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Civil Rights - Mitigating Measures and the Defintion of Disability under the Americans with Disabilities Act of 1990 - A Case of Judicial Myopia - Sutton v. United Air Lines

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Case Notes

CIVIL RIGHTS—Mitigating Measures and the Definition of Disability Under the Americans with Disabilities Act of 1990—A Case of Judicial Myopia? *Sutton v. United Air Lines*, 119 S. Ct. 2139 (1999).

INTRODUCTION

The Americans with Disabilities Act of 1990 (ADA)[1] was created "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[2] If the purpose of the ADA is clear, its application has not been. One of the most controversial issues involving the ADA is whether the determination of "disability" for purposes of the Act should be made with or without reference to mitigating and corrective measures.[3] The United States Supreme Court recently addressed this issue in *Sutton v. United Air Lines*,[4] holding that mitigating and corrective measures should be considered in determining whether an individual is disabled under the ADA.[5]

Karen Sutton and Kimberly Hinton (the Pilots) are identical twin sisters who have severe myopia.[6] Each Pilot's uncorrected vision is 20/200 or worse in the right eye and 20/400 or worse in the left eye.[7] Without the use of corrective measures, each "effectively cannot see to conduct numerous activities such as driving a vehicle, watching television or shopping in public stores."[8] However, with the use of corrective measures, such as glasses or contact lenses, each Pilot has vision that is 20/20 or better and both "function identically to individuals without a similar impairment."[9]

The Pilots are experienced commercial airline pilots. Both have flown for regional commercial airlines, but it is their life-long goal to fly for a major global carrier.[10] To that end, in 1992 both applied for pilot positions

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1. The Americans with Disability Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified in scattered sections of 42 U.S.C. §§ 12101-12213 (1997)).

2. 42 U.S.C. § 12101(b)(1) (1997).

3. *See infra* notes 56-68 and accompanying text, illustrating the conflicting positions on the issue in the Circuit Courts of Appeals.

4. 119 S. Ct. 2139 (1999).

5. *Id.* at 2149.

6. *Id.* at 2143. Webster's Dictionary defines "myopia" as: "Nearsightedness; a condition of the eye in which the rays from distant objects are brought to a focus before they reach the retina and form an indistinct image." WEBSTER'S NEW INTERNATIONAL DICTIONARY 1620 (2d ed. 1956).

7. *Sutton, 119* S.Ct. at 2143.

8. *Id.*

9. *Id.*

10. *Id.*

with United Air Lines (United).[11] Each met United's basic age, education, experience, and Federal Aviation Administration certification qualifications.[12] After submitting their applications for employment, the Pilots were invited by United to an interview and to flight simulator tests.[13] During the interview process, however, both were told that a mistake had been made in inviting them to interview because neither met United's minimum vision requirement, which was uncorrected vision acuity of 20/100 or better.[14] Due to their failure to meet this requirement United terminated the Pilots' interviews and rejected their applications.[15]

In light of United's proffered reason for rejecting them, the Pilots filed a charge of disability discrimination under the ADA with the Equal Employment Opportunity Commission (EEOC).[16] After receiving a right to sue letter, the Pilots filed suit in the United States District Court for the District of Colorado, alleging that United discriminated against them on the basis of their disabilities, or because United regarded them as having disabilities, in violation of the ADA.[17] The district court dismissed the Pilots' complaint for failure to state a claim upon which relief could be granted.[18] In doing so, the district court first held that the Pilots were not actually disabled under subsection (A) of the ADA's definition of "disability" because they could fully correct their visual impairments.[19] Second, the court held that the Pilots were not "regarded as" disabled under subsection (C) of this definition because they alleged only that United regarded them as unable to satisfy the requirements of the position, that of a global airline pilot.[20] Employing similar logic, the United States Court of Appeals for the Tenth Circuit affirmed the district court's judgment.[21]

The United States Supreme Court granted certiorari to decide two issues. The first issue is whether the Pilots stated a claim under subsection (A) of the disability definition; that is, whether they properly alleged that they have a physical impairment that substantially limits one or more of their major life activities.[22] The second issue is whether the Pilots stated a claim under subsection (C) of the disability definition; that is, whether they properly alleged that they are individuals "regarded as" having disabilities.[23]

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11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* *See infra* note 37 and accompanying text.
18. *Id.* at 2144.
19. *Id.*
20. *Id.*
21. Sutton v. United Air Lines, 130 F.3d 893, 902-03 (10th Cir. 1997).
22. *Sutton*, 119 S. Ct. at 2146.
23. *Id.* at 2149.

In a seven to two opinion, the Supreme Court affirmed the Tenth Circuit's decision that the Pilots did not properly allege they were "disabled" under the proper construction of either subsection (A) or subsection (C) and, therefore, failed to state a claim upon which relief could be granted.[24]

This case note examines the first part of the Court's holding: That "disability" should be determined with reference to mitigating measures. The note first considers the majority and concurring opinions' reliance on the ADA's statutory finding that "some 43,000,000 Americans have one or more physical or mental disability." Secondly, the note examines the majority's disregard of the legislative history of the ADA and the EEOC's interpretive guidance. Next, the note argues that a more generous construction of the definition of disability best effectuates Congress' intent in enacting the ADA. Finally, the note concludes by suggesting that the Court failed to see an alternative approach. The Court could have interpreted the definition of disability broadly to exclude consideration of mitigating measures, as the legislative history, the EEOC's interpretive guidance, and the majority of circuit courts had done prior to the Court's decision, and then relied on the structure of the employment title to eliminate non-meritorious claims from the protection of the ADA. This approach would provide courts with the means to be consistent with the broad definition of disability that Congress intended and still eliminate the danger of overextending the ADA's reach and impact.

BACKGROUND

The ADA

When President George Bush signed the ADA into law on July 26, 1990, he described the Act as an "historic new civil rights Act . . . the world's first comprehensive declaration of equality for people with disabilities."[25] In its current form, the ADA is composed of four titles addressing respectively: employment, public services, public accommodations and services operated by private entities, and miscellaneous provisions.[26] The four titles of the Act are preceded by sections providing Congressional findings[27] and purposes,[28] in addition to a short list of definitions.[29]

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24. *Id.* at 2143.

25. 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, 413-14 (1991).

26. 42 U.S.C. §§ 12111-12213 (1997). In *Sutton*, the Pilots brought their case in under the ADA's employment title, which provides as a general rule, "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (1997).

27. In the findings section, Congress declares, in part, that some forty-three million Americans have a physical or mental disability, and that these individuals are "a discrete and insular minority who have been faced with restrictions and limitations . . . and relegated to a position of political powerlessness in

The authority to issue regulations to implement the ADA is split primarily among three executive agencies.[30] The Equal Employment Opportunity Commission (EEOC) has the authority to issue regulations to carry out the employment provisions in Title I of the ADA;[31] the Department of Justice is granted authority to issue regulations pertaining to the public services provisions in Title II;[32] and the Department of Transportation has authority to issue regulations with respect to the transportation provisions of Titles II and III.[33] Title I is enforced primarily by the EEOC and private plaintiffs,[34] while Titles II and III are enforced primarily by the Department of Justice and private plaintiffs.[35] In addition, each of these agencies is authorized to offer technical assistance regarding the provisions they administer.[36]

The Definition of Disability

The ADA defines disability as: "with respect to an individual—(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 impairment; or (C) being regarded as having such impairment."[37] The ADA's definition of disability is drawn almost verbatim from the 1973 Rehabilitation Act's definition of a handicap.[38] Congress relied on this definition for two reasons: First, it worked well under the Rehabilitation Act since it was adopted in 1973, and second, Congress realized that providing a specific list of all of

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our society." 42 U.S.C. § 12101(a) (1997).

28. Four purposes are identified in the purpose subsection:

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(b) (1997).

29. The terms "auxiliary aids and services," "disability," and "State" are the three terms defined in the disability section. 42 U.S.C. § 12102 (1997).

30. Sutton v. United Airlines, 119 S. Ct. 2139, 2144-45 (1999).

31. 42 U.S.C. § 12116 (1997). Because *Sutton* was decided under the employment title, that title and the EEOC are the focus of this note.

32. 42 U.S.C. § 12134 (1997).

33. 42 U.S.C. §§ 1249(a), 12164, 12186(a)(1), 12143(b) (1997).

34. 42 U.S.C. § 12117 (1997). The Department of Justice also has enforcement authority under Title I. *Id.*

35. 42 U.S.C. §§ 12133, 12188 (1997).

36. 42 U.S.C. § 12206(c)(1) (1997).

37. 42 U.S.C. § 12102(2) (1997).

38. The Rehabilitation Act defines the term "individual with a disability" as an individual who: "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(8)(A) (1997). The Rehabilitation Act stands as an immediate predecessor to the ADA and is referred to throughout the ADA. *See infra* notes 164-168 and accompanying text.

the disabilities the ADA was designed to include was impractical.[39] Although the ADA does not list specific disabilities covered by the Act, the Act does make explicit exclusions from the disability definition.[40]

Prior to *Sutton*, the Supreme Court closely examined the definition of disability as it appears in the ADA only once, in *Bragdon v. Abbott*.[41] In *Bragdon*, a patient infected with the human immunodeficiency virus (HIV) brought an action under the ADA against a dentist who refused to treat her in his office.[42] In its analysis, the Court broke subsection (A) of the disability definition inquiry into three elements: (1) whether the individual's condition (HIV infection) constitutes a physical impairment, (2) whether the life activity the individual asserts (reproduction and child bearing) constitutes a major life activity for purposes of the ADA, and (3) whether the individual's impairment substantially limits the major life activity.[43] The Court answered each element in the affirmative[44] and held that the HIV infection is a disability under the ADA, even when the infection has not progressed to the so-called symptomatic phase, as a physical impairment that substantially limits the major life activity of reproduction.[45] The Court relied heavily on the Rehabilitation Act in reaching its holding[46] and further "confirmed" its holding by examining agency interpretations before and after the enactment of the ADA.[47]

Mitigating Measures

The ADA does not expressly state whether a disability should be determined with or without mitigating measures.[48] Various executive agency guidelines and the ADA's legislative history, however, address the issue directly.[49] The EEOC's Interpretive Guidance provides that "[t]he determi-

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39. H.R. REP. NO. 101-485, pt. III, at 27 (1990), *reprinted in* 1990 U.S.S.C.A.N. 450.

40. The ADA specifically excludes from the disability definition illegal drug use, homosexuality and bisexuality, and certain conditions including sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from illegal drug use. *See* 42 U.S.C. §§ 12210, 12211(a), 12211(b) (1997).

41. Bragdon v. Abbott, 118 S. Ct. 2196 (1998).

42. *Id.* at 2101.

43. *Id.* at 2202.

44. *Id.* at 2200, 2205-06. The Court: (1) held that HIV infection is an impairment because of the immediacy with which the virus attacks the immune system when it enters the body, (2) "[had] little difficulty" determining that reproduction is a major life activity, and (3) held that HIV infection substantially limits the individual's major life activity of reproduction because a woman infected with HIV who tries to conceive a child imposes on the man a significant risk of becoming infected, and that infected woman risks infecting her child during gestation and child birth. *Id.*

45. *Id.* at 2207. The court declined, however, to consider whether the HIV infection is a per se disability under the ADA. *Id.*

46. *Id.* at 2205.

47. *Id.* at 2207. *See infra* notes 149-154 and accompanying text.

48. *See* 42 U.S.C. § 12102(2) (1997).

49. As indicated in the principal case section and the analysis section of this case note, the significance of both the agencies' guidelines and the ADA's legislative history is at the heart of the dispute in *Sutton* because, if the guidelines and legislative history were given deference, then the Court likely

nation of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices."[50] In addition, the Department of Justice's appendix to its regulations provides that "[t]he question of 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."[51]

Similar to the agencies' guidance, the legislative history of the ADA indicates that disability should be determined without reference to mitigating measures. The Senate Labor Committee Report states 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] Also, the Report of the House Committee on the Judiciary states that when determining whether an individual's impairment substantially limits a major life activity, "[t]he impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation."[53] The Report of the House Committee on Education and Labor provides a view similar to that of the Report of the House Committee on the Judiciary.[54]

Prior to *Sutton*, the Supreme Court had not expressly considered whether a disability under the ADA must be determined with or without reference to mitigating or corrective measures.[55] The Circuit Courts of Appeals, however, had wrestled extensively with the issue and reached three different positions.

A clear majority of the circuits concluded that disability should be determined without regard to mitigating measures.[56] However, the circuits'

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would have concluded that disability should be determined without reference to mitigating measures.

50. 29 CFR pt. 1630, App. § 1630.2(j) (1998). "An individual who uses artificial legs," the EEOC's interpretive guidance continues, "would likewise be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication." *Id.*

51. 28 CFR pt. 35, App. A, § 35.104 (1998). *See supra* notes 30-36 and accompanying text for the authority of the EEOC and the DOJ under the ADA.

52. S. REP. NO. 101-116, p. 23 (1989).

53. H.R. REP. NO. 101-485, pt. III, at 28 (1990), *reprinted in* 1990 U.S.S.C.A.N. 451.

54. H.R. REP. NO. 101-485, pt. III, at 52 (1990), *reprinted in* 1990 U.S.S.C.A.N. 334.

55. In *Bragdon*, the Supreme Court expressly reserved judgment on the issue. 118 S. Ct. 2196, 2206. In addition, the Pilots note that in a 1996 decision under the Rehabilitation Act, the U.S. Supreme Court "implicitly assumed that a disability can be substantially limiting even though corrected by ongoing treatment." Petitioners' Brief at 10, Sutton v. United Air Lines, 119 S. Ct. 2139 (1999) (No. 97-1943) (citing *Lane v. Pena*, 518 U.S. 187 (1996) (assuming insulin-dependent diabetes to be a handicap but deciding against plaintiff on grounds of sovereign immunity)).

56. *See* Arnold v. United Parcel Services, Inc., 136 F.3d 854 (1st Cir. 1998); Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997); Holihan v. Lucky Stores, Inc., 87 F.3d 362 (9th Cir. 1996); Harris v. H & W Contracting Co., 102 F.3d 516 (11th Cir. 1996); Matczak v. Frankford Candy and Chocolate

reasons for doing so varied. The First Circuit held that in light of the ADA's broad remedial purposes and legislative history, courts must evaluate the employee's disability (diabetes) based on his underlying medical condition without considering the external ameliorative effects (insulin medication).[57] In addition, the court held that the EEOC's interpretive guidance stating that disability determinations under the ADA should be made on a case by case basis and without regard to mitigating measures, ". . . is not merely 'permissible;' it is entirely consistent" with the ADA's legislative history and purposes.[58] The Eighth, Ninth, and Eleventh Circuits simply deferred to the EEOC's interpretive guidance.[59] The Third Circuit relied on a combination of the EEOC's interpretive guidance and the legislative history of the ADA;[60] the Second Circuit relied on the legislative history and the decisions of other circuits;[61] and the Seventh Circuit relied exclusively on the decisions of other circuits.[62]

Other than the Tenth Circuit,[63] the Sixth Circuit is the only court of appeals to hold explicitly that the EEOC's position that disability should be determined without regard to mitigating measures is not a permissible construction of the ADA.[64] Judge Kennedy, writing for the court on the issue of mitigating measures, noted that, in some instances, a mitigating measure actually will impose a substantial limitation on an individual's major life activities. In these cases, the individual would be disabled under the ADA.[65] "But," Judge Kennedy wrote, "where an impairment is fully controlled by mitigating measures and such measures do not themselves substantially limit an individual's major life activities, I believe the ADA pro-

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Co., 136 F.3d 933 (3d Cir. 1997); Barlett v. New York State Bd. of Law Examiners, 156 F.3d 321 (2d Cir. 1998); Baert v. Euclid Beverages, 149 F.3d 626 (7th Cir. 1998).

57. *Arnold*, 136 F.3d at 863.

58. *Id.* at 864.

59. *Doane*, 115 F.3d at 627-28 (holding employee's personal, sub-concious adjustments to vision impairment did not take him outside of the protective provisions of the ADA); *Holihan*, 87 F.3d at 366 (adopting EEOC's interpretive guidelines, but holding that employee was not actually disabled under the ADA because he was not substantially limited in a major life activity); *Harris*, 102 F.3d at 520-21 (holding that EEOC's interpretive guidelines are based on a permissible construction of the ADA).

60. *Matczak*, 136 F.3d at 938-39 (holding that disabled individuals who control their disability with medication still may invoke the protections of the ADA, but concluding that whether the epileptic employee at issue is disabled under the ADA constitutes a genuine issue of material fact better left for resolution by a jury).

61. *Barlett*, 156 F.3d 321 (holding that self-accomodations taken by an individual with a learning disability do not take her outside of the protections of the ADA).

62. , Baert v. Euclid Beverages, 149 F.3d 626, 629-30 (7th Cir. 1998) (holding that a diabetic's condition is to be evaluated without regard to the fact that he is able to control the effects of the disease with insulin).

63. The Tenth Circuit consistently has held that disability should be determined with reference to mitigating measures. Sutton v. United Air Lines, 130 F.3d 893 (10th Cir. 1997); Murphy v. United Parcel Services, Inc., 946 F. Supp. 872 (10th Cir. 1996).

64. Gilday v. Mecosta County, 124 F.3d 760, 766 (6th Cir. 1997).

65. *Id.* at 768.

vides no protection."[66]

The Fifth Circuit reached an intermediate position, holding that whether an individual must be evaluated without regard to mitigating measures depends on the nature of the impairment and the mitigating measures employed by the individual and "must be considered on a case-by-case basis to determine whether the individual disease and the accompanying mitigation fall within the scope of the EEOC Guidelines and the legislative history."[67] Significantly, the court suggested but decided to "leave for another day," the idea that a correctable vision impairment, for example, "may or may not be sufficiently similar to ailments enumerated in the EEOC guidelines and legislative history, and as such we cannot say whether mitigating measures such as eyeglasses or laser surgery should be considered in assessing whether an individual is disabled."[68]

Companion Cases

On the same day *Sutton* was decided the Supreme Court decided two additional cases that discussed whether the determination of disability for purposes of the ADA should be made with or without reference to mitigating and corrective measures. The first of these companion cases is *Albertsons, Inc. v. Kirkingburg*.[69] In *Albertsons*, a former employee was fired from his job as a truck driver after he failed to meet the Department of Transportation's basic vision standards and brought an action against Albertsons under the ADA.[70] The Supreme Court reversed the Ninth Circuit's holding that the employee had established a disability under the ADA by demonstrating that the manner in which he sees differs significantly from the manner in which most people see.[71] The Supreme Court held that individuals with monocular vision were not per se disabled within the meaning of the ADA but, instead, must prove their disabilities by offering evidence that the limitations in terms of their own experiences are substantial.[72] As to the relevance of mitigating measures in the determination of disability, the Court held that the Ninth Circuit erred when it "appeared to suggest that in gauging whether a monocular individual has a disability a court need not take account of the individual's ability to compensate for the impairment."[73] "We have just held . . . in [*Sutton*]," the Court noted, "that mitigating meas-

66. *Id.*
67. Washington v. HCA Health Services of Texas, Inc., 152 F.3d 464, 471 (5th Cir. 1998).
68. *Id.*
69. 119 S. Ct. 2162 (1999).
70. *Id.* at 2166.
71. *Id.* at 2168. In addition to its discussion of whether the employee was "disabled" for purposes of the ADA, the Court also addressed at length the existence of an experimental waiver program by which a DOT standard could be waived in an individual case. *Id.* at 2171-74. The Court's discussion of the waiver program, however, is not immediately relevant to this case note.
72. *Id.* at 2169.
73. *Id.* at 2168-69.

ures must be taken into account in judging whether an individual possesses a disability."[74] Furthermore, the Court stated, "[w]e see no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own system."[75]

Sutton's second companion case is *Murphy v. United Parcel Service, Inc.* (UPS).[76] In *Murphy*, a UPS employee whose job required him to drive commercial vehicles sued UPS under Title I of the ADA when he was fired upon discovery that his blood pressure exceeded DOT health certification requirements for commercial vehicle drivers.[77] The Supreme Court addressed two issues: First, whether the Tenth Circuit correctly considered the employee in his medicated state when it held that the employee's impairment did not "substantially [limit]" one or more of his major life activities, and second, whether the Tenth Circuit correctly determined that the employee was not "regarded as" disabled.[78] The Supreme Court affirmed the Tenth Circuit's resolution of both issues.[79] The Court noted, however, that "[b]ecause the question whether [the employee] is disabled when taking his medication is not before us, we have no occasion here to consider whether [the employee] is 'disabled' due to limitations that persist despite his medication or the negative side effects of his medication."[80] The Court, citing *Sutton*, only reiterated in the abstract that mitigating measures should be considered in determining whether an individual is disabled for purposes of the ADA.[81]

PRINCIPAL CASE

In *Sutton*, the Supreme Court affirmed the Tenth Circuit's decision that the Pilots did not properly allege they are disabled within the ADA's meaning and, therefore, failed to state a claim upon which relief could be granted.[82] The majority opinion, written by Justice O'Connor, dealt with two issues. The first issue was whether the Pilots stated a claim under subsection (A) of the disability definition, that is, whether the Pilots properly alleged that they have physical impairments that substantially limits one or more of their major life activities.[83] This first issue, the Court acknowledged, "turns on whether disability is to be determined with or without ref-

74. *Id* at 2169.
75. *Id.*
76. 119 S. Ct. 2133 (1999).
77. *Id.* at 2136.
78. *Id.*
79. *Id.*
80. *Id* at 2137.
81. *Id.*
82. Sutton v. United Airlines, 119 S. Ct. 2139, 2143 (1999).
83. *Id.* at 2146.

erence to corrective measures."[84] The second issue the Court addressed is whether the Pilots stated a claim under subsection (C) of the disability definition, that is, whether the Pilots properly alleged that they were individuals "regarded as" having a disability.[85]

The Court first examined whether disability is to be determined with or without reference to corrective measures. The Court concluded that whether an individual is disabled for purposes of the ADA should be determined with reference to measures, such as eyeglasses and contact lenses, that mitigate the individual's impairment.[86] Accordingly, the Court held that the approach adopted by the executive agencies[87] concluding the contrary, is an impermissible interpretation of the ADA.[88] The Court identified three separate provisions of the ADA, read in concert, that led it to this conclusion.[89]

First, the Court identified subsection (A) of the ADA's disability definition, which defines "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities" of an individual.[90] The Court noted that the phrase "substantially limits" appears in the ADA in the present indicative form, and, therefore, the Court stated that "the language is properly read as requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability under the ADA."[91] A "disability," the Court ruled, "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."[92] Therefore, the Court held, "a person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected, it does not 'substantially limi[t]' a major life activity" and does not fall within subsection (A) of the disability definition.[93]

The second provision of the ADA the Court identified is the Act's requirement that disabilities be evaluated "with respect to an individual" and be determined based on whether an impairment substantially limits "the major life activities of such an individual."[94] The Court noted that this requirement means that "whether a person has a disability under the ADA is

84. *Id.*
85. *Id.* at 2149.
86. *Id.* at 2146.
87. *See supra* notes 49-51.
88. *Sutton*, 119 S. Ct. at 2146.
89. *Id.*
90. *Id.* (quoting 42 U.S.C. § 12102(2)(A) (1997)).
91. *Id.* at 2146.
92. *Id.*
93. *Id.* at 2146-47.
94. *Id.* at 2147 (quoting 42 U.S.C. § 12102(2) (1997)).

an individualized inquiry."[95] The Court found that "the agency guidelines' directive that persons be judged in their uncorrected or unmitigated state runs directly counter to the individualized inquiry mandated by the ADA."[96] "The agency approach," the Court also noted, "would often require courts and employers to speculate about a person's condition and would, in many cases, force them to make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather that on the individual's actual condition."[97] The Court stated that "the guidelines approach would create a system in which persons often must be treated as members of a group of people with similar impairments, rather than as individuals."[98] The Court held this result, "is contrary to both the letter and spirit of the ADA."[99]

Finally, "and critically,"[100] the Court identified the ADA's statutory finding that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older" as leading to the Court's conclusion that disability is to be determined with reference to mitigating measures.[101] Noting that "the number of people with visual impairments alone is 100 million,"[102] the Court held that "[h]ad Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings."[103] "That it did not," the Court concluded, "is evidence that the ADA's coverage is restricted to only those whose impairments are not mitigated by corrective measures."[104]

In reaching its holding that disability should be determined with reference to mitigating measures, the Court quickly disposed of both the EEOC's interpretive guidance and the legislative history of the ADA. The Court acknowledged the EEOC's authority to issue regulations implementing the employment title of the ADA and identified both the EEOC's regulations and interpretive guidance regarding the proper interpretation of the term disability.[105] The Court pointed out, however, that "[n]o agency . . . has been given authority to issue regulations implementing the generally appli-

95. *Id.* at 2147 (citing *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998)).
96. *Id.* at 2147.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* (quoting 42 U.S.C. § 12101(a)(1) (1997)).
102. *Id.* at 2149. The Court also noted that it is estimated that more than 28 million Americans have impaired hearing and that some 50 million Americans have high blood pressure. *Id.*
103. *Id.* at 2149.
104. *Id.*
105. *Id.* at 2144-45.

cable provisions of the ADA which fall outside of Titles I-V."[106] "Most notably," the Court stated, "no agency has been delegated authority to interpret the term 'disability.'"[107] In the end, the Court determined that deciding what deference was due to the EEOC's guidance was not necessary in the case and passed on ruling on the issue.[108]

The Court even more quickly disposed of the ADA's legislative history. The Court admitted that the dissent relies on the Act's legislative history for the contrary position that disabilities should be determined in their unmitigated state but stated, "[b]ecause we decide that, by its own terms, the ADA cannot be read in this manner, we have no reason to consider the ADA's legislative history."[109]

The second issue the Court addressed, which is not the focus of this case note, is whether the Pilots properly alleged that they are individuals "regarded as" having a disability.[110] The Court first noted two apparent ways in which individuals may fall within this statutory definition: 1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or 2) a covered entity believes that an actual, non-limitting impairment substantially limits one or more major life activities.[111] The Court examined the Pilots' allegation that they fell under the first of these categories, in other words, that United mistakenly believes the Pilots' physical impairments substantially limit them in the major life activity of working.[112]

The Court affirmed the lower courts' dismissal of the Pilots' allegations.[113] In doing so, the Court first stated that an employer "runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity."[114] The Court held that "[w]hen the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to

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106. *Id.* at 2145.
107. *Id.*
108. *Id.* 2145-46.
109. *Id.* at 2146.
110. *Id.* at 2149. Subsection (C) of the ADA's disability definition provides that having a disability includes "being regarded as having," 42 U.S.C. § 12102(2)(C) (1997), "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A) (1997).
111. *Sutton*, 119 S.Ct. at 2149-50.
112. *Id.* at 2150-51. To support their allegations, the Pilots alleged specifically that United has a vision requirement that is based on myth and stereotype and that this requirement substantially limits the Pilot's ability to engage in the major life activity of working by precluding them from obtaining the job of global airline pilot, which the Pilots argue is a class of employment. *Id.* at 2150. The Court noted that there is no dispute that the Pilots are physically impaired but that the Pilots did not make the obvious argument that they are substantially limited in the major life activity of seeing. *Id.*
113. *Id.* at 2152.
114. *Id.* at 2150.

work in a broad class of jobs."[115] The Court noted that the Pilots alleged only that United regarded their poor vision as precluding them from holding positions as global airline pilots,[116] and held that "[b]ecause the position of global airline pilot is a single job, this allegation does not support the claim that [United] regards [the Pilots] as having a substantially limiting impairment."[117] Therefore, the Court concluded that the Pilots failed properly to allege that their poor eyesight is regarded as an impairment that substantially limits them in the major life activity of working.[118]

Justice Ginsburg filed a short concurring opinion in the case.[119] She agreed that subsection (A) of the ADA's disability definition "does not reach the legions of people with correctable disabilities."[120] She wrote to express her opinion that:

> [t]he strongest clues to Congress' perception of the domain of the [ADA] . . . are legislative findings that 'some 43,000,000 Americans have one or more physical or mental disabilities,' and that 'individuals with disabilities are a discrete and insular minority,' persons 'subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society.[121]

These legislative findings, Justice Ginsburg states, "are inconsistent with the enormously embracing definition of disability [the Pilots] urge."[122]

Two dissenting opinions were filed in the case. The first is a lengthy opinion written by Justice Stevens and joined by Justice Breyer.[123] Justice Stevens wrote:

> [I]f we apply the customary tools of statutory construction, it is quite clear that the threshold question whether an individual is 'disabled' within the meaning of the Act—and, therefore, is entitled to the basic assurances that the Act affords—focuses on her past or present physical condition without regard to mitigation that has resulted from rehabilitation, self-improvement, prosthetic devices, or

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115. *Id.* at 2151. The Court relied heavily on EEOC's codified regulations to reach this decision. In particular, the Court relied on 29 CFR § 1630.2(j)(3)(i), which states, in part: "The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *Id.*

116. *Id.*

117. *Id.*

118. *Id.* To reach this conclusion, the Court first "assum[ed] without deciding that working is a major life activity and that the EEOC regulations interpreting the term "substantially limits" are reasonable. *Id.*

119. *Id.* at 2152 (Ginsburg, J., concurring).

120. *Id.* (Ginsburg, J., concurring).

121. *Id.* (Ginsburg, J., concurring) (quoting 42 U.S.C. §§ 12101(a)(1), 12101(a)(7) (1997).

122. *Id.* (Ginsburg, J., concurring).

123. *Id.* (Stevens, J., dissenting).

medication.[124]

Justice Stevens identified two parts to the question of statutory construction presented in this case: First, whether the determination of disability for people that Congress unquestionably intended to cover should focus on their mitigated or unmitigated state; if the answer to the first inquiry is to define disability without regard to mitigating measures, the second question is whether that general rule should be applied to the Pilots' impairment, which is "what might be characterized as a 'minor, trivial impairment.' "[125]

Through an involved process of statutory construction, including reliance on the ADA's legislative history and the EEOC's interpretive guidelines, Justice Stevens concluded that "disability" for purposes of the Act should be determined without reference to mitigating measures.[126] Second, he highlighted the broad purposes and structure of the Act to conclude that the Pilots do have a disability covered by the ADA.[127]

Justice Breyer filed a separate dissenting opinion in which he identified the dilemma the Court faced:

> We must draw a statutory line that either (1) will include within the category of persons authorized to bring suit under the [ADA] some whom Congress may not have wanted to protect (those who wear ordinary eyeglasses), or (2) will exclude from the threshold category those whom Congress certainly did want to protect (those who successfully use corrective devices or medicines, such as hearing aids or prostheses or medicine for epilepsy).[128]

Justice Breyer concluded that "the statute's language, structure, basic purposes, and history require us to choose the former statutory line."[129]

In addition, Justice Breyer addressed the concern that the more liberal interpretation of determining disability without regard to mitigating measures would lead to "too many lawsuits that ultimately proved without merit or otherwise drew too much time and attention away from those whom Congress clearly sought to protect."[130] Justice Breyer suggested a remedy to this potential problem: "The [EEOC], through regulation, might draw finer definitional lines, excluding some of those who wear eyeglasses (say, those with certain vision impairments who readily can find corrective lenses), thereby cabining the overly broad extension of the statute that the

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124. *Id.* (Stevens, J., dissenting).
125. *Id.* at 2153 (Stevens, J., dissenting).
126. *Id.* at 2153-56 (Stevens, J., dissenting).
127. *Id.* at 2156-61 (Stevens, J., dissenting).
128. *Id.* at 2161 (Breyer, J., dissenting).
129. *Id.* (Breyer, J., dissenting).
130. *Id.* (Breyer, J., dissenting).

majority fears."[131]

ANALYSIS

As Justice Breyer's dissent expressed,[132] the *Sutton* Court was faced with the unenviable task of drawing a statutory line between two alternatives: Rule that disability should be determined without reference to mitigating measures and risk opening the ADA floodgates; or rule that mitigating measures should be considered and risk closing the gates on individuals whom the ADA was intended to protect. By holding that mitigating measures should be considered in determining the threshold question of disability, the majority chose to close the ADA's gates.

However, in drawing the statutory line, the Court itself may have suffered from uncorrected myopia, failing to see another possible approach. The Court could have construed the threshold definition of disability generously to exclude consideration of mitigating measures, as the ADA's legislative history, the EEOC's interpretive guidance, and the broad remedial purposes of the Act suggest. Then, the Court could have relied upon specific provisions of the ADA's employment title to eliminate unwarranted claims from the Act's protection.

The Majority and Concurring Opinions' Reliance on the Statutory Finding that Fourty-three Million Americans Have One or More Physical or Mental Disabilities

The ADA's statutory finding that some forty-three million Americans have a physical or mental disability was a significant factor in the majority and concurring opinions.[133] Accepting, *arguendo*, the Court's statement that the number of people with vision impairments is alone one hundred million, defining disability without reference to mitigating measures would extend coverage beyond the forty-three million figure. However, Congress unlikely intended the forty-three million figure to be a fixed cap on the ADA's protected class.

To begin with, the ADA's disability definition contains three categories: Those individuals who have an impairment that substantially limits in a major life activity; those who have a "record of" such impairment; and

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131. *Id.* Neither Justice Stevens's nor Justice Breyer's dissents specifically addressed the Court's holding that the Pilots were not "regarded as" disabled for purposes of subsection (C) of the ADA's definition of "disability." Justice Stevens stated in passing, however, that the three parts of the disability definition "do not identify mutually exclusive, discrete categories. *Id.* at 2153. On the contrary, they furnish three overlapping formulas aimed at ensuring that individuals who now have, or ever had, a substantially limiting impairment are covered by the Act." *Id.*

132. *Sutton*, 119 S. Ct. at 2161 (Breyer, J., dissenting).

133. *See supra* notes 100-04 and accompanying text; notes 119-22 and accompanying text.

those who are "regarded as" having such impairment.[134] The Court's detailed explanation of how the forty-three million figure was reached, however, gives no indication that the figure includes those disabled individuals who fall under the two latter categories.[135] Therefore, accepting the Court's explanation on how the figure was reached, individuals who fall into the "record of" and "regarded as" categories are not included in the forty-three million figure, although Congress fully intended to protect them under the Act.[136]

Second, when Congress accepted this seemingly innocuous 43 million figure, Congress likely did not anticipate that the Supreme Court would rely on the figure as heavily as it did. More likely, Congress simply accepted the figure, extracted from a law review "article authored by the drafter of the original ADA bill introduced in Congress in 1988,"[137] as authority further supporting the congressional finding that disability discrimination was and is a major problem in America. When viewed in context with the other statutory finding and purposes,[138] it becomes even clearer that Congress did not intend the figure to be used to support an ungenerous construction of the operational definition of disability.

The Majority's Disregard of the ADA's Legislative History and the EEOC's Interpretive Guidance

The Court quickly disposed of both the ADA's legislative history and the EEOC's interpretive guidance in its holding that disability should be determined with reference to mitigating measures.[139] However, both the Act's legislative history and the EEOC's guidance deserve more consideration than the Court afforded.

134. 42 U.S.C. § 12102(2) (1997).

135. The Court explains that the 43 million figure was reached, in part, from a 1988 report from the National Council on Disability stating that 37.3 million individuals have "difficulty performing one or more basic physical activities," including "seeing, hearing, speaking, walking, using stairs, lifting or carrying, getting around outside, getting around inside, and getting into or out of bed." *Sutton*, 119 S. Ct. at 2148. This 37.3 million number, the Court explains, "includes only non-institutionalized persons with physical disabilities who are over age 15. *Id.* The 5.7 million gap between the 43 million figure in the report can thus probably be explained as an effort to include in the findings those who were excluded from the National Council figure." *Id.* The Court then cites the results from four studies as examples that may fill in the 5.7 million gap: 943,000 non-institutionalized persons with an activity limitation due to mental illness; 947,000 non-institutionalized persons with an activity limitation due to mental retardation; 1,900,000 non-institutionalized persons under 18 with an activity limitation; and 1,553,000 resident patients in nursing and related care facilities in 1986. *Id.*

136. In his dissent, Justice Stevens wrote: "It is . . . undeniable . . . that '43 million' is not a fixed cap on the Act's protected class: By including the 'record of' and 'regarded as' categories, Congress fully expected the Act to protect individuals who lack, in the Court's words, 'actual' disabilities, and therefore are not counted in that number." *Sutton*, 119 S. Ct. at 2160 (Stevens, J., dissenting).

137. *Sutton*, 119 S. Ct. at 2147.

138. *See infra* notes 157-59 and accompanying text.

139. *See supra* notes 105-09 and accompanying text.

1. The Legislative History

An established maxim of statutory interpretation is if "Congress had an intention on the precise question at issue, that intention is the law and must be given effect."[140] The Supreme Court has explained: "In surveying legislative history we have repeatedly stated that the authorative source for finding the Legislature's intent lies in the Committee reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation.'"[141] Furthermore, the Court has noted that legislative history may be particularly "useful to conscientious and disinterested judges" when a statute has "bipartisan support and has been carefully considered by committees familiar with the subject matter."[142]

Both the House and Senate Reports on the ADA clearly state that "whether a person has a disability should be determined without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids."[143] The House Report on the ADA reinforces this point with specific examples of individuals who are disabled notwithstanding their use of mitigating measures: "[A] person with epilepsy, an impairment which substantially limits a major life activity, is covered under this test," as is a person with poor hearing, "even if the hearing loss is corrected by the use of a hearing aid."[144] This specific evidence of congressional intent that disability be determined without reference to mitigating measures is consistent with the broad purposes and structure of the ADA; the *Sutton* Court should have considered this evidence more seriously.

2. The EEOC's Interpretive Guidance

The Court in *Sutton* pointed out that no agency is given authority to issue regulations implementing the general provisions of the ADA, and "most notably," no agency is given authority to interpret the term "disability."[145] But the Court specifically declined to consider what deference, if any, is due to the EEOC's interpretive guidance. The reader is left to ponder why the Court disregarded this guidance in reaching its holding.[146] The EEOC's

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140. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 n.9 (1984).

141. Garcia v. United States, 469 U.S. 70, 76 (1984) (quoting Zuber v. Allen, 396 U.S. 168, 186 (1969)).

142. Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 276 (1996) (Stevens, J., concurring).

143. *See supra* notes 52-54.

144. H.R. REP. NO. 101-485, pt. III, at 28-29 (1990), *reprinted in* 1990 U.S.S.C.A.N. 451.

145. Sutton v. United Ailrlines, 119 S. Ct. 2139, 2145 (1999).

146. Since its decision fifteen years ago in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court generally has employed a two-pronged test when it reviews an administrative agency's construction of a statute which it administers: First, if the Court determines that the language of the statute is clear, "the court . . . must give effect to the unambiguously expressed intent of Congress"; second, if the Court finds that the language of the statute is ambiguous, the Court will defer

guidance, which unequivocally states that mitigating measures should not be considered in determining disability,[147] deserved more consideration than the court afforded.

First, by expressly instructing the EEOC to enforce, to issue regulations, and to provide technical assistance regarding the employment provisions of the Act,[148] Congress clearly expressed its intent that the EEOC play a large role in the interpretation and application of the ADA. For the Court to suggest that because the EEOC was not given the specific authority to interpret the generally applicable provisions of the ADA is to handcuff the EEOC to implementing specific provisions of the ADA that are meaningless without the generally applicable provisions of the Act. This result undermines Congress' broad delegation of authority to the EEOC.

Further evidence that the EEOC's guidance deserves more consideration than the Court afforded is found in *Bragdon v. Abbott*,[149] the leading Supreme Court case examining disability under the ADA prior to *Sutton* and its companions. In *Bragdon*, the Court made clear that lower courts should accord substantial deference to agency views under the ADA.[150] The Court noted that "well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"[151] The Court "further reinforced" its conclusion in *Bragdon* by deferring to administrative guidance issued by the Department of Justice to implement Title III of the ADA, noting that "[a]s the agency directed by Congress to issue implementing regulations, to render technical assistance explaining the responsibilities of covered individuals and institutions, and to enforce Title III in court, the Department's views are entitled to deference."[152] Not only did the Court cite the Department of Justice's regulations with approval, it also gave def-

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to an agency's interpretation so long as that interpretation is reasonable. 467 U.S. 837, 842-43 (1984). The majority opinion in Sutton makes no reference to the *Chevron* analysis. If the Court expressly had applied *Chevron*, the Court's decision indicates it would have concluded the matter at the first prong of the test by deciding that the language of the ADA unambiguously requires that disability be determined with reference to mitigating measures. *See supra* notes 90-104. This likely result, however, may be inconsistent with the Court's decision in *Bragdon* just one year earlier, where the Court "further reinforced" its decision by citing *Chevron* and deferring to the DOJ's administrative guidance in interpreting the definition of disability. *See* 118 S. Ct. 2196, 2209 (1998) and *infra* notes 149-54 and accompanying text. However, whatever the outcome, a more satisfying approach would have been for the Court to clearly apply the *Chevron* analysis in this case. Of course, the obvious counterpoint to this criticism is that because Congress had not directed any agency to interpret or enforce the definition section of the ADA, the Court was not required to give any deference to either the EEOC or the DOJ regulations concerning the definition of "disability."

147. 29 CFR pt. 1630, App. § 1630.2(j) (1998). The DOJ's identical statement in the appendix to its regulations further validates the EEOC's position. 28 CFR pt. 35, App. A § 35.104 (1998).

148. 42 U.S.C. §§ 12116, 12117, 12206(c)(1) (1997). *See supra* notes 30-36 and accompanying text.

149. 118 S. Ct. 2196 (1998).

150. *Id.* at 2208-09. *See also* Ruth Colker, *The Americans with Disability Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 150 (1999).

151. *Bragdon*, 118 S.Ct. at 2207 (quoting *Skidmore v. Swift & Co.*, 65 S. Ct. 161, 164 (1944).

152. *Id.* at 2208-09.

erence to the agency's technical assistance manual and the appendix to the agency's regulations.[153] The Court "also dr[ew] guidance from the views of the agencies authorized to administer other sections of the ADA," and cited a list including the EEOC's regulations, Technical Assistance Manual, and Interpretive Manual.[154]

By broadly delegating authority to the EEOC, Congress expressed its intent that the agency play a large role in the interpretation and application of the Act. In addition, the Court, just one year prior in *Bragdon*, recognized that agency views under the ADA are entitled to deference. The EEOC's interpretive guidance, like the legislative history of the Act, unequivocally states that disability should be determined without reference to mitigating measures, and the Court should not have disposed of the guidance so quickly.

The Supreme Court's Holding Undermines the Broad Purposes of the ADA

The ADA is a "broad remedial statute."[155] It is a "familiar canon of statutory construction that remedial legislation," such as the ADA, "should be construed broadly to effectuate its purposes."[156] The narrow reading of disability that the *Sutton* majority endorsed undermines the broad purposes Congress sought to effectuate in passing the ADA by prematurely closing the gates on otherwise qualified individuals.

The primary purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[157] In enacting the ADA, Congress found that these individuals "have been faced with restrictions and limitations . . . 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."[158] "[T]he Nation's proper goals regarding individuals with disabilities," Congress declared, "are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."[159]

It would seem that Congress defined disability broadly in order to re-

153. *Id.* at 2209.

154. *Id.* In addition, other Supreme Court cases have noted that an agency's interpretation of its own regulation is due judicial deference. *See* Lyng v. Payne, 476 U.S. 926, 939 (1986) ("an agency's construction of its own regulations is entitled to substantial deference."); Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151 (1991) ("we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers.").

155. Arnold v. United Parcel Service, 136 F.3d 854, 861 (1st Cir. 1998) (quoting Penny v. United Parcel Service, 128 F.3d 408, 414 (6th Cir. 1997)).

156. *Id.* (quoting Tcherepnin v. Knight, 389 U.S. 332, 336 (1967)).

157. 42 U.S.C. § 12101(b)(1) (1997).

158. 42 U.S.C. § 12101(a)(7) (1997).

159. 42 U.S.C. § 12101(a)(8) (1997).

alize these broad goals. An individual is disabled not only when an impairment substantially limits the individual's life activities,[160] but also when there is a record of the impairment,[161] and when the individual is regarded as having an impairment.[162] The sweep of the three prongs of the definition, as Justice Stevens argued in his dissent, "furnish[es] three overlapping formulas aimed at ensuring that individuals who now have, or ever had, a substantially limiting impairment are covered by the Act."[163] Had Congress intended a narrow definition, which is the result of the *Sutton* Court's decision, it would not have included such a broad range of circumstances that are covered by the definition.

Further evidence that Congress intended the ADA's definition of disability to be broadly construed is found in congressional reliance on the Rehabilitation Act of 1973 in drafting the ADA. Not only did Congress adopt the Rehabilitation Act's definition of "handicapped individual" almost verbatim for the ADA's definition of disability,[164] but the ADA also expressly states, "[e]xcept as otherwise provided in this Act, nothing in this Act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 or the regulations issued by Federal agencies pursuant to such title."[165] In cases decided under the Rehabilitation Act prior to the enactment of the ADA, "handicapped individual" was defined very broadly to include a wide variety of physical and mental impairments.[166] The Supreme Court itself recognized, prior to the enactment of the ADA, that the Rehabilitation Act's definition of "handicapped individual" was "broad."[167] Moreover, no court ever defined disability with reference to mitigating measures when interpreting the definition of "handicapped individual" under the Rehabilitation Act.[168]

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160. 42 U.S.C. § 12102(2)(a) (1997).
161. 42 U.S.C. § 12102(2)(b) (1997).
162. 42 U.S.C. § 12102(2)(c) (1997).
163. Sutton v. United Airlines, 119 S. Ct. 2139, 2153 (1999) (Stevens, J., dissenting).
164. *See supra* notes 39-40 and accompanying text.
165. 42 U.S.C. § 12201(a) (1997).
166. *See e.g.*, Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977) (vision in only one eye); Strathie v. Department of Transportation, 547 F. Supp. 1367 (E.D. Pa. 1982) (impaired hearing and use of hearing aids); Gardner v. Morris, 752 F.2d 1271 (8th Cir. 1987) (epilepsy); Pushkin v. University of Colorado, 658 F.2d 1372 (10th Cir. 1981) (multiple sclerosis); Ward v. Mass. Bay Trans. Auth., 550 F. Supp. 1310 (D. Mass. 1982) (artificial leg); Ackerman v. Western Electric Co., 643 F. Supp. 836 (N.D. Cal. 1986) (asthma). *See* Brief Amicus Curiae of the American Civil Liberties Union in Support of Petitioners at 7 n.5, Sutton v. United Air Lines, 119 S. Ct. 2139 (1999) (No. 97-1943) (collecting the cited cases).
167. School Board of Nassau County v. Arline, 480 U.S. 273, 285 (1987).
168. *See e.g.*, Strathie v. Department of Transportation, 716 F.2d 227, 228-229 (3d Cir. 1983) (undisputed that individual with a hearing impairment was handicapped under the Rehabilitation Act even though with the use of a hearing aid his hearing was corrected to an acceptable level under relevant state law); Bentivegna v. U.S. Department of Labor, 694 F.2d 619, 621-622 (9th Cir. 1982) (accepting without discussion that individual with insulin-dependent diabetes was handicapped under the Rehabilitation Act); Reynolds v. Brock, 815 F.2d 571 (9th Cir. 1987) (holding epilepsy was a handicap even though it was controlled by medication); Fallacaro v. Richardson, 964 F. Supp. 87 (D.D.C. 1997) (relying, in part, on language and purposes of the Rehabilitation Act for its conclusion that totally blind individual was

The *Sutton* Court's holding leads to the counterintuitive result that individuals who take affirmative steps to overcome their limitations and thereby make themselves more employable will not be protected by the ADA.[169] This result conflicts with the broad remedial purposes of the Act. As evidenced by these broad purposes, by the wide sweep of the disability definition itself, and by Congress' reliance on the Rehabilitation Act in promulgating the ADA, Congress clearly intended the definition of disability to be inclusive, rather than exclusive. The Court's ruling undermines this intent.

Safeguards

As Justice Breyer acknowledged in his dissent,[170] a major concern exists that if the Court were to define disability without reference to mitigating measures, some non-meritorious claims would fall under the ADA's protection. However, the ADA's structure provides a means to allow the inclusive definition of disability that Congress intended and still eliminate the danger of overextending the ADA's impact beyond the scope Congress intended. A court could define disability broadly to exclude consideration of mitigating measures, as the legislative history, the EEOC, and the majority of circuit courts urge, and then rely upon the other provisions of the employment title to eliminate non-meritorious claims from the protection of the ADA.[171]

Whether an individual is disabled is only the threshold inquiry. A disabled individual is within the gates of the ADA, but, in order to establish the defendant's liability under the Act, the individual still must prove that he or she was excluded from employment "because of" his or her disability, and that he or she can, "with or without reasonable accommodations, . . . perform the essential functions" of the job.[172] Furthermore, even if an individ-

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handicapped under the statute even though she had 20/20 vision with corrective lenses). *See* Brief Amicus Curiae of the National Employment Lawyers Association in Support of Petitioners at 9 n.3, Sutton v. United Air Lines, 119 S. Ct. 2139 (1999) (No. 97-1943) (collecting the cited cases).

169. Sutton v. United Airlines, 119 S. Ct. 2139, 2159 (1999) (Stevens, J., dissenting).

170. *Sutton*, 119 S. Ct. at 2161 (Breyer, J., dissenting).

171. Because *Sutton* was decided under the employment title of the ADA, the defenses available to employers under the employment title are the focus of this section of this note. It is important to understand, however, that there are defenses available under the public services title and public accommodations and services operated by private entities title as well. There is no subsection entitled "Defenses" in either the public services or public accommodations titles, as there is in the employment title. *See* 42 U.S.C. § 12113 (1997). However, defenses can be inferred from other provisions. For example, under the public services title, a public entity is not required in certain situations to provide to individuals who use wheelchairs services made available to the general public at certain facilities when such individuals could not utilize or benefit from such services provided at such facilities. *See* 42 U.S.C. § 12148(a)(3) (1997). Under the public accommodations title, an entity does not violate the ADA if the entity can show that making modifications to accommodate disabled individuals would fundamentally alter the nature of the good, service, or facility at issue, or if the entity can show that making the modifications would result in an undue burden. *See* 42 U.S.C. § 12182(b)(2)(a)(ii), (iii) (1997).

172. *Sutton*, 119 S. Ct. at 2156 (Stevens, J., dissenting) (citing 42 U.S.C. § 12112(a) (1997): "General Rule: No covered entity shall discriminate against a qualified individual with a disability because of the

ual satisfies all three statutory requirements and, therefore, states an ADA claim, the ADA provides at least three defenses for employers: 1) that the necessary accommodations for the employee would impose an undue hardship on the employer, 2) that the employee failed to meet a "qualification standard" that "has been shown to be job-related and consistent with business necessity," and 3) that the employee would pose a direct threat to others in the work place.[173]

These provisions of the employment title of the ADA allow courts to protect employers' rights by eliminating non-meritorious claims from the protection of the ADA while still being faithful to the broad purposes of the Act.[174] It may very well be, for example, that the *Sutton* Pilots' severe myopia simply renders them unable to perform the essential functions of a commercial airline pilot in a safe and effective manner. If such is the case, then United is justified, under the ADA, in refusing to hire the Pilots. However, the employment title of the ADA requires that this question be answered through a fact-based, individualized inquiry into the business necessities of the job, into whether the Pilots are qualified to meet those necessities, and into whether the Pilots will pose a direct threat to others in the work place—not through the threshold inquiry into whether they meet the statutory definition of disabled.[175]

If the gates of the ADA are closed to an impaired but otherwise qualified individual simply to avoid the danger of extending liability for actual violations of the Act beyond the scope Congress intended, these fact-based, individual inquiries will never be reached. As Justice Stevens stated in his dissent:

> *Sutton*, at its core, is about whether, assuming that [the Pilots] can prove they are 'qualified,' the airline has a duty to come forward with some legitimate explanation for refusing to hire them because of their uncorrected eyesight, or whether the ADA leaves the airline free to decline to hire petitioners on this basis even if it is acting purely on the basis of irrational fear and stereotype.[176]

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disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment"; 42 U.S.C. § 12111(8) (1997): "The term "qualified individual with a disability means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.")

173. *See* Petitioner's Brief at 20, Murphy v. United Parcel Service, Inc., 119 S. Ct. 2133 (1999)(No. 97-1992) (citing 42 U.S.C. §§ 12112(b)(5)(A), 12113(a), 12113(b) (1997)).

174. *See* Isaac S. Greaney, *The Practical Impossibility of Considering the Effect of Mitigating Measures Under the Americans with Disabilities Act of 1990*, 26 FORDHAM URB. L.J. 1267 (1999).

175. *See* Brief for the United States and the Equal Employment Opportunity Commission as Amicus Curiae Supporting Petitioner at 15, Murphy v. United Parcel Service, 119 S. Ct. 2133 (1999) (No. 97-1992).

176. *Sutton*, 119 S. Ct. 2157 (Stevens, J. dissenting).

Clearly, Congress enacted the ADA to eliminate the latter of these results.

Adopting the more generous position that disability should be determined without reference to mitigating measures likely would not come without cost to the courts. The *Sutton* Court's decision effectively will eliminate at the outset, through dismissals for failure to state a claim or through summary judgments, claims by persons the Court views as not included in its more limited class of disabled persons. The approach this case note suggests, on the other hand, may actualize the Court's fear that some non-meritorious claims may not be eliminated at the summary proceedings stage, thereby requiring courts to spend the time and resources necessary to try these cases on the merits. However, the cost of trying more cases on the merits is outweighed by the benefit of insuring that courts are fully implementing the core congressional purposes of the ADA. The best approach, therefore, would define disability broadly to exclude consideration of mitigating measures, and then allow the structure of the ADA to eliminate non-meritorious claims.

CONCLUSION

By holding that "disability" for purposes of the ADA should be determined with reference to mitigating measures, the Supreme Court drew a statutory line that undoubtedly will reduce the number of non-meritorious claims covered by the Act. However, the same statutory line likely will eliminate from protection many otherwise qualified individuals whom the ADA was designed to protect.

The ADA's structure may provide the Court with the means to avoid drawing this narrow statutory line. The Court could have construed the threshold inquiry of disability broadly to exclude consideration of mitigating measures, constant with the ADA's legislative history, the EEOC's interpretive guidance, and the broad remedial purposes of the Act, and then relied upon specific provisions of the ADA's employment title to eliminate unwarranted claims from the Act's protection. Failing to do so indicates that the Court itself may have suffered from judicial myopia.

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