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Determining the Intended Beneficiaries of the ADA in the Aftermath of Sutton: Limiting the Application of the Disabling Corrections Corollary

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NOTES

DETERMINING THE INTENDED BENEFICIARIES OF THE ADA IN THE AFTERMATH OF *SUTTON*: LIMITING THE APPLICATION OF THE DISABLING CORRECTIONS COROLLARY

A recent advertisement for athletic shoes shows a young woman running around a track. As the commercial ends, the camera zooms out and the viewer is able to see that the woman is running on two prosthetic limbs.[1] Until recently, most observers—both laymen and the judiciary—certainly would have considered this woman "disabled" and therefore deserving of protection from discrimination under the Americans with Disabilities Act of 1990 (ADA).[2] A recent trilogy of Supreme Court decisions,[3] however, suggests otherwise.

In *Sutton v. United Air Lines, Inc.*,[4] the Supreme Court rejected the predominant understanding of what constitutes a disability under the ADA[5]—resolving a split among the circuits[6]—and held that courts must consider the individual's ability to mitigate or correct his or her impairment when evaluating whether an

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1. Leonard H. Glantz, *Disability Definition Mess*, NAT'L L.J., Aug. 23, 1999, at A15 (discussing the television advertisement).

2. Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213 (1994 & Supp. V 1999); *see, e.g.*, Greene v. New York, No. 95 Civ. 6580, 1998 WL 264838, at *6 n.8 (S.D.N.Y. May 22, 1998) (accepting defendant's stipulation that the plaintiff is disabled within the meaning of the ADA because she is required to use a prosthetic limb for her amputated right leg).

3. Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999); Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

4. 527 U.S. at 471.

5. *See infra* notes 49-53 and accompanying text.

6. *See infra* notes 48-57 and accompanying text.

individual is entitled to the statute's protections.[7] Thus, those individuals who can utilize "corrective measures"—either artificial or the body's own—may not be entitled to ADA protection. Immediately following the decision, the legal community and popular press perceived the Court's holding as "gutting" the ADA and rendering it useless in the workplace.[8] There is already strong indication that lower courts are interpreting *Sutton* in a manner that severely limits the scope of protection granted to those who use corrective measures.[9]

A closer reading of the Court's decision, however, suggests that the Court's language may not be as limiting as initially anticipated. In particular, the Court held that when considering whether an

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7. *Sutton*, 527 U.S. at 475. Although this Note focuses primarily on *Sutton*, both *Murphy* and *Albertson's* provide additional support that the definition of disability under the ADA includes consideration of mitigating measures. In *Murphy*, a mechanic was fired from his position because of high blood pressure. *Murphy*, 527 U.S. at 518. When unmedicated, the plaintiff's blood pressure was above the U.S. Department of Transportation's recommendations for certification. *Id.* at 519. In his medicated state, however, the plaintiff could function normally. *Id.* Following *Sutton*, the Court evaluated the plaintiff in his medicated state and held that he was not substantially limited and therefore not disabled under the ADA. *Id.* at 521.

"In perhaps the most surprising of these recent decisions, the Court extended its *Sutton* decision in *Albertson's, Inc. v. Kirkingburg*, finding that whether an individual possesses a disability within the meaning of the ADA requires consideration of... measures undertaken, whether consciously or not, with the body's own systems." Diane L. Kimberlin & Linda Ottinger Headley, *ADA Overview and Update: What Has the Supreme Court Done to Disability Law?*, 19 REV. LITIG. 579, 588-89 (2000) (footnotes omitted). Thus, in *Albertson's*, the Court reversed the Ninth Circuit's decision that monocular vision is a per se disability and held that a plaintiff's ability to make subconscious physical adjustments must be considered in assessing whether the individual is disabled under the ADA. *Albertson's*, 527 U.S. at 565-66.

8. Indeed, the popular press suggested that individuals with diabetes, cancer, and amputated limbs were no longer protected by the ADA. *See, e.g.*, Jan Crawford Greenburg, *Ruling Trims the Scope of Disability Law: High Court Excludes Correctable Impairments from Job Protection*, CHI. TRIB., June 23, 1999, at 1, *available at* 1999 WL 2886114. *But see* Lauren J. McGarity, Note, *Disabling Corrections and Correctable Disabilities: Why Side Effects Might be the Saving Grace of* Sutton, 109 YALE L.J. 1161, 1162 (2000) (suggesting that the widespread perception that the ADA was powerless in the workplace may be incorrect due to the disabling corrections corollary); Susan B. Egan, *Those with Corrected Disabilities Still Protected by ADA After* "Sutton," N.Y.L.J., Nov. 12, 1999, at 1 (arguing that individuals with fully corrected disabilities are still protected under the "regarded as" prong of the ADA).

9. *See, e.g.*, Todd v. Academy Corp., 57 F. Supp. 2d 448, 454 (S.D. Tex. 1999) (holding that plaintiff's epilepsy condition, as treated by medication, did not constitute a disability); Taylor v. Blue Cross & Blue Shield of Tex., Inc. 55 F. Supp. 2d 604, 611 (N.D. Tex. 1999) (dismissing the plaintiff's claim because sleep apnea is fully corrected by nasal CPAP).

individual is "'substantially limited' in a major life activity and thus disabled under the [ADA]," it is imperative to evaluate the effects—"both positive and negative"—of the corrective measures.[10] Notably, the Court emphasized that evaluating individuals in their mitigated or corrected state is the only way to permit courts to "consider any negative side effects suffered by an individual resulting from the use of mitigating measures."[11] *Sutton* therefore suggests a "disabling corrections" corollary:[12] individuals who use corrective measures for an otherwise nondisabling mental or physical impairment, and who have disabling negative side effects, may require ADA protection.[13]

As the next wave of post-*Sutton* ADA litigation begins, courts are going to be faced with plaintiffs who invoke the "disabling corrections" language in *Sutton* to argue that the side effects of their corrective measures are disabling.[14] *Sutton*, however, fails to address the scope of the disabling corrections corollary. Strict adherence to the language in *Sutton* would mandate accepting the claims of a wide range of potential plaintiffs. "Individuals who take medications that cause extreme drowsiness, nausea, or other severe side effects would be appropriately considered 'individuals with disabilities' under [*Sutton*], as would individuals who have had corrective surgeries, such as colostomies or hysterectomies, that give rise to permanently disabling conditions."[15] If courts strictly adhere to the language in *Sutton*, however, an absurd anomaly arises. On the one hand, individuals who are not otherwise disabled, but take corrective measures for nondisabling

10. *Sutton*, 527 U.S. at 482.

11. *Id.* at 484.

12. *See* McGarity, *supra* note 8, at 1163-64 (defining the "disabling corrections" corollary).

13. *See id.* McGarity suggests that the disabling corrections corollary will help mitigate the Supreme Court's restrictive view of disability in *Sutton* by providing individuals an additional avenue to obtain the protections of the ADA. On the contrary, this Note argues that this group of plaintiffs was not an intended beneficiary of the ADA when it was drafted and, therefore, is not entitled to ADA protection. For a more extensive discussion, see *infra* notes 124-36 and accompanying text.

14. *See* McGarity, *supra* note 8, at 1163 (arguing that the next wave of post-*Sutton* litigation "will undoubtedly encounter both (1) plaintiffs who argue that their corrective measures are 'imperfect' and (2) plaintiffs who invoke the 'disabling corrections' language in *Sutton* to argue that the side effects of their corrective measures substantially limit a major life activity").

15. *Id.*

impairments, may receive protection under the ADA if they suffer from negative side effects.[16] On the other hand, individuals who are otherwise disabled (e.g., individuals with diabetes), but are able to mitigate the effects of their impairment, will be barred from coverage. Surely, Congress never intended such a result when it enacted the ADA.[17]

This Note argues that a narrow construction of the disabling corrections alluded to in *Sutton* most consistently supports the legislative history and congressional intent of the ADA. In particular, courts should not engage in the disabling corrections analysis unless the plaintiff would be disabled in his unmedicated or uncorrected state. If the plaintiff fulfills this threshold requirement, the court may then evaluate both the positive and negative side effects of the corrective measure to assess whether the individual is "substantially limited" in a major life activity and thus disabled under the ADA. Such an approach has the advantage of balancing the ADA's explicit goal of encouraging individuals with disabilities to participate in the workplace without fear of discrimination, while at the same time fulfilling the goal of both employers and the Court of minimizing trivial, unwarranted litigation.

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16. For example, an individual with mild obesity may take medication to help control his weight. This medication can have side effects including nausea, headaches, and slight dizziness. Under a strict literal interpretation of *Sutton*, this individual may be considered disabled due to the side effects of his medication. His underlying problem (mild obesity), however, is not considered a disability under the ADA. *See* 2 EQUAL EMPLOYMENT COMPLIANCE MANUAL (CBC) § 902.2(c)(5)(ii) (1995) (articulating that "[b]eing overweight, in and of itself, generally is not an impairment"). It seems wholly inconsistent with the intent of the drafters that this otherwise nondisabled individual receive the protection of the ADA, while an individual who requires the use of prosthetic limbs may not be protected because he is able to compensate for his impairment.

17. Congress reported that individuals with disabilities "occupy an inferior status . . . and are severely disadvantaged socially, vocationally, economically, and educationally . . . ." 42 U.S.C. § 12101(a)(6) (1994 & Supp. V 1999). In a related finding, Congress stipulated that "individuals with disabilities are a discrete and insular minority" and thus would qualify as a suspect classification for equal protection purposes. *Id.* § 12101(a)(7). Adopting a broad interpretation of the disabling corrections corollary, thereby protecting individuals who are not otherwise disabled but who suffer side effects from medication, is not consistent with these congressional findings. For further discussion of how the disabling corrections corollary can be implemented consistently with the congressional purpose of the ADA, see *infra* notes 124-36 and accompanying text.

This Note contains three sections. The first summarizes the history of the ADA, along with the framework and rationale supporting its enactment. Moreover, this section focuses on the ADA's definition of "disability," paying particular attention to the impact of mitigating measures litigation on the evolution of its definition. The next section analyzes the "disabling corrections" language in *Sutton* and the subsequent case law that has examined the corollary, arguing that a narrow interpretation of the disabling corrections corollary best serves both the Supreme Court's goals in *Sutton* and the legislative intent of the ADA. The third section suggests that the Equal Employment Opportunity Commission (EEOC) should promulgate regulations under title I of the ADA endorsing a narrow construction of the disabling corrections language in *Sutton*.[18] Furthermore, this final section discusses the importance of judicial deference to the proposed EEOC regulations, as the ADA is "ambiguous with respect to the [disabling corrections] issue"[19] and the proposed EEOC regulations are "a permissible construction of the statute."[20]

THE ADA DEFINITION OF "DISABILITY"

The History, Framework, and Rationale of the ADA[21]

In 1973, with the enactment of the Rehabilitation Act,[22] the federal government ushered in an era of legislation targeted at eliminating discrimination against the disabled. The Rehabilitation Act of 1973 provides that "[n]o otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be

18. The ADA delegates authority to promulgate regulations to different federal agencies. The EEOC is authorized to issue regulations governing title I of the Act regulating private employment discrimination. *See* 42 U.S.C. § 12116 (1994). Because the focus of this Note is on title I of the ADA, the recommended regulations are directed at the EEOC.

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

20. *Id.*

21. For an extensive discussion of the origins, history, and framework of the ADA, see 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, 415-34 (1991).

22. The Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 335 (codified as amended in scattered sections of 29 U.S.C. (1994)).

subjected to discrimination under any program or activity receiving Federal financial assistance...."[23] Although the Rehabilitation Act was meaningful legislation, it failed to eliminate a significant aspect of discrimination based on disability—discrimination in the private employment context—because it only applied to federal government agencies and businesses that received federal government funding.[24] In response to growing concern over the failure of the Rehabilitation Act to eliminate discrimination in private employment, Congress passed the Americans with Disabilities Act in 1990.[25] Congress intended the ADA to broaden the scope of the Rehabilitation Act and extend protection to the private sector.[26] Moreover, in his remarks at the White House signing ceremony, President Bush described the ADA as "an 'historic new civil rights Act ... the world's first comprehensive declaration of equality for people with disabilities.'"[27] Indeed, the ADA is intended "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[28]

The ADA is divided into five subchapter titles: I–Employment; II–Public Services; III–Public Accommodations and Services operated by Private Entities; IV–Telecommunications Relay Services; and V–Miscellaneous Provisions.[29] Title I of the Act, aimed specifically at eliminating discrimination in the workplace, prohibits discrimination "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

23. 29 U.S.C. § 794(a) (1994).

24. For a discussion of the scope of the Rehabilitation Act of 1973, see BRIAN DOYLE, DISABILITY, DISCRIMINATION AND EQUAL OPPORTUNITIES: A COMPARATIVE STUDY OF THE EMPLOYMENT RIGHTS OF DISABLED PERSONS 81-89 (1995).

25. Pub. L. No. 101-336, 104 Stat. 327 (1990).

26. Elizabeth A. Chang, Note, *Who Should Have It Both Ways?: The Role of Mitigating Measures in an ADA Analysis*, 64 BROOK. L. REV. 1123, 1126 (1998) (maintaining that the "ADA expands the protections provided by the Rehabilitation Act into the private sector, state and local governmental agencies, and the Senate").

27. Burgdorf, *supra* note 21, at 413-14 (quoting President George Bush, Remarks during the Ceremony for the Signing of the Americans with Disabilities Act of 1990, 2 (July 26, 1990)).

28. 42 U.S.C. § 12101(b)(1) (1994).

29. *Id.* §§ 12111-12213. This Note focuses primarily on discrimination in the workplace and therefore focuses on title I of the ADA. Title I is codified at *id.* §§ 12111-12117.

of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[30] Therefore, an employee who intends to assert a claim under the ADA faces the threshold question of whether he is disabled within the meaning of the statute. Unlike prior civil rights laws, however, the intended beneficiaries of the ADA are neither discrete nor well-defined.[31]

Defining Disability under the ADA[32]

To establish a prima facie case of discrimination and to be entitled to protection under title I of the ADA, a plaintiff must prove that he is disabled, that he is otherwise qualified for the job, and that he has been discriminated against "because of" his disability.[33] The existence of a disability can be established in one of several methods,[34] but the principle method requires a three-step process.[35] First, the court must consider whether the condition constitutes a physical or mental impairment.[36] Second, the court

30. *Id.* § 12112(a).

31. *See* McGarity, *supra* note 8, at 1166.

32. In defining the term "disabled" in the ADA, Congress piggybacked on the existing Rehabilitation Act definition. Congress was hesitant to alter the definition of "disabled" within the ADA and, therefore, the term is defined exactly as it is in the Rehabilitation Act—except that the phrase "handicapped person" was changed to "disability." *See* Bragdon v. Abbott, 524 U.S. 624, 631 (1998). Additionally, title V of the ADA provides that previous Rehabilitation Act case law interpreting the term "disabled" would apply to the ADA. *See id.*

33. *See, e.g.*, Moritz v. Frontier Airlines, Inc., 147 F.3d 784, 786 (8th Cir. 1998); Gordon v. E.L. Hamm & Assocs., Inc., 100 F.3d 907, 910 (11th Cir. 1996); *see also* Brian T. Rabineau, Note, *Those with Disabilities Take Heed: Eighth Circuit Suggests that ADA May Not Protect Those Who Fail to Control a Controllable Disability*, 65 MO. L. REV. 319, 322 (2000) (reiterating that plaintiffs must establish all three aspects of the test to maintain a prima facie case of discrimination).

34. The ADA defines disability as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). This Note addresses solely the first definition of disability, paying particular attention to how the disabling corrections corollary meshes with the "substantially limits" aspect of the definition.

35. *See Bragdon*, 524 U.S. at 631 (promulgating a three-step process to determine whether a plaintiff has a disability pursuant to the ADA).

36. *See id.* The "physical or mental impairment" and "major life activity" prongs of the test are not the focus of this Note. The EEOC regulations define the term "physical or mental impairment" as a "physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one ... of the ... body systems," or "[a]ny mental or physiological disorder." 29 C.F.R. § 1630.2(h) (2001). The regulations also define major life activities as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking,

must identify the plaintiff's life activity and determine if it qualifies as a "major life activity" under the ADA.[37] Finally, the court must assess whether the plaintiff's impairment substantially limits the major life activity.[38] Aside from occasional inquiry and debate, the courts have analyzed the first two prongs consistently. In contrast, the third prong resulted in "a firestorm of controversy,"[39] a split among the federal circuit courts,[40] and voluminous litigation.

Agency Interpretations[41]

The authority to issue regulations to implement the ADA is split primarily between three government agencies.[42] The EEOC was granted authority to issue regulations to carry out the employment provisions in title I of the ADA.[43] "No agency, however, [was delegated the] authority to issue regulations implementing the generally applicable provisions of the ADA ... which fall outside Titles I-V."[44] Despite its apparent lack of authority, the EEOC

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breathing, learning, and working." *Id.* § 1630.2(i).

37. *Bragdon*, 524 U.S. at 631.

38. *See id.*; EEOC v. R.J. Gallagher Co., 181 F.3d 645, 652 (5th Cir. 1999).

39. Rabineau, *supra* note 33, at 323.

40. *See infra* notes 49-57 and accompanying text.

41. For a discussion of the EEOC interpretive regulations that accompany the definition of disability, see Timothy Stewart Bland, *The Determination of Disability Under the ADA: Should Mitigating Factors Such as Medications Be Considered?*, 35 IDAHO L. REV. 265, 272-73 (1999); Erica Worth Harris, *Controlled Impairments Under the Americans with Disabilities Act: A Search for the Meaning of "Disability"*, 73 WASH. L. REV. 575, 578-84 (1998); Jonathan Bridges, Note, *Mitigating Measures Under the Americans with Disabilities Act: Interpretation and Deference in the Judicial Process*, 74 NOTRE DAME L. REV. 1061, 1061-62 (1999); Chang, *supra* note 26, at 1134-35; Sheryl Rebecca Kamholz, Note, *The Americans with Disabilities Act: Advocating Judicial Deference to the EEOC's Mitigating Measures Guidelines*, 8 B.U. PUB. INT. L.J. 99, 104-05 (1998); Rabineau, *supra* note 33, at 323-24; Susan E. Dallas, *Sutton: Use of Mitigating Measures to Determine Disability Under the ADA*, COLO. LAW., Mar. 1999, at 59.

42. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 478 (1999). While Congress granted the EEOC authority to issue regulations for title I of the ADA, it granted the Attorney General the authority to issue regulations with respect to title II, subtitle A, which relates to public services. 42 U.S.C. § 12134 (1994). Additionally, Congress granted the Secretary of Transportation authority to issue regulations pertinent to the transportation provisions of titles II and III. *Id.* § 12149(a).

43. 42 U.S.C. § 12116 ("Not later than 1 year after [the date of enactment of this Act], the Commission shall issue regulations ... to carry out this subchapter ....").

44. *Sutton*, 527 U.S. at 479. The generally applicable provisions—42 U.S.C. §§ 12101-12102—include the definition of "disability."

promulgated interpretive guidelines to its regulations defining the term "disability" in the context of employment.[45] In particular, the EEOC regulations expand on two of the necessary components of the statutory definition of disability: (1) whether a "physical or mental impairment" exists; and (2) whether the impairment "substantially limits" a major life activity.[46] In both instances, the EEOC regulations indicate that the determination of whether an individual is disabled should be made on a case-by-case basis "'without regard to mitigating measures such as medicines, or assistive or prosthetic devices.'"[47] Despite the EEOC's clear interpretation of what constitutes a disability, the federal courts remained divided until *Sutton*.

Early Case Law on Mitigating Measures

Prior to the 1999 Supreme Court term, there was significant disagreement among the federal circuits as to whether mitigating measures should be considered when determining whether an individual met the ADA's definition of disability.[48] Eight circuits adopted the EEOC position whereby an individual's disability status is evaluated in his or her unmedicated or uncorrected state.[49] This majority position was grounded in both the EEOC regulations and the legislative intent of the statute. In fact, "[a] review of the

45. 29 C.F.R. § 1630.2(g) (2001). The Department of Justice (DOJ) has also issued similar interpretive guidelines. The DOJ guidelines stipulate "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids and services." 28 C.F.R. pt. 35, app. A, § 35.104.

46. *See* Chang, *supra* note 26, at 1134 (describing the two sections of the EEOC interpretive guidelines that discuss the definition of disability).

47. *Sutton*, 527 U.S. at 502 (quoting 29 C.F.R. pt. 1630, app. § 1630.2(j)).

48. *See* Michael J. Puma, Note, *Respecting the Plain Language of the ADA: A Textualist Argument Rejecting the EEOC's Analysis of Controlled Disabilities*, 67 GEO. WASH. L. REV. 123, 126-40 (1998) (discussing the split among the courts concerning whether mitigating measures should be considered in the determination of disability).

49. Bartlett v. New York State Bd. of Law Exam'rs, 156 F.3d 321, 329 (2d Cir. 1998); Washington v. HCA Health Servs., 152 F.3d 464, 470-71 (5th Cir. 1998); Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 629-30 (7th Cir. 1998); Arnold v. United Parcel Serv., 136 F.3d 854, 863 (1st Cir. 1998); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937 (3d Cir. 1997); Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir. 1997); Harris v. H & W Contracting Co., 102 F.3d 516, 520-21 (11th Cir. 1996); Holihan v. Lucky Stores, 87 F.3d 362, 366 (9th Cir. 1996).

relevant House and Senate reports reveals that the EEOC's mitigating measures guideline is consistent with the Act's legislative history."[50] House Report No. 101-485 states that whether an individual has a disability should be assessed without regard to the availability of mitigating measures.[51] Moreover, Senate Report No. 101-116 provides that "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids."[52] In addition, some of the courts that adopted the EEOC's position recognized the traditional rule of judicial deference to agency interpretation when the statutory language is ambiguous and the agency's interpretation was reasonable.[53]

Conversely, prior to *Sutton*, two circuits adopted the position that individuals should be evaluated in their mitigated or corrected state when assessing whether they were disabled within the meaning of the ADA.[54] These courts based their rejection of the EEOC guidelines primarily on their concern that the EEOC's position required courts to engage in imaginative judicial inquiry by assessing individuals in their uncorrected state.[55] The lower courts adopting the medicated approach also indicated that the EEOC's interpretive guidance for its regulations was relatively weak authority, and that agency deference was not required because the guidelines were contrary to the plain, unambiguous language of the statute.[56] As the Tenth Circuit wrote, courts should be concerned

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50. Kamholz, *supra* note 41, at 108.

51. H.R. Rep. No. 101-485, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 334.

52. S. Rep. No. 101-116, at 23 (1989).

53. *See* Wilson v. Pennsylvania State Police Dep't, 964 F. Supp. 898, 904-05 (E.D. Pa. 1997) (accepting the EEOC's view as a reasonable interpretation of the statute and as supported by legislative history); Sicard v. City of Sioux City, 950 F. Supp. 1420, 1435-38 (N.D. Iowa 1996) (same). For a thorough discussion of the concept of judicial deference to agency interpretation, see *infra* notes 155-63 and accompanying text.

54. *See* Sutton v. United Air Lines, Inc., 130 F.3d 893, 902 (10th Cir. 1997), *aff'd*, 527 U.S. 471 (1999); Gilday v. Mecosta County, 124 F.3d 760, 767 (6th Cir. 1997). The Fifth Circuit also indicated that, despite its preference for the medicated approach, it felt bound by the EEOC's interpretation of the statute. *HCA Health Servs.*, 152 F.3d at 470. The Fourth Circuit did not address the issue prior to *Sutton*.

55. McGarity, *supra* note 8, at 1169 (referring to the Colorado District Court's analysis in *Sutton*, which the Tenth Circuit subsequently affirmed).

56. *Sutton*, 130 F.3d at 902 (rejecting the EEOC's interpretive guidance as contrary to the plain language of the ADA); Hodgens v. General Dynamics Corp., 963 F. Supp. 102, 107-

"with whether the impairment affects the individual in fact, not whether it would hypothetically affect the individual without the use of corrective measures."[57]

Resolving the Circuit Court Split—Sutton v. United Air Lines, Inc.

In June 1999, the United States Supreme Court announced three opinions that changed the way "disability" is defined under the ADA.[58] In these cases, the Court affirmed that inquiries about whether an individual is disabled, and thus deserves the protection of the ADA, must be done on a case-by-case basis.[59] More importantly, the Court held that, when assessing whether an individual is disabled, the Court should consider individuals in their corrected or mitigated state.[60] These decisions were paramount, not only because they made proving disability status far more difficult, but also because they contradicted the more commonly held notion that disability should be considered without corrective or mitigating measures.[61]

In *Sutton v. United Air Lines, Inc.*—the leading decision in the 1999 trilogy—the Supreme Court was faced with determining whether twin sisters, who had severe myopia causing them to see 20/200 in their right eyes and 20/400 in their left eyes when

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08 (D.R.I. 1997) (same); Moore v. City of Overland Park, 950 F. Supp. 1081, 1088 (D. Kan. 1996) (same).

57. *Sutton*, 130 F.3d at 902.

58. *See supra* notes 3-7 and accompanying text.

59. Sutton v. United Air Lines, Inc., 527 U.S. 471, 483 (1999) (maintaining that whether a person has a disability under the ADA requires an individualized inquiry); *see also* Allison Duncan, Note, *Defining Disability in the ADA:* Sutton v. United Airlines, Inc., 60 LA. L. REV. 967 (2000) (reporting that the Court held that disabilities must be considered on a case-by-case basis).

60. For a lengthy discussion of the *Sutton* decision, including analysis of the holding and its potentially controversial future impacts, see Andrew Tuch, *Disability & ADA: Supreme Court Clarifies the Meaning of Disability Under ADA*, 27 J.L. MED. & ETHICS 275 (1999); *see also* Julia J. Hall, Note, Sutton v. United Air Lines, Inc.*: The Role of Mitigating Measures in Determining Disabilities*, 51 MERCER L. REV. 799 (2000) (providing a thorough discussion of *Sutton* and the legal framework embodied in the decision); Linda Greenhouse, *High Court Limits Who Is Protected by Disability Law*, N.Y. TIMES ABSTRACTS, June, 23, 1999, at 1 (summarizing the decision and articulating the immediate response in the aftermath of the decision), *available at* 1999 WL 30524172.

61. *See supra* note 49 and accompanying text.

uncorrected, were disabled within the meaning of the ADA.[62] The petitioners, Karen Sutton and Kimberly Hinton, applied to United Airlines (United) for positions as commercial airline pilots.[63] Although the petitioners met United's age, education, experience, and FAA certification requirements, the company refused to hire them because the petitioners did not meet their minimum vision requirements.[64] Subsequently, the petitioners sued United in the U.S. District Court for the District of Colorado, alleging that United discriminated against them on the basis of their disabilities in violation of the ADA.[65]

In support of their contention that they deserved protection under the ADA, the petitioners argued that their myopia significantly interfered with their ability to engage in the major life activity of working.[66] Moreover, they claimed that the court should follow the EEOC guidelines and determine their disability status in an uncorrected state.[67] The District Court of Colorado dismissed the petitioners' complaint for failure to state a claim on which relief could be granted.[68] The court reasoned that the petitioners were not disabled under the meaning of the ADA because their vision impairment was fully correctable and therefore they were not substantially limited in the major life activity of working.[69] Employing similar logic, the Tenth Circuit affirmed the District Court's decision.[70]

The Supreme Court granted certiorari to resolve the tension between the Courts of Appeals regarding whether mitigating measures should be considered in assessing an individual's disability status.[71] By a seven to two vote, the Court affirmed the Tenth Circuit's decision, thereby rejecting the position of both the

62. *Sutton*, 527 U.S. at 475.

63. *Id.*

64. *Id.* at 476. Both women were initially invited for an interview but were later informed by United that they did not meet United's minimum vision requirement of 20/100 uncorrected vision and therefore were ineligible for employment.

65. *Id.*

66. *Id.*

67. *Id.* at 481.

68. *Id.* at 476.

69. *Id.*

70. *Id.* at 477.

71. *Id.*

majority of the federal Courts of Appeals and the EEOC interpretive guidelines.[72] The majority opinion, crafted by Justice O'Connor, rested on three grounds.[73]

First, the Court concluded that strict literal interpretation of the term "substantially limits" requires that the individual be evaluated in their mitigated state. The Court determined that because the language is in the present indicative verb form, it requires that the "person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability. A 'disability' exists only where an impairment 'substantially limits' a major life activity, not where it 'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken."[74] Because Sutton and Hinton had perfect vision with their corrective eyeglasses, they were not disabled within the meaning of the Act.

Second, because the ADA "requires that disabilities be evaluated 'with respect to an *individual*' and be determined based on whether the impairment substantially limits the 'major life activities of such *individual*,'"[75] the ADA demands an individualized inquiry. The Court, therefore, concluded that the EEOC interpretive guidelines were inconsistent with an individualized inquiry because evaluating an individual in his corrected state would require reliance on general medical information and speculation.[76]

Finally, in denying the petitioners' claim, the Court relied heavily on Congress's findings that, at the time of the Act's enactment, forty-three million Americans had disabilities.[77] The Court decided

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72. The Court's decision to deny the Sutton sisters ADA protection makes sense because the twin sisters suffered from a minor, albeit easily corrected, impairment. Therefore, as applied to the individualized facts, the mitigating measures (eyeglasses) were successful in fully compensating the women. Future courts, however, will be challenged with more complex and difficult "disability" assessments as a result of this decision. For example, do radiation and chemotherapy treatments fully mitigate the disabling effects of cancer? This Note suggests that when faced with difficult assessments, the courts should narrowly construe the impacts of mitigating measures, *both positive and negative*, to ensure *Sutton* protects the intended beneficiaries of the ADA.

73. *Sutton*, 527 U.S. at 481-89 (discussing each of the three reasons for affirming the Tenth Circuit's decision).

74. *Id.* at 482.

75. *Id.* at 483 (quoting 42 U.S.C. § 12102(2)) (emphasis added).

76. *Id.*

77. *Id.* at 484.

that following the EEOC interpretive guidelines, and thus considering individuals in the absence of mitigating measures, would contradict Congress's findings because it would increase the number of disabled persons to over 160 million.[78]

In a vigorous dissent, Justice Stevens argued that "customary tools of statutory construction" support the idea that "whether an individual is 'disabled' within the meaning of the Act ... [requires consideration] without regard to mitigation that has resulted from rehabilitation, self-improvement, prosthetic devices, or medication."[79] Moreover, he asserted that "in order to be faithful to the remedial purpose of the Act, [it should be given] generous, rather than miserly, construction."[80] Stevens stressed that all of the agency interpretations,[81] and the clear legislative history of the ADA and its precursor—the Rehabilitation Act—support assessing individuals in their uncorrected state.[82] Furthermore, the dissent rejected the majority's concern that an individualized inquiry would require courts to speculate about a person's hypothetical condition.[83] Finally, Stevens contended that even if the number of intended beneficiaries exceeded Congress's findings, the Court's reasoning did not justify such a restrictive construction of the Act.[84] Despite Justice Stevens' dissent, however, the Supreme Court

78. *Id.* at 484-88 (referring to 42 U.S.C. § 12101(a)(1)). Justice O'Connor relied on information in a law review article to approximate the number of disabled Americans. *See* Burgdorf, *supra* note 21, at 434 n.117.

79. *Sutton*, 527 U.S. at 495 (Stevens, J., dissenting).

80. *Id.*

81. *Id.* at 496 (asserting that all three of the Executive agencies that issued regulations or interpretive bulletins stipulated that assessing whether an individual is disabled requires evaluating them in their uncorrected state).

82. *See id.* at 496-503. "All of the [legislative] Reports, indeed, are replete with references to the understanding that the Act's protected class includes individuals with various medical conditions that ordinarily are perfectly 'correctable' with medication or treatment." *Id.* at 501. Additionally, Justice Stevens argued that there are really two parts to the analysis of whether mitigating measures should be considered. The dissent distinguished between people "Congress unquestionably intended to cover" and individuals with "minor, trivial impairment[s]." *Id.* at 495-96. More importantly, the dissent asserted that the majority's fears about expansive, trivial ADA litigation could be eliminated if the court adopted the same distinction. *Id.* The dissent believed that individuals "Congress unquestionably intended to cover" are deserving of a broad interpretation of the Act's protections and therefore should be evaluated in their nonmitigated state. *Id.* at 495.

83. *Id.* at 508.

84. *Id.*

adopted the mitigating measure approach, and thereby opened the door to litigation based on the disabling corrections corollary.

SUTTON'S "DISABLING CORRECTIONS COROLLARY"

Prior to *Sutton*, courts treated certain conditions as almost per se disabilities.[85] In *Sutton*, however, the Court rejected categorical classifications and instead held that the determination of whether an individual has a disability under the ADA is a highly individualized inquiry.[86] More importantly, the Supreme Court held that each individualized inquiry requires an examination of the individual in his corrected state such that "the effects of those measures—both positive and negative—must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act."[87] Indeed, the Court emphasized that adopting the EEOC approach, thereby evaluating individuals in their uncorrected or unmitigated state, would force employers and courts to speculate about a person's condition and make disability determinations based on general, rather than individualized information.[88] The Court reasoned that viewing disabilities in their corrected state was the only way to "consider any negative side effects suffered by an individual resulting from the use of mitigating measures, even when those side effects are very severe."[89]

By embracing the mitigating measures approach, the Court created an important corollary to the "rule" that individuals who can control their disability through the use of corrective devices or

85. In *Bragdon v. Abbott*, for example, the Supreme Court held that a woman with asymptomatic HIV was disabled under the ADA because she was "substantially limited" in the major life activity of reproduction. 524 U.S. 624 (1998). Although the Court espoused an individual inquiry into each individual's circumstances, the language in the decision hinted that any individual with asymptomatic HIV would be substantially limited in the major life activity of reproduction, and therefore disabled. In addition, in other cases, individuals with impairments including blindness, mental retardation, insulin-dependent diabetes, and severe epilepsy or hypertension were categorically considered disabled. KAREN H. HENRY, ADA: 10 STEPS TO COMPLIANCE (1999).

86. *Sutton*, 527 U.S. at 483.

87. *Id.* at 482.

88. *Id.* at 483.

89. *Id.* at 484.

medications are generally not entitled to the protections of the ADA.[90] *Sutton* suggests that individuals who use corrective measures for a mental or physical impairment, and who have negative side effects, require ADA protection. Under this regime, courts are tasked with evaluating not only the underlying physical or mental impairment, but the side effects resulting from corrective devices or medications.[91]

The adoption of the disabling corrections corollary leads to many questions concerning its scope. Should individuals who are not otherwise disabled under the ADA gain protection from the Act because they use corrective devices or medications that result in negative side effects?[92] "How severe must a side effect be before it should be considered disabling? Should severe but temporary side effects be considered disabilities for the purpose of the ADA?"[93] In *Sutton* the Supreme Court did not address, let alone provide answers to, these questions.

In the aftermath of *Sutton*, lower courts likewise have failed to resolve any of these difficult questions.[94] In the few decisions after *Sutton* addressing the side effects of mitigating measures, the courts have acknowledged *Sutton*'s disabling corrections language, but have failed to meaningfully apply it.[95] Two prominent Courts of

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90. One commentator maintained that adopting the disabling corrections corollary could be the "saving grace" of the *Sutton* decision if it is interpreted broadly. *See* McGarity, *supra* note 8, at 1173. Indeed, she argues that "the disabling corrections corollary helps to ensure that the *Sutton* decision will clarify, not destroy, the protections of the ADA." *Id.*

91. In *Sutton*, this determination was straightforward because wearing eyeglasses does not lead to noticeable, detrimental side effects. In other cases, however, this determination may be far more complicated. For example, it is significantly more difficult to assess the ramifications from chemotherapy treatments (nausea, loss of weight, loss of hair) for cancer patients.

92. In other words, should the disabling corrections corollary extend beyond correctable disabilities cases?

93. McGarity, *supra* note 8, at 1175.

94. The difficulty in resolving these issues is compounded by the limited precedent available to guide courts' analyses. Prior to *Sutton*, eight circuits required courts to assess an individual's impairment in its unmitigated or uncorrected state. *See supra* note 49. Under such a regime the court's sole responsibility was assessing whether the underlying impairment was a disability, not the potentially disabling impacts of treatment.

95. *See, e.g.*, Belk v. Southwestern Bell Tel. Co., 194 F.3d 946 (8th Cir. 1999); Taylor v. Phoenixville Sch. Dist., 184 F.3d 296 (3rd Cir. 1999); EEOC v. R.J. Gallagher Co., 181 F.3d 645 (5th Cir. 1999); Arnold v. City of Appleton, 97 F. Supp. 2d 937 (E.D. Wis. 2000); Popko v. Pennsylvania State Univ., 84 F. Supp. 2d 589 (M.D. Pa. 2000); Marasovich v. Prairie

Appeals' decisions highlight the lower courts' reluctance to resolve issues pertaining to the scope of the disabling corrections corollary.

In *EEOC v. R.J. Gallagher Co.*,[96] the plaintiff was diagnosed with myeldosplastic syndrome (MDS), a type of blood cancer.[97] After the plaintiff underwent thirty days of chemotherapy, his doctor indicated that the cancer had gone into "complete remission" and that the plaintiff could return to work without limitation.[98] Upon returning to work the plaintiff assured his supervisor that he could continue his duties as president, but that he would have to continue to undergo chemotherapy sessions.[99] Moreover, he offered to minimize the impact of the chemotherapy by scheduling the sessions on weekends.[100] His supervisor, however, expressed doubt that the plaintiff could continue to work after being treated for cancer, and subsequently demoted him to vice-president of sales, resulting in a fifty-percent cut in salary.[101] Relying on the fact that the plaintiff's cancer was in complete remission, the Fifth Circuit held that the plaintiff was not substantially limited in the major life activity of working.[102]

The court's assessment, however, is made without any meaningful consideration of "the side effects of [the plaintiff's] treatment."[103] The Fifth Circuit's reluctance to address the disabling corrections corollary is evident in its illusory analysis of the side effects of the plaintiff's chemotherapy. The court found that

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Material Sales, No. 98 C 2070, 1999 WL 1101244 (N.D. Ill. Dec. 1, 1999); Rolff v. Interim Personnel, Inc., No. 2:99CV44, 1999 WL 1095768 (E.D. Mo. Nov. 4, 1999); Todd v. Academy Corp., 57 F. Supp. 2d 448 (S.D. Tex. 1999); Davis v. Computer Maint. Serv., Inc., No. 01A01-9809-CV00459, 1999 WL 767597 (Tenn. Ct. App. Sept. 29, 1999).

96. 181 F.3d at 645.

97. *Id.* at 648.

98. *Id.* at 649.

99. *Id.*

100. *Id.* The plaintiff was required to receive monthly chemotherapy sessions lasting three to five days, meaning that he would be required to miss one to three days if he scheduled the treatments on weekends. *Id.* at 654.

101. *Id.* at 649.

102. *Id.* at 655.

103. *Id.* at 654. The court mentioned that the disability assessment requires consideration of both the actual effects of the cancer, and the side effects of the medical treatment. *Id.* The absence of any substantive analysis of the plaintiff's side effects (particularly the physical side effects), however, suggests their resistance to address the scope of the disabling corrections corollary. Specifically, the court could have addressed how the duration and severity of side effects should be considered.

the side effects from his treatment were isolated to the fact that the plaintiff would be required to miss a few days of work each month for treatment.[104] More importantly, the court failed to evaluate the physical side effects of the plaintiff's chemotherapy treatments —nausea, weakness, and weight loss—that could have limited his ability to work.

Similarly, in *Taylor v. Phoenixville School District*,[105] a decision issued before *Sutton*, the Third Circuit held that a former secretary for a school district was disabled because in her unmedicated state her bipolar disorder substantially limited her work.[106] The plaintiff worked for the defendant for twenty years and received exemplary performance appraisals prior to the onset of her disorder.[107] After being admitted to a psychiatric institution and receiving treatment with Lithium and Navane to control her disorder, the plaintiff was released to return to work.[108] Over the following year, the plaintiff received numerous disciplinary notices, experienced difficulties adapting to additional personal responsibilities and the school's new computer system, and subsequently was discharged.[109] In its decision, the Third Circuit held that the plaintiff was disabled because her mental disorder resulted in serious delusions and paranoia, which substantially impaired her ability to think.[110]

In light of *Sutton*, however, the Third Circuit granted a panel rehearing and revisited whether the plaintiff's bipolar disorder was substantially limiting in her corrected state.[111] In rejecting the defendant's motion for summary judgment, the court held that there was a genuine issue of material fact as to whether the plaintiff was disabled under the ADA.[112] Additionally, the court remanded the case because the facts suggested that the plaintiff's

104. *Id.*

105. 174 F.3d 142 (3d Cir. 1999), *opinion amended on reh'g and remanded*, 184 F.3d 296 (3d Cir. 1999).

106. *Id.* at 156.

107. *Id.* at 148.

108. *Id.* at 148-49.

109. *Id.* at 149-50.

110. *Id.* at 156.

111. Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 302 (3d Cir. 1999).

112. *Id.* at 306.

medication did not fully control her symptoms, as evidenced by her numerous visits to the doctor despite her limited income.[113]

Despite what appears to be a more meaningful application of the disabling corrections corollary, the Third Circuit also bypassed an opportunity to solidify its scope. Although acknowledging that Lithium and Navane have severe side effects,[114] some of which manifested in the plaintiff, the court was reluctant to find that the negative side effects of her medication were independently disabling.[115] Instead, the court continued to analyze her disability in terms of whether the medication could fully correct her impairment. Although the court's decision is consistent with *Sutton*, it bypassed the opportunity to further define the expansiveness of the disabling corrections corollary.[116]

Both of these decisions, like *Sutton*, involved plaintiffs with correctable disabilities.[117] Therefore, the courts' analysis of mitigating measures mirrors *Sutton* and is limited to whether the corrective device completely or perfectly alleviates the individual's impairment. If the court finds that the corrective device successfully mitigates the impairment, the individual who would otherwise be disabled is no longer substantially limited in a major life activity.

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113. *Id.* at 308 (indicating that the plaintiff saw the doctor twenty-five times even though she earned only a secretary's salary, cared for a disabled child, and each visit cost $120).

114. The court found that "when the amount of lithium in the blood is near and above the therapeutic range, side effects can include nausea, vomiting, abdominal pain, slight tremor, lethargy, impaired concentration, dizziness, slurred speech, ataxia, muscle weakness, and nystagmus." *Id.* at 303 n.1.

115. *See id.* at 308-09.

116. The Third Circuit's determination, although inconclusive, supports this Note's premise that the disabling corrections corollary should be interpreted narrowly. *See id.*

117. *See Taylor*, 184 F.3d at 296; EEOC v. R.J. Gallagher Co., 181 F.3d 645 (5th Cir. 1999). Correctable disabilities refer to physical or mental impairments that would be considered disabilities in their uncorrected state. *See* Sutton v. United Air Lines, Inc., 527 U.S.471, 482 (1999). Indeed, the post-*Sutton* disabling corrections decisions have almost exclusively involved plaintiffs with correctable disabilities. *See, e.g.*, Belk v. Southwestern Bell Tel. Co., 194 F.3d 946 (8th Cir. 1999) (polio); Taylor v. Phoenixville Sch. Dist., 184 F.3d 296 (3rd Cir. 1999) (bipolar disorder); EEOC v. R.J. Gallagher Co., 181 F.3d 645 (5th Cir. 1999) (cancer); Arnold v. City of Appleton, 97 F. Supp. 2d 937 (E.D. Wis. 2000) (epilepsy); Popko v. Pennsylvania State Univ., 84 F. Supp. 2d 589 (M.D. Pa. 2000) (idiopathic epilepsy); Rolff v. Interim Personnel, Inc., No. 2:99CV44, 1999 WL 1095768 (E.D. Mo. Nov. 4, 1999) (Hepatitis C); Todd v. Academy Corp., 57 F. Supp. 2d 448 (S.D. Tex. 1999) (epilepsy); Davis v. Computer Maint. Serv., Inc., No. 01A01-9809-CV00459, 1999 WL 767597 (Tenn. Ct. App. Sept. 29, 1999) (diabetes).

Following the Supreme Court's lead, the post-*Sutton* decisions primarily focus on the positive aspects of the corrective device, downplaying the impact of the negative side effects resulting from the corrective measure.[118] Indeed, courts have narrowly construed the disabling corrections corollary in such a way as to render it largely ineffective for plaintiffs.[119]

Often overlooked, however, is that *Sutton* is not limited to individuals with correctable disabilities. Strict literal interpretation of *Sutton* requires courts to assess an individual's disability status even if the individual would not be disabled in their uncorrected or unmedicated state. Because the post-*Sutton* cases have focused almost exclusively on individuals with correctable disabilities, the courts have neither addressed nor resolved the question of whether the disabling aspects of a corrective measure can provide independent grounds for disability status.[120]

As the next wave of ADA litigation begins, it is highly probable that individuals who are not otherwise disabled, for example individuals with minor back pain, will pursue ADA protection on the basis that their medication or corrective device is independently disabling.[121] Faced with this unique question, the courts must

118. *See supra* note 117. The court's analysis in *Sutton* suggests that the side effects of the medication pertain solely to whether it fully mitigates the impairment and not to whether side effects are themselves disabling. *See Sutton*, 527 U.S. at 482. Courts have been reluctant to find that the use of a mitigating device or medication results in an impairment that substantially limits a major life activity.

119. Although the courts are correct in narrowly construing the negative side effects of the medication, this Note suggests that they are too liberal or illusory in their analysis of the positive aspects of the mitigating measures. In order to avoid rendering the ADA largely powerless in the workplace, and thus severely hindering the intended beneficiaries' ability to qualify for the Act's protection, courts should continue to find plaintiffs with correctable disabilities "disabled" unless the mitigating measure *fully* alleviates the individual's capacity in a major life activity.

120. In other words, can an individual with a nondisabling physical or mental impairment gain protection from the ADA due exclusively to the negative side effects of medication?

121. Due to the recency of the *Sutton* decision, there is minimal case law supporting this hypothesis. One case, however, suggests that plaintiffs are going to pursue this new avenue of litigation. In *Marasovich v. Prairie Material Sales*, the plaintiff, a concrete-mixer truck driver who suffered from back pain requiring medication, alleged that his employer violated the ADA by terminating him after he was involved in two accidents. No. 98 C 2070, 1999 WL 1101244, at *1 (N.D. Ill. Dec. 1, 1999). Shortly after his second accident, the plaintiff's employer required him to take a drug test and submit to a physical examination. *Id.* at *3. The drug test and examination disclosed that the plaintiff was taking significant levels of Valium on a daily basis. *Id.* In response, the defendant notified the plaintiff that his use of

narrowly construe *Sutton*'s disabling corrections language to ensure that only the intended beneficiaries of the ADA receive the Act's protection.

Narrow Construction of "Disabling Corrections" for Individuals Not Otherwise Disabled

In the absence of meaningful case law interpreting the breadth and scope of *Sutton*'s disabling corrections corollary, it is imperative to look at the findings and purpose of the ADA, and to the underlying aspects of the *Sutton* decision, to determine whether the negative side effects of a corrective device can provide an independent basis for disability status.[122] Each of these methods of analysis suggests that the proper interpretation of the disabling corrections corollary is a narrow one.[123] Moreover, they suggest that individuals who are not otherwise disabled were not the intended beneficiaries of the Act.

Findings and Purpose of the ADA[124]

Congress enacted the ADA in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrim-

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the Valium disqualified him from driving his truck and that if he wished to continue his employment, he would be required to stop taking the medication. *Id.* at *3-4. After refusing to stop taking his medication, the defendant terminated the plaintiff. *Id.* at *4. The court denied the defendant's motion for summary judgment and found that there was a genuine issue as to whether the plaintiff was a qualified individual with a disability under the ADA. *Id.* at *6. In particular, the court stated that "[a] reasonable trier of fact could find that [the plaintiff's] back spasms, pain, and side effects of some of his medication substantially limited his ability to work as a truck driver." *Id.*

Although the court lumped the side effects together with the plaintiff's physical impairment, it is highly unlikely that an individual with back spasms would be considered disabled under the ADA's definition of disability. *See supra* notes 32-40 and accompanying text (detailing the ADA definition of disability). Therefore, this court implicitly suggested that the side effects from medication may provide an independent basis for disability status.

122. In other words, it is necessary to inquire whether individuals with nondisabling impairments, who nonetheless have potentially disabling side effects from medication, require ADA protection.

123. *See* McGarity, *supra* note 8, at 1174 (arguing that "a generous interpretation of the disabling corrections corollary would serve the larger goals of the ADA").

124. For a thorough discussion of the purpose and findings of the ADA, see Burgdorf, *supra* note 21, at 434-40.

ination against individuals with disabilities."[125] Moreover, the Act sought to eliminate the widespread, pervasive discrimination against persons with disabilities.[126] Indeed, prior to the Act, individuals with disabilities confronted major "forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities ...."[127] Furthermore, Congress found that "unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion or age,"[128] individuals with disabilities have "had no legal recourse to redress such discrimination."[129]

Perhaps even more importantly, Congress declared that census data and national polls[130] reported that individuals with disabilities "occupy an inferior status" and are "severely disadvantaged socially,

125. 42 U.S.C. § 12101(b)(1) (1994).

126. *Id.* § 12101(a)(2). The findings state that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem...." *Id.*

127. *Id.* § 12101(a)(5).

128. *Id.* § 12101(a)(4).

129. *Id.* The 1988 version of the bill included a statement whereby the ADA would provide a prohibition of discrimination against individuals with disabilities that paralleled the coverage afforded in other civil rights legislation "on the basis of race, sex, national origin, and religion." S. REP. NO. 100-2345, (1988); H.R. REP. NO. 100-4498, (1998). When the bill was revised to provide coverage of public accommodations and telecommunications relay services, however, the bill was modified to remove the stated purpose, and the present finding was added.

130. The Committee reports accompanying the ADA catalog the many sources and studies underlying their findings. *See* S. REP. NO. 101-116, at 6-9 (1989); H.R. REP. NO. 101-485, pt. 2, at 28-32 (1990). The sources include: LOUIS HARRIS & ASSOCS., THE ICD SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM (1986); LOUIS HARRIS & ASSOCS., THE ICU SURVEY II: EMPLOYING DISABLED AMERICANS (1987); NAT'L COUNCIL ON DISABILITY, ON THE THRESHOLD OF INDEPENDENCE (1988); NAT'L COUNCIL ON DISABILITY, TOWARD INDEPENDENCE (1986); TASK FORCE ON THE RIGHTS AND EMPOWERMENT OF AMERICANS WITH DISABILITIES, EQUALITY FOR 43 MILLION AMERICANS WITH DISABILITIES: A MORAL AND ECONOMIC IMPERATIVE (1990); U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES (1983).

vocationally, economically, and educationally."[131] In a related finding, Congress stipulated that "individuals with disabilities are a discrete and insular minority."[132] Therefore, they would qualify as a suspect classification for equal protection purposes.[133] In effect, this finding is a congressional endorsement of the idea that individuals with disabilities should be subjected to heightened judicial scrutiny under the equal protection clause.[134]

Although Congress intended the ADA to provide broad coverage, the totality of the congressional findings emphatically endorses a narrow construction of the disabling corrections corollary.[135] Undoubtedly, the ADA was intended to encourage and enable individuals with disabilities to become active members of our society. The Act's broad coverage, however, targeted a specific class of individuals: individuals that were disadvantaged[136] economically, socially, and vocationally, occupying an inferior status in society. Congress even boldly suggested that the intended beneficiaries of the Act should be considered a suspect class, warranting heightened judicial scrutiny.

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131. 42 U.S.C. § 12101(a)(6).

132. *Id.* § 12101(a)(7). Relying on Supreme Court equal protection litigation, Congress described individuals with disabilities 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, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society ....

Id.

133. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (discussing scrutiny for suspect classifications).

134. For a similar argument, see Burgdorf, *supra* note 21, at 436. Although inconclusive, it appears that the Supreme Court has rejected "suspect" classification for individuals with disabilities. *Id.* In particular, the Supreme Court held that a mentally retarded individual did not receive heightened judicial scrutiny warranted for individuals in suspect classifications. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 (1985).

135. *But see* McGarity, *supra* note 8, at 1174 (arguing that a generous interpretation of the disabling corrections corollary would best serve the ADA's goals).

136. In testimony to the United States Senate, the President of Louis Harris and Associates documented a high correlation of disability with poverty, joblessness, lack of education, and failure to participate in social life. *See Joint Hearing on the Guaranteed Job Opportunity Act Before the Senate Comm. On Labor and Human Res.*, S. Hrg. 100-166, pt. 2, at 9 (1987); *see also* S. REP. NO. 101-116, at 8 (1989) (quoting the testimony).

Surely individuals with minor physical or mental impairments, who subsequently have negative side effects from medication, are not deserving of suspect classification. Moreover, those individuals are not a disadvantaged class of individuals who have suffered educationally, vocationally, or economically due to their impairment. Simply put, extending the disabling corrections corollary to individuals who are not otherwise disabled would result in protecting a class of plaintiffs who were never intended to receive the Act's protections.

Policy Rationale of Sutton

The narrow approach to the disabling corrections corollary is also supported by *Sutton* itself. In particular, the two primary arguments in favor of mitigating measures analysis are consistent with a narrow interpretation of the disabling corrections corollary. First, *Sutton*'s reliance on a present impairment[137] inherently limits the application of the disabling corrections corollary. Assessing whether an individual is *presently* limited in a major life activity due to side effects from medication is incredibly complicated because the side effects of drug treatments are frequently of uncertain severity or duration.[138] In addition, "[m]any of these [side] effects decrease with time as an individual's body adjusts or as an individual's physician adjusts the dosage of the medication ...."[139] Acceptance of an expansive approach to the disabling corrections corollary, therefore, would arguably result in a situation where an individual's ADA protection fluctuates depending upon how well his physician can control the side effects of his medication. Although the ADA is based on a pro-work policy, the adoption of the disabling corrections analysis for individuals not otherwise disabled would be incredibly taxing on both the employer and the courts.[140] Therefore,

137. For a discussion of *Sutton*'s reliance on a present, not potential or hypothetical impairment, see *supra* note 74 and accompanying text.

138. *See, e.g.*, MERCK MANUAL OF MEDICAL INFORMATION 42 (Robert Berkow et. al. eds., 1997) (explaining that adverse drug reactions are common and vary in both duration and severity).

139. McGarity, *supra* note 8, at 1179.

140. The adoption of an expansive approach to disabling corrections, as prescribed by McGarity, *id.*, would burden the courts with determining not only whether the underlying

although the acceptance of the narrow approach to disabling corrections has the potential to infringe upon the autonomy of individuals with minor (nondisabling) impairments, it is justified in part by the burden an expansive approach would place on both the employer and the courts.

Moreover, the EEOC regulations support this position. In particular, when determining whether an individual is disabled, the EEOC regulations suggest three factors to consider: (1) "[t]he nature and the severity of the impairment;" (2) "[t]he duration ... of the impairment;" and (3) the "long term impact" of the impairment.[141] The EEOC technical assistance manual for the ADA further stipulates that temporary, nonchronic impairments that do not have a lasting duration and have little or no long-term impact usually are not disabilities.[142] The EEOC guidelines, coupled with *Sutton*'s reliance on a present impairment, suggest that courts should limit the disabling corrections corollary because only especially severe, lasting side effects of medical treatments would justify disability status. Even in the cases of severe side effects, however, the courts should refrain from engaging in disabling corrections analysis when the individual is not otherwise disabled because the marginal benefit of such analysis is marred by the potential for confusion and inconsistency among the courts.[143]

Second, a narrow interpretation of the disabling corrections corollary is consistent with *Sutton*'s interpretation of the congressional findings. In *Sutton*, the Supreme Court held that adopting the EEOC approach—considering individuals in the

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impairment is a "disability," but also whether side effects from a corrective device or medication substantially limit a major life activity. Requiring this further analysis substantially increases the complexity of the litigation, and provides only marginal value.

141. 29 C.F.R. § 1630.2(j)(2) (2001).

142. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § 2.2(a)(iii) (1992).

143. The increased complexity is minimized, and therefore justified, in cases where the individual has a correctable disability. In those cases, the court is only looking to determine if the mitigating measure fully alleviates the disabling impairment. As such, the court examines the totality of the corrective device's impact, both positive and negative, to determine if the individual is disabled. If the corrective device has significant negative side effects, then it is unlikely to fully compensate for the underlying disability and the individual will continue to be entitled to ADA protection.

absence of mitigating measures—would inevitably result in coverage for 160 million individuals, a number much higher than the 43 million cited in the ADA's findings.[144] Although the specific source of the 43 million figure was not clear to the Court,[145] the majority relied on the figure to identify the group that Congress intended to protect by enacting the ADA. Given the Court's deference to these congressional findings, it follows that the other congressional findings, supported by weightier statistical information,[146] would likewise be followed and the disabling corrections corollary would not be found to be an independent basis for disability status.[147]

Moreover, the Court's adoption of the 43 million figure illustrates its desire to minimize trivial, unwarranted ADA litigation.[148] The Court's underlying goal of diminishing trivial ADA suits is also best served by allowing disabling corrections analysis for individuals with correctable disabilities, while rejecting the analysis for individuals with nondisabling impairments. This approach better facilitates both the Supreme Court's and ADA's goals because it eliminates litigation involving individuals who were never the intended beneficiaries of the Act, while enabling courts to assess disabled individuals in their corrected state.[149]

REGULATORY REFORM AND JUDICIAL DEFERENCE

As described above, the provisions of the EEOC's title I regulations emphasize that the nature and severity, duration, and long-term impact of an impairment are determinative factors in

144. 42 U.S.C. § 12101(a)(1) (1994); Sutton v. United Air Lines, Inc., 527 U.S. 471, 487 (1999).

145. *Sutton*, 527 U.S. at 484.

146. *See supra* note 130 and accompanying text.

147. For a discussion of this issue, see *supra* notes 124-36 and accompanying text.

148. The Court noted that the number of individuals with vision impairments alone is 100 million. *Sutton*, 527 U.S. at 487.

149. Accepting a broad interpretation of the disabling corrections corollary would burden courts with litigation that did not exist prior to *Sutton*. In *Sutton* the Supreme Court was not attempting to create a new means of ADA protection. Rather, the Court was striving to resolve a split among the Circuits as to whether mitigating measures should be evaluated in cases where the plaintiff has a correctable disability.

assessing an individual's disability status.[150] *Sutton* suggests, however, that courts relax their analysis of the "duration" and "long-term impact" requirements to facilitate analysis of mitigating measures. Because this has the potential to completely read these two critical elements out of the EEOC regulations, an amendment[151] to those regulations is required to encourage courts to give the disabling corrections corollary the narrow scope that both the ADA's findings and the Supreme Court's *Sutton* opinion require.[152]

The EEOC's title I regulations pertaining to the term "substantially limits" should be amended to clarify the role that *Sutton*'s disabling correction language should play in the courts' analysis of whether an individual has a disability.[153] In particular, the amendment should require the courts to distinguish between two classifications of plaintiffs, those with correctable disabilities, and those with nondisabling impairments. After making such a determination, the courts should be allowed to engage in disabling corrections analysis for the individuals with correctable disabilities, while being precluded from engaging in such analysis for individuals with nondisabling impairments. For example, the new 29 C.F.R. § 1630.2(j)(2) could read as follows:

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150. *See supra* notes 141-42 and accompanying text.

151. There is some evidence that the EEOC would be receptive to amendments of their regulations. In a statement following *Sutton*, Peggy R. Mastroianni, associate legal counsel for the EEOC, stated that the Supreme Court's decision confused employers because it unsettled an area of the ADA that was largely stable, and has made them question what should be considered a disability. Peggy R. Mastroianni, *Americans with Disabilities*, CONGRESSIONAL TESTIMONY BY FEDERAL DOCUMENT CLEARING HOUSE, July 26, 2000, *available at* 2000 WL 23832034. Moreover, Mastroianni believes that this confusion calls for more technical assistance from the EEOC. *Id.*

152. In light of *Sutton*, even some of the original drafters of the ADA called for reform. *See* Bruce Rubenstein, *Supreme Court Narrows the ADA Definition of Disability: Corrected Disabilities Don't Count*, CORP. LEGAL TIMES, Sept. 1999, at 1 (articulating that Professor Chai R. Feidblum of Georgetown University, one of the drafters of the Act, called on Congress to remedy the Supreme Court's decision in *Sutton*).

153. 29 C.F.R. § 1630.2(j)(2) (2001). This section currently reads as follows:

> (2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:
>
> (i) The nature and severity of the impairment;
>
> (ii) The duration or expected duration of the impairment; and
>
> (iii) The permanent or long-term impact, or the expected permanent or long term impact of or resulting from an impairment.

Id.

> (2) Determining whether an individual is substantially limited in a major life activity requires a threshold assessment of whether the individual suffers from an impairment that would be disabling in its unmitigated or uncorrected state. If the individual's impairment is not independently disabling in its uncorrected state, then the impairment does not necessitate the assessment of the side effects, either positive or negative, of the mitigating measure. If, however, the impairment is independently disabling, the court should consider the following factors: (i) The nature and severity of the impairment in its mitigated state; (ii) The duration or expected duration of the permanent impairment in its mitigated state; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment in its mitigated state.

In essence, the disabling corrections corollary would be extended to those individuals who are suffering from correctable disabilities, while at the same time eliminating the disabling corrections analysis for individuals who are not otherwise disabled. This amendment is consistent with the findings and purpose of the ADA, as well as with *Sutton*, because it encourages individuals with disabling impairments to attempt to alleviate their impacts by pursuing ameliorative measures, and ensures that only the intended beneficiaries of the Act receive its protection.

Judicial Deference Needed

The success of the amended EEOC regulation depends on judicial deference. Nevertheless, some commentators argue that "[t]he efficacy of a strategy that focuses on changes to the definitional portions of the EEOC regulations may be somewhat doubtful in light of the language in *Sutton* questioning the deference due those regulations and the apparent 'judicial uprising' against the EEOC's ADA regulations."[154] A closer reading of *Sutton*, however, suggests

154. McGarity, *supra* note 8, at 1189 (footnote omitted). *But see* Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 307 (1999) ("The [Supreme] Court concluded that it did not have to resolve the issues of deference because the parties in *Sutton* did not contest the validity of the regulations, including 29 C.F.R. § 1630.2(j) .... Because we have previously applied 29

that the Court did not dismiss the concept of judicial deference to the EEOC regulations.[155] Instead, the Court held that the EEOC interpretive guidelines should not be followed in *Sutton* because they contradicted the explicit language of the ADA and therefore were an "impermissible interpretation of the [Act]."[156]

In the absence of regulations contradicting the plain language of the statute, the Supreme Court has long recognized the principle of judicial deference to agency action.[157] In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Court held:

> [When] Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[158]

The proposed, amended regulations rectify what the Court deemed an "impermissible interpretation" of the statute and therefore would demand judicial deference. Specifically, the proposed new regulations incorporate *Sutton*'s mitigating measures approach for individuals with correctable disabilities and therefore are a permissible interpretation of the ADA.

Moreover, it is not necessary for the court to conclude that the agency's construction is the only reasonable interpretation, or that the court would have reached the same conclusion.[159] Instead, judicial deference to agency regulations is mandated if the agency's interpretation is reasonable and not contrary to congressional

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C.F.R. § 1630.2(j), we will follow it here . . . .") (citation omitted).

155. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 481-84 (1999).

156. *Id.* at 482 (citations omitted). Ten years earlier, the Court maintained that "no deference is due to agency interpretations at odds with the plain language of the statute itself." Public Employees Ret. Sys. v. Betts, 492 U.S. 158, 171 (1989). In *Sutton*, the Court reasoned that the phrase "*substantially limits* one or more of the major life activities" could not possibly support the EEOC guidelines because the present indicative verb form requires assessing individuals in their mitigated state. *Sutton*, 527 U.S. at 482.

157. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

158. *Id.* at 843.

159. *See* Kamholz, *supra* note 41, at 110. For additional discussion of agency deference pursuant to *Chevron*, see Bridges, *supra* note 41, at 1071-76; Puma, *supra* note 48, at 140-45.

intent.[160] Applied to the disabling corrections corollary, the question becomes: Is the limitation of the disabling corrections approach to individuals with correctable disabilities a *reasonable* interpretation of the ADA? Clearly the answer is "yes." The Court decided *Sutton* in the midst of controversy concerning whether mitigating measures should be considered in cases involving plaintiffs with correctable disabilities. The intent of *Sutton* was not to create a new avenue for creative plaintiffs, but rather to restrict ADA litigation. Consequently it seems abundantly clear that the modified regulations, which also support a narrowing of ADA litigation, are reasonable. Additionally, as both *Sutton* and the Act itself are silent concerning the scope of the disabling corrections corollary, judicial deference to agency interpretation is warranted.

Finally, the modified regulations do not contradict congressional intent. The congressional findings clearly suggest that the intended beneficiaries of the Act are a "discrete and insular minority" who have been subjected to a "history of purposeful unequal treatment."[161] Individuals with minor, nondisabling impairments, but who subsequently have disabling side effects as a result of their treatment, are not deserving of the Act's protection. Furthermore, the legislative intent, although rejected by *Sutton*, also suggests that negative side effects from medication should not lead to ADA protection.[162]

CONCLUSION

The Supreme Court's decision in *Sutton* has provoked the popular press, and many legal scholars, to question the breadth and scope of the ADA. At the heart of its decision, the Supreme Court held that the individualized inquiry demanded by the ADA requires courts to evaluate individuals in their corrected or medicated state. At first blush, this decision seems to resolve the question concerning mitigating measures. A closer look, however, suggests that *Sutton* may just be the tip of the iceberg, opening the door to

160. Bridges, *supra* note 41, at 1071.

161. As intended by 42 U.S.C. § 12101(a)(7) (1994).

162. For a discussion of the Committee Reports supporting the enactment of the ADA, see *supra* notes 50-52 and accompanying text.

additional ADA litigation by individuals suffering from disabling corrections.

Both the lower courts' interpretations and the EEOC's reaction to *Sutton*'s disabling corrections corollary will greatly impact the future of ADA litigation. If the lower courts interpret *Sutton* expansively, thereby allowing disabling side effects to become an independent means of ADA protection, a pandora's box of ADA litigation will be opened. On the contrary, if the lower courts carefully read *Sutton*, and correctly interpret the disabling corrections corollary, then the side effects of mitigating measures should be considered only for individuals who would be disabled in the absence of the corrective device. This approach best serves the goals of the ADA because it provides protection for only those individuals who have been subjected to a history of unequal treatment as a result of their significant impairment.[163]

In addition, before the lower courts attempt to resolve this complicated issue, the EEOC should offer guidance through the promulgation of amended regulations. In particular, the EEOC should articulate the importance of distinguishing between individuals with correctable disabilities (like the plaintiffs in *Sutton*) and individuals who are not otherwise disabled. Moreover, the modified regulations should ensure that the effects of corrective measures—both positive and negative—should be considered only for individuals with correctable disabilities.

This narrow construction of the "disabling corrections" language in *Sutton* is necessary to ensure that only individuals who suffer from disabilities, and cannot fully alleviate the corresponding limitation on a major life activity, receive the protections of the ADA. Excluding individuals who utilize the disabling corrections language as an independent basis for disability status is consistent with the congressional findings and purpose of the ADA, and at the same time fosters the pro-mitigation policy espoused in *Sutton*. Most importantly, a narrow construction of the disabling corrections language ensures that the intended beneficiaries of the ADA are protected from workplace discrimination and can be self-sufficient participants in our society.

Richard C. Dunn

163. 42 U.S.C. § 12101(a)(7).