\textsuperscript{189} Courts that disregard mitigating measures likewise indulge in fantasy when considering the hypothetical state of impairment of an individual who consistently utilizes mitigating measures to control such impairment.\textsuperscript{190} By holding that the determination of whether an individual is disabled includes consideration of any mitigating or corrective measures, the Supreme Court removed the analysis from the hypothetical to the veritable as mandated by the plain language of the ADA.

III. Proper Classification of a Claim Within the Disability Definition

The statutory definition of disability is already necessarily broad so as not to preclude those who require protection. Congress did not attempt to actually list impairments that qualify as disabilities at the risk of overlooking impairments and therefore excluding certain individuals.\textsuperscript{191} The Supreme Court, however, effectively suggested that a line was drawn by Congress’s statement of findings. “A statute that protects everyone protects no one.”\textsuperscript{192}

Some authorities, including the United States Commission on Civil Rights, have argued that the concepts of disabilities... are largely socially determined and that virtually everyone is ‘handicapped’ for one purpose or another.

\textsuperscript{187} See id.
\textsuperscript{188} See 42 U.S.C. § 12102(2) (1994); 29 C.F.R. § 1630.2(g) (1999); 29 C.F.R. pt. 1630, app. § 1630.2(g). (j).
\textsuperscript{189} See Brief of Amicus Curiae Society for Human Resource Management in Support of Respondents at 1–2, Sutton (No. 97-1943).
\textsuperscript{190} For example, after the Sutton decision, in EEOC v. R.J. Gallagher Co., 181 F.3d 645 (5th Cir. 1999), the Fifth Circuit Court of Appeals, in considering whether a form of blood cancer was a disability, noted that “[w]ithout treatment, [plaintiff’s] condition would have resulted in ‘severe anemia, systemic infection, internal bleeding’ and would ‘infiltrate other organs or body systems.’” EEOC, 181 F.3d at 653 (emphasis added). Thus, before Sutton, the court might have “assume[d] that [plaintiff] was suffering from [these afflictions],” when, in fact, the plaintiff was treated and experienced none of these limiting afflictions. Id. at 653–54.
\textsuperscript{191} See, e.g., S. Rep. No. 101-116, at 23 (1989) “It is not possible to include in the legislation a list of all the specific conditions, diseases, or infections that would constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list . . . .” See id.
\textsuperscript{192} Brief of Amicus Curiae Society for Human Resource Management in Support of Respondents at 7, Sutton (No. 97-1943).
Nevertheless, federal laws have generally assumed that a distinct class of disabilities or handicapping conditions exists, and have targeted individuals with such conditions as the principal beneficiaries of federal services, benefits, and protection.\textsuperscript{193}

The ADA targets that distinct class by limiting coverage to those whose impairments (or other’s attitudes) substantially limit them in performing major life activities. Millions of Americans have various ailments and impairments that prevent them from certain activities. However, these afflictions are often trivial, temporary, or mitigated by various therapies or remedies. In short, they do not impede an individual beyond what a reasonable person might consider “normal.” People with disabilities, however, often face daily obstacles in the performance of the most elementary and fundamental of activities.\textsuperscript{194} The Tenth Circuit implied that Petitioners’ claim that they actually are disabled trivializes the condition of being “disabled.”\textsuperscript{195} However, a claim that an employer regarded a person as disabled, even if such person is not actually disabled, does not trivialize the condition of being disabled, but recognizes the existence of society’s discriminatory stereotypes.

That United “regarded” the Petitioners as being disabled was certainly the Petitioners’ most cogent argument. It represents exactly what Congress envisioned when considering the third prong of the definition. The attitudes and unfounded assumptions about disabled people have contributed significantly to their subordination in society.\textsuperscript{196} Here, Petitioners claimed that United regarded them as disabled in the major life activity of working because “United presumed without substantiation that they [could not] perform the function of the job [and that] United disqualified them based on ‘myth, fear or stereotype’ that individuals with uncorrected vision of worse than 20/100 constitute a safety hazard.”\textsuperscript{197}

The Supreme Court did not require United to substantiate its reasons for having such a requirement, but focused on petitioner’s claim that United regarded the plaintiffs as disabled in the major life activity of working.\textsuperscript{198} The Court seemed to suggest that Petitioners might have met with more success had they claimed that United regarded them as substantially limited in the major life activity of seeing.\textsuperscript{199} This claim might have resulted in the Court requiring United to substantiate the need for its vision requirement. After all, it is certainly not beyond the realm of possibilities that United’s vision requirement is a completely arbitrary re-

\textsuperscript{193} Burgdorf, supra note 10, at 441.
\textsuperscript{194} See, e.g., supra note 154 and accompanying text.
\textsuperscript{195} Sutton v. United Air Lines, Inc., 130 F.3d 893, 898 (10th Cir. 1997) (commenting that “the impairment must be significant, and not merely trivial”).
\textsuperscript{196} See supra note 12 and accompanying text.
\textsuperscript{197} Sutton, 130 F.3d at 903.
\textsuperscript{199} See Sutton, 119 S. Ct. at 2150. See also supra note 108 and accompanying text.
quirement with no basis in necessity, safety, or otherwise. However, the issue did not arise because Petitioners did not claim that United incorrectly regarded them as unable to see. Instead, the Court considered whether United improperly concluded that Petitioners were unable to work in a "class" or "broad range of jobs." The Court concluded that United had not.

This may be an overly stringent test for a plaintiff to meet when trying to prove that an employer regarded her as substantially limited in the major life activity of working. It essentially presents a Catch-22 situation to a plaintiff claiming a disability under the first prong because if she succeeds at showing that her impairment substantially limits her in performing a class of jobs, she has in effect argued that she is not a "qualified individual with a disability" because she cannot perform the essential functions of the job, and she would therefore not qualify for protection under the ADA. This is a significant hurdle for a plaintiff claiming an actual disability under the first prong of the definition. Thus in pleading, such plaintiffs should attempt to identify a major life activity that is substantially limited other than working when claiming a first prong disability. On the other hand, when a plaintiff claims that an employer incorrectly believes that an employee or applicant cannot perform a job—because of a mistaken belief based on a past record of disability (second prong), or a misperception related to a disability (third prong)—the hurdle presented by the "qualified individual" analysis is significantly lower assuming the plaintiff can actually prove that the employer's belief is incorrect. This is proven simply by showing that the plaintiff can perform the essential functions of the job.

It is arguably evident from the above analysis however, that Congress intended people with largely mitigated or corrected impairments to have ADA protection from the discriminatory misperceptions of employers under the second and third prongs and not to claim an actual disability

200. Sutton, 119 S. Ct. at 2151. Although an individual may be limited in his or her ability to perform a certain job, it is not until this limitation rises to the level of substantial that the ADA deems it a disability. Preclusion from a class of jobs is simply evidence of a substantial limitation, whereas courts do not consider preclusion from a single job a substantial limitation. See supra text accompanying notes 49–50. The EEOC regulations recommend that courts give this evidence great weight in determining whether one is substantially limited in the major life activity of working. See C.F.R. § 1630.2(j)(3)(ii)(B)-(C).

201. Sutton, 119 S. Ct. at 2151.

202. Additional commentary on this suggestion is beyond the scope of this Comment. But see Brief of Senators Harkin and Kennedy, Representatives Hoyer and Owens and Former Senator Dole as Amici Curiae in Support of Respondent Kirkingburg and Petitioners Sutton and Murphy at 25–28, (Nos. 97-1943, 97-1992, 98-591) (suggesting that "[t]he only way to give meaning to the ‘regarded as’ prong is to interpret the rejection from the job in question to signify the employer’s view of the plaintiff’s ability to perform the class of jobs to which the job in question belongs").

203. See supra note 30 and text accompanying note 33 (defining “qualified individual with a disability,” and describing how a plaintiff must, in reaching the “qualified individual” inquiry, must first demonstrate that she is disabled under 42 U.S.C. § 12102(2)). See also supra note 202.
under the first prong. Properly applied, Sutton will sustain the protection afforded by the ADA to America’s disabled population, and, as intended, still allow those without per se disabling impairments to have their day in court when an employer’s discrimination is based on mistaken beliefs regarding an impairment. In fact, since Sutton, courts have properly dismissed various plaintiff’s claims of actual disability under the first prong when their impairments were substantially mitigated or corrected, but sustained their claims under the third prong when their employers nevertheless discriminated against them.

IV. CONCLUSION

Left unanalyzed, Justice Stevens’ misunderstanding of the intended mechanics of the statutory definitions of “disability,” his focus on the “impairment” instead of the “disability,” his misquotes, and his omission of any discussion of the inconsistencies in the legislative history, all combine to nourish a seed that may quickly grow to sprout the leaves of discontent among an ill-informed public. Such discontent could plausibly lead citizens to place calls to Congress members who, equally ill-informed (most were either not present at the time the ADA was enacted, or, if present, cannot be expected to recall every detail emanating from events transpiring eleven years ago), might conceivably present a bill to amend the ADA’s definition in favor of the EEOC interpretation.

This need not be the case however. The Supreme Court’s recent interpretation of the ADA’s definition of “disability” finally clarifies a muddied area of disability law. It offers a reasonable and practical interpretation of the ADA’s definition of disability. When signing the ADA into law, President Bush declared that “[t]he Americans with Disabilities Act presents us all with an historic opportunity. It signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life.” Sutton will return the ADA to those

204. See supra notes 200–203 and accompanying text (properly applied, and perhaps, with reconsideration by the EEOC or the Court of the “class of jobs” requirement when the major life activity claimed to be limited is that of working).

205. See, e.g., EEOC v. R.J. Gallagher Co., 181 F.3d 645 (5th Cir. 1999) (concluding that although plaintiff’s remitting cancer did not substantially limit his ability to work, a material factual dispute existed regarding whether he had a record of disability or was regarded as having a disability); Haiman v. Village of Fox Lake, 1999 WL 476973 (N.D. Ill. 1999) (holding that plaintiff’s heart condition did not significantly restrict her ability to work, but that she had presented sufficient evidence to allow a finding that her employer regarded her as disabled).

206. See Greenberger, supra note 131, at B1 (quoting Professor Chai Feldblum stating “I think people with disabilities may well need to question whether we should ask Congress to revisit this issue.”).

who demanded and impelled its enactment,208 and remove it from the opportunist grasp of those who know nothing of the isolation and powerlessness bred by disability.209 While it is true that the definition of "disability" is largely intuitive, congressional testimony exposed its parameters.210 The result was an inevitably imperfect definition that is, nevertheless, workable due to its flexibility. However, courts and claimants stretched that flexibility to a level that placed an absurd demand on employers211 and courts,212 resulting in subordination of the Act's ideological roots. The Supreme Court's ruling should contract the ADA's protected class back to that which was reasonably contemplated by Congress by excluding those whose trivial impairments present no practical or substantial limitation on their lives, and by including those who have mitigated or corrected impairments, yet are still regarded as disabled.

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208. See Harris, supra note 23, at 608 (arguing that "[a]s [the EEOC in controlled impairment cases] continues to venture outward from the original model of anti-discrimination legislation to extend protection to other groups, the dangers of losing sight of the ideological foundations of the legislation increases").

209. See id. (arguing that the EEOC interpretation "gives an economic windfall to an undeserving class").

210. See supra note 154 and accompanying text.

211. See supra notes 177–183 and accompanying text.

212. See supra note 190 and accompanying text.

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