Pace Law Review

Volume 21
Issue 1 *Fall 2000*

Article 5

September 2000

The ADA - A Practitioner's Guide in the Aftermath of Sutton: Sutton v. United Air Lines

Nora Belanger

Case Note

The ADA – A Practitioner's Guide in the Aftermath of *Sutton*: *Sutton v. United Air Lines*

Nora Belanger

Table of Contents

PART I. INTRODUCTION

The Americans with Disabilities Act (hereinafter "ADA") was enacted "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[1] The purpose of the ADA is to "ensure equality of opportunity" and "legal redress" for persons with disabilities.[2] With regard to employment, the ADA is intended "to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to individuals without disabilities."[3] Yet a construction worker with ventricular tachacardia, which leaves him periodically unconscious due to an irregular heartbeat, is not protected under the Act.[4] A registered nurse who develops multiple sclerosis is terminated from her position in a hospital

1. ADA of 1990 (ADA), 42 U.S.C. § 12101(b)(1) (1994).
2. *Id.* § 12101(a) (1994).
3. Steven S. Locke, *The Incredible Shrinking Class: Redefining the Scope of Disability Under the Americans With Disabilities Act*, 68 U. COLO. L. REV. 107, 107 (quoting 29 C.F.R. app. § 1630 (1996)).
4. *See* Hurley v. Modern Continental Constr. Co., Inc., 77 F. Supp. 2d 183, 185-86 (D. Mass. 1999).

intensive care unit, although she fails to fall under the ADA definition of "disabled."[5] An epileptic whose medication still leaves him suffering from periodic petit mal seizures does not fall within the definition of disability.[6] All were fired or failed to be hired for jobs with no recourse under the ADA, pursuant to the United States Supreme Court decision on June 22, 1999 in *Sutton v. United Air Lines Inc.*[7] *Sutton* narrowed the scope of disabilities by ruling that lower courts must consider mitigating measures when making a determination of whether an individual is disabled.[8] Prior to *Sutton*, federal circuit courts were divided on the issue, with most courts holding that the determination should be made without regard to mitigating measures.[9] In the aftermath of *Sutton*, practitioners and legal scholars are left with unanswered questions that predate the case, as well as new issues specifically raised by the decision.

In *Sutton*, along with two sister cases decided the same day, the Supreme Court narrowed the scope of disabilities to exclude those impairments which, when corrected, do not "substantially limit a major life activity."[10] In each of these cases, *Sutton*, *Murphy v. United Parcel Service, Inc.*,[11] and *Albertson's, Inc. v. Kirkingburg,*[12] a divided Supreme Court held that, when determining whether a person is disabled under the ADA, the impairment must be considered in its mitigated state.[13] A mitigated state is accomplished by compensating for the disability with corrective measures such as medications, rehabilitation, aids, devices, or by "the body's own systems."[14]

Part II of this note discusses the history of the ADA, its definitions, prior case decisions regarding medically controlled impairments and societal effects of the Act.[15] Part III provides a comprehensive overview and analysis of *Sutton v. United Air*

5. *See* Sorensen v. Univ. of Utah Hosp., 194 F.3d 1084, 1085-86 (1999).
6. *See* Todd v. Academy Corp., 57 F. Supp. 2d 448, 453-54 (S.D. Tex. 1999).
7. 527 U.S. 471 (1999).
8. *See id.* at 475.
9. *See id.* at 477.
10. *Id.* at 481.
11. 527 U.S. 516, 521 (1999).
12. 527 U.S. 555, 565 (1999).
13. *See Sutton*, 527 U.S. at 475.
14. *Albertson's*, 527 U.S. at 566.
15. *See infra* notes 20-87 and accompanying text.

Lines, including the facts, the holding, and the dissent.[16] Part IV explores the future implications of the decision for practitioners, as well as employers and employees, and provides an important look at how courts will apply the ADA in future cases.[17] Part V concludes with a final thought on clarification of the ADA in light of the *Sutton* ruling.

PART II. THE AMERICANS WITH DISABILITIES ACT – BACKGROUND AND INTERPRETATION

A. *Purpose of the Act*

The Americans with Disabilties Act of 1990 prohibits discrimination against disabled individuals, specifically in the area of employment.[18] The main objective of Title I of the ADA was to "extend to the private sector those protections against disability discrimination in employment already afforded the public sector by the Rehabilitation Act."[19] "With the legal framework for protection against discrimination already in place in the Rehabilitation Act, Congress, and subsequently the [Equal Employment Opportunity Commission] and courts, borrowed heavily from the statute in setting out the parameters of the ADA."[20] The purpose of the ADA is to protect disabled individuals from discrimination "in all phases of life, including employment, public services, and public accommodations."[21] The goal is to provide equality in the employment setting to individuals with disabilities, who are "a discreet and insular minority," and who have been "relegated to a position of political powerlessness in our society" because of "stereotypic assumptions not truly indicative of [their] individual ability."[22] The ADA provides the disabled person with enforcement powers parallel to those used in addressing violations of the Civil Rights Act of 1964 for discrimination based on race, color and national origin.[23] Discrimination is described in the ADA as

16. *See infra* notes 88-146 and accompanying text.
17. *See infra* notes 147-322 and accompanying text.
18. ADA, 42 U.S.C. § 12101 (1994).
19. *See* Locke, *supra* note 3, at 110.
20. *Id.* at 110.
21. *Id.* at 107.
22. ADA, 42 U.S.C. § 12101(a)(7) (1994).
23. 29 C.F.R. app. § 1630.2 (a)-(f) (2000).

"limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status" of such employee because of his disability.[24] The Act further defines discrimination as "participating in a contractual or other arrangement . . .that has the effect of subjecting a . . . qualified applicant. . .with a disability to the discrimination" such as a "labor union . . . or [a] training . . . program;"[25] "utilizing standards, criteria or methods of administration"[26] that "perpetuate the discrimination;"[27] "denying employment opportunities . . . [to] an otherwise qualified individual;"[28] "using qualification standards, employment tests or other selection criteria that screen out" disabled individuals;[29] and failing to make "reasonable accommodations" for the disabled individual."[30] Congress expressly provided that the purpose of the ADA "is to provide clear, strong, consistent enforceable standards addressing discrimination against individuals with disabilities."[31]

B. *Legislative History of the Act*

The definition of disability in the ADA was taken almost verbatim from the Rehabilitation Act of 1973.[32] The ADA states that "[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."[33] The terms set forth in the main provision of the ADA are further defined in other sections of the statute,[34] in the implementing regulations issued by the Equal Employment Opportunity Commission ("EEOC"),[35] in the Rehabilitation Act of

24. ADA, 42 U.S.C. § 12112(b)(1) (1994).
25. *Id.* § 12112(b)(2).
26. *Id.* § 12112(b)(3).
27. *Id.* § 12112(b)(3)(B).
28. *Id.* § 12112(b)(5)(B).
29. ADA, 42 U.S.C. § 12112(b)(6) (1994).
30. *Id.* § 12112(b)(5)(A).
31. *Id.* § 12101(b)(2).
32. The Rehabilitation Act of 1973, 29 U.S.C. § 794 (1973).
33. 42 U.S.C. § 12112(a) (1994).
34. *See id.* § 12102; *see also* 42 U.S.C. § 12111 (1994).
35. *See* 29 C.F.R. § 1630.1-1630.16 (2000).

1973,[36] in state disability statutes,[37] and in judicial interpretations.[38]

C. *Definitions Under the ADA*

The elements of a prima facie case for disability discrimination are: (1) the plaintiff is "a disabled person within the meaning of the ADA; (2) she is qualified to perform the essential functions of the job in question with or without reasonable accommodation; and (3) the employer terminated her or treated her differently from others who were similarly situated."[39] A three-prong test emerged to determine the existence of a disability under the ADA definition: "Disability" means "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[40]

The first prong requires a determination of whether an individual meets the threshold of being physically impaired within the meaning of the Act.[41] A "physical impairment" is defined as "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the body's systems."[42] The term has been construed broadly, so that a person with any kind of physical condition will generally be found to have a physical impairment.[43] A mental impairment is, likewise, defined broadly as "any mental or psychological dis-

---

36. The Rehabilitation Act of 1973, 29 U.S.C. § 794 (1973).

37. *See The Americans With Disabilities Act: Great Progress, Greater Potential,* 109 HARV. L. REV. 1602, at 1604.

38. *See id.*

39. Locke, *supra* note 1, at 111-112. *See also* McCrory v. Kraft Food Ingredients, 98 F.3d 1342 (6th Cir. 1996).

To prevail on an ADA claim, a plaintiff must prove that the employer "terminated him, or subjected him to an adverse employment action 'because of' his disability." Heiser v. Genuine Parts Co., 900 F. Supp. 1137, 1151 (D. Minn. 1995).

40. ADA, 42 U.S.C. § 12102(2) (1994).

41. Locke, *supra* note 3, at 110-11.

42. *Id.* at 110. The following body systems are included in the statute: "[N]eurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine." 29 C.F.R. § 1630.2(h)(1)(1996).

43. *See* Locke, *supra* note 3 at 110. For instance, obesity and dyslexia have been held to be a physical impairment. *See id.* at 146, n.29.

order. . ."[44] The statutory phrase "substantially limits" is defined by the EEOC regulations as "unable to perform a major life activity that the average person in the general population can perform."[45] A "major life activity" is defined by regulation also, and includes basic, necessary human "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[46] In order to prove that he is substantially limited in a major life activity, an individual must show that an impairment renders him (1) "[u]nable to perform a major life activity that the average person in the general population can perform"; or, that he is (2) "[s]ignificantly restricted as to the condition, manner or duration under which [he] can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity."[47] Certain conditions, by judicial interpretation or regulatory guidelines, are generally not considered disabilities.[48] For example, "common personality traits such as poor judgment or a quick temper" and normal deviations in "height, weight, or muscle tone" do not constitute disabilities.[49] Likewise, temporary conditions such as "broken limbs. . .concussions, [and] appendicitis" are not disabilities under the ADA.[50] Current illegal drug use does not generally constitute a disability, but alcoholism does.[51]

In addition to being disabled, an individual must be qualified for the particular job that he is applying for or has been terminated from.[52] "Otherwise qualified" individuals with disabilities are defined by the ADA as those who "with or without reasonable accommodation, can perform the essential functions

44. 29 C.F.R. § 1630.2(h)(2) (2000).

45. 29 C.F.R. § 1630.2(j)(1)(i) (2000).

46. 29 C.F.R. § 1630.2(h)(2)(i) (2000).

47. 29 C.F.R. § 1630.2(j)(1)(i-ii) (2000).

48. *The Americans With Disabilities Act: Great Progress, Greater Potential, supra* note 33, at 1609-10.

49. 29 C.F.R. app. § 1630.2(h) (2000).

50. 29 C.F.R. app. § 1630.2(j) (2000).

51. *See The Americans With Disabilities Act: Great Progress, Greater Potential, supra* note 37, at 1609-10.

52. *See id.* at 1610.

of the employment position."[53] In *Tyndall v. National Education Center*,[54] the fourth circuit held that an employee who was not able to meet the attendance requirements of his job was not considered to be "otherwise qualified" for the job under the ADA.[55] Likewise, in *Carrozza v. Howard County Maryland*,[56] an employee diagnosed with bi-polar disorder, who was unable to maintain an objectively acceptable standard of professional behavior in the workplace, was held not to be "otherwise qualified."[57] To be "otherwise qualified," an individual must be capable of performing the essential functions of the job.[58] Any written description or advertisement that precedes the interviewing of applicants is considered evidence of the essential functions of the job.[59]

When the "major life activity" under consideration is that of working, the statutory phrase "substantially limits" requires that the individual be "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities."[60] For instance, a hospital employee with carpal tunnel syndrome, who was unable to perform only one job, that of hospital cook, was not considered disabled under the ADA.[61] Factors to be considered in determining whether an impairment is substantially limiting under the ADA include: "(1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long term impact, or the expected permanent or long term impact . . .of the impairment."[62] An impairment must disqualify a person from "a class of jobs or a broad range of

53. *See The Americans With Disabilities Act: Great Progress, Greater Potential, supra* note 37, at 1610 (quoting 42 U.S.C. § 12111(8)).

54. 31 F.3d 209 (4th Cir. 1994).

55. *See* Buchanan Ingersoll, P.C. *How to Hire Right and Fire Right Under the Americans with Disabilities Act* (visited Sept. 17, 1999) <http://www.lawoffice.com>.

56. 45 F.3d 425 (4th Cir. 1995).

57. *See* Jean Gaskill, *Americans With Disabilities Act - An Analysis of Developments Relating to Disability Law,* 508 PLI/Lit 973, 995-96 (1994).

58. *See* ADA, 42 U.S.C. § 12111(8) (1990).

59. *See id.*

60. 29 CFR § 1630.2(j)(3)(i) (2000).

61. *See* Crumpton v. St. Vincent's Hosp., 963 F. Supp. 1104, 1113-14 (N.D. Ala. 1997).

62. 29 C.F.R. § 1630.2(j)(2) (2000).

jobs in various classes" to be substantially limiting for the purpose of determining whether an individual fits the definition of disabled under the ADA.[63] For example, if an individual's medical restrictions make it impossible for him to safely perform the tasks of the position he has applied for, but there are other available job openings consistent with his medical restrictions, that employee is not "substantially limited."[64] Requiring certain physical criteria for an employment position is not violative of the ADA.[65] An employer is "free to decide that physical characteristics . . . that do not rise to the level of impairment . . . are preferable to others," and as long as they are not substantially limiting, that certain impairments may "make individuals less than ideally suited for a job."[66]

The legislature has recognized that persons with disabilities may not be unable to perform a job in exactly the same way that non-disabled persons would perform it, thus employers are required to make reasonable accommodations for disabled employees.[67] Reasonable accommodations may include:

> making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and job-restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modification of equipment or devices; appropriate adjustment or modifications of examinations . . . and other similar accommodations for individuals with disabilities.[68]

An employer may demand medical proof of the disability and information regarding the form of accommodation required.[69] The employer need not provide the best possible accommodation, reallocate essential job functions, create a new position for the disabled person, or place him in a position for which he is not qualified."[70] For instance, in *Larkins v.Ciba Vi-*

---

63. *Id.* at § 1630.2(j)(3)(i).

64. *See* Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. Dist. Ct. App. 1994).

65. *See* Sutton v. United Air Lines, 527 U.S. 471, 490 (1999).

66. *Id.* at 490-91.

67. *See The Americans With Disabilities Act: Great Progress, Greater Potential, supra* note 37, at 1604-1606.

68. 29 C.F.R. § 1630.2(o)(2)(i-ii) (2000).

69. *See How to Hire Right and Fire Right Under the Americans with Disabilities Act, supra* note 55.

70. *See id.*

sion Corp.,[71] it was not considered a reasonable accommodation to eliminate stressful telephone work from a customer service job.[72] It was not a reasonable accommodation because it would require eliminating the essential function of the job, *i.e.*, answering customer complaints over the telephone.[73]

D. *Defenses By Employers*

Employers have a defense in certain situations for failing to accommodate individuals with disabilities.[74] Such a defense may be available where the situation would "impose an undue hardship on operations;" where selection standards are "consistent with business necessity;"[75] or where the employer is able to show that employing the individual would cause a "direct threat to the health or safety of other individuals in the workplace."[76] The employer has the burden of proving undue hardship.[77] Factors that may be considered with regard to whether a reasonable accommodation creates an undue hardship include: expense of the proposed accommodation relative to the individual's salary; number of employees in the firm; financial resources; and overall impact of the accommodation on the operation of the facility.[78] The determination of whether a disabled individual has an impairment which poses a "direct threat" to himself or other employees is an individualized inquiry.[79] It requires that the employer balance the "nature, severity and duration of the risk" against the probability that it will occur and the severity of the harm if it does occur.[80] He must also consider the modification of employment practices that would serve to mitigate the risk.[81]

---

71. Larkins v. CIBA Vision Corp., 858 F. Supp 1572 (N.D. Ga. 1994).

72. *See id.* at 1582.

73. *See id.*

74. *See The Americans With Disabilities Act: Great Progress, Greater Potential, supra* note 37, at 1605-07.

75. *Id.* at 1606.

76. *Id.* at 1607.

77. *See* Eric Wade Richardson, *Who is a Qualified Individual With a Disability Under the Americans with Disabilities Act,* 64 U. CIN. L. REV. 189, 198-99 (1995).

78. *See id.* at 196.

79. *See How to Hire Right and Fire Right Under the Americans with Disabilities Act, supra* note 55.

80. *See id.*

81. *See id.*

E. *Record of a Disability*

The second prong of the ADA protects persons who have a record of a disability.[82] If an employer discriminates against an individual on the basis of historical records, the individual is protected even though he does not meet the first prong of the definition.[83] The provision also protects persons who have been misclassified with a disability.[84]

F. *"Regarded As" Having a Disability*

The third criteria that allows an individual to fall within the definition of disability is being "regarded as" disabled by an employer.[85] Persons fall within this definition when either (1) an entity perceives an impairment that is not substantially limiting as constituting a "substantially limiting impairment" or (2) the impairment is only limiting because of the "attitudes of others" or (3) an entity mistakenly believes that a person has "a substantially limiting impairment."[86]

PART III. *SUTTON V. UNITED AIR LINES* – PROCEDURAL HISTORY, FACTS, ANALYSIS

In *Sutton v. United Air Lines*, the Supreme Court decided the issue of whether corrective or mitigating measures should be considered in determining if an individual is substantially limited in a major life activity and thus disabled within the meaning of the ADA.[87] The petitioners in *Sutton* were twin sisters, both of whom were severely myopic, and were rejected for employment as commercial airline pilots.[88] Though each plaintiff had an uncorrected visual acuity of 20/200 or worse in one eye and 20/400 or worse in the other, "with corrective measures, such as glasses or contact lenses, 'both function[ed] identically to individuals without a similar impairment.'"[89] Their employ-

82. *See* 42 U.S.C. § 12102(2)(B) (1995).

83. *See* 29 CFR § 1630.2(k) (current through September 29, 2000).

84. *See id.*

85. *The Americans With Disabilities Act: Great Progress, Greater Potential*, *supra* note 37, at 1608.

86. 29 C.F.R. § 1630.2(1) (current through September 29, 2000).

87. *See* Sutton v. United Air Lines, 527 U.S. 471, 475 (1999).

88. *See id.* at 475-76.

89. *Id.* at 475.

ment interviews were terminated and they were told that, although they met all other Federal Aviation Administration ("FAA") certification requirements including age, education and experience qualifications, they would not be considered for employment as global airline pilots because of their failure to meet the airline's minimum vision requirement of an uncorrected visual acuity of 20/100.[90] In response to their rejection for employment, the plaintiffs filed suit under the ADA in the U.S. District Court for the District of Colorado.[91] The petitioners alleged that the respondent had "discriminated against them 'on the basis of their disability or because [respondent] regarded [them] as having a disability' in violation of the ADA."[92] Specifically, petitioners argued that because of their severe myopia, they were substantially limited in a major life activity or were regarded as disabled by the entity, and thus fell within the definition of a disability under the Act.[93]

The district court dismissed the complaint for failure to state a claim upon which relief could be granted.[94] Because petitioners could fully correct their visual impairments, the court held that they did not fall within the meaning of disabled as defined by the ADA.[95] Moreover, the court held that petitioners had not supported their allegations that they were "'regarded'. . . as having an impairment that substantially limits a major life activity."[96] The court observed that "an employer 'regards an employee as handicapped in his or her ability to work by finding the employee's impairment to foreclose generally the type of employment involved.'"[97] Because petitioners had alleged only that the respondent regarded them as unable to satisfy the requirements of the specific position of commercial airline pilot, the court reasoned that they "had not stated a claim that they were regarded as substantially limited in the major life activity of working."[98] The Court of Appeals for the

90. *See id.* at 475-76.
91. *See id.*
92. *Sutton,* 527 U.S. at 476.
93. *See id.*
94. *See id.*
95. *Id.* at 476.
96. *Id.*
97. *Sutton,* 527 U.S. at 477.
98. *Id.*

Tenth Circuit affirmed, using a similar analysis.[99] Because the decision differs from opinions of other courts of appeals, certiorari was granted,[100] and the U.S. Supreme Court affirmed in a 7-2 decision authored by Justice O'Connor.[101]

The Supreme Court reasoned that the applicants were not disabled within the ADA definition because they could fully correct their visual impairment with corrective measures.[102] The Court analyzed that three provisions of the ADA, when read in concert, lead to the conclusion that "if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures - both positive and negative - must be taken into account" when determining whether that person is disabled under the Act.[103] First, "the phrase 'substantially limits' appears [in subsection (2)(A) of the ADA] in the present indicative verb form."[104] The language must therefore be "read as requiring that a person be presently - not potentially or hypothetically - substantially limited" to fall under the definition of disability.[105] Consequently, a disability does not exist where an impairment "'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken."[106]

Second, the Court reasoned that the language in subsection (2)(A) "requires 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 individual."[107] Therefore, the question of whether a person has a disability under the ADA is an "individualized inquiry."[108] The individualized inquiry runs counter to the EEOC guidelines that state that the determination of whether an impairment is a disability "must be made on a case by case basis, without regard to mitigative measures such as medicines, or assistive or prosthetic devices."[109] The Court reasoned that the EEOC's case by

99. *See id.*
100. *See id.*
101. *See id.* at 474-75.
102. *See Sutton,* 527 U.S. at 488-89.
103. *Id.* at 482.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Sutton,* 527 U.S. at 483 (quoting 42 U.S.C. § 12102(2) (2000)).
108. *Id.*
109. *Id.* at 480 (quoting 29 C.F.R. app. § 1630.2(j)).

case approach was "contrary to both the letter and spirit" of the ADA.[110] The majority argued that the guidelines would create a system where persons would be "treated as members of a group. . . with similar impairments, rather than as individuals."[111] It might also lead to the result that courts could not consider negative side effects resulting from corrective measures, "even when those side effects are very severe."[112]

Additionally, the Court relied on the congressional finding that some 43,000,000 Americans have at least one disability,[113] prompting the conclusion that the legislature must not have intended to bring under the ADA's protection all of those uncorrected conditions that amount to disabilities, as the group would include more than 160 million people.[114] Therefore, since the petitioners alleged that they had 20/20 vision when using corrective lenses, the Court held that they are not "substantially limited" in the "major life activity" of working, as required under the ADA's definition.[115]

Finally, respondents successfully argued that the petitioners were not "regarded as" having a substantially limiting impairment by United Air Lines, as they alleged they were only excluded from the specific job of global airline pilot, and only because of a specific requirement that its pilots have uncorrected 20/100 vision.[116] Claims that fit the third prong definition of disability generally arise when an employer mistakenly believes that an individual has a substantially limiting impairment.[117] Petitioners argued that United Air Lines has an unacceptable vision requirement "based on myth and stereotype," and that respondent mistakenly believes that due to their poor vision, petitioners are unable to work as commercial airline pilots.[118] The Court reasoned that merely failing to meet physical criteria for an employment position, without more, does not con-

110. *Id.* at 483-84.
111. *Id.* at 483-84.
112. *Id.* at 484.
113. *See Sutton,* 527 U.S. at 484-85. *See also* 42 U.S.C. § 12101(a)(1).
114. *See id.* at 487.
115. *See id.* at 489.
116. *See id.* at 493.
117. *See id.* at 489-90.
118. *Sutton,* 527 U.S. at 489-90.

stitute regarding the individuals as disabled.[119] The ADA permits employers to decide that certain physical or medical attributes are more ideally suited to a job, as long as the attributes are not substantially limiting impairments within the meaning of the ADA.[120] In addition, the Court held that petitioners had not met the burden of proving that they were regarded as substantially limited in the major life activity of working.[121] The Court explained that when the major life activity under consideration is working, the ADA requires that an individual allege that she is unable to work "in a broad class of jobs."[122] The Court found the EEOC guideline's definition of "substantially limited" to mean "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities."[123] Since working was the major life activity at issue, the Court held that the petitioners' allegations were insufficient because they were excluded only from the single job of global airline pilot.[124] The Court held that, although the petitioners might be excluded from working as global airline pilots at other airlines, a variety of other positions were available to them, such as regional pilot or flight instructor.[125] In her concurrence, Justice Ginsburg agreed that the ADA does not cover individuals with corrected disabilities because those persons are not a "discreet and insular minority". . . "subjected to a history of purposeful unequal treatment and . . . political powerlessness."[126]

In the dissent, Justice Stevens, joined by Justice Breyer, approached the analysis as a two part question of statutory interpretation.[127] The first part was whether it was the intent of Congress for the determination of a disability to focus on the impairment in its mitigated or unmitigated condition.[128] The

119. *See id.* at 493-94.
120. *See id.* at 490-91.
121. *Id.* at 493.
122. *Id.* at 491.
123. *Sutton,* 527 U.S. at 491.
124. *See id.* at 493.
125. *See id.*
126. *Id.* at 494 (Ginzburg, J., concurring) (quoting 42 U.S.C. § 12101(a)(7)).
127. *See id.* at 495 (Stevens, J., dissenting).
128. *See Sutton,* 527 U.S. at 495.

second part was, in the event that Congress intended that the impairment should be judged "without regard to ameliorative measures," should the general rule be applied to a condition which "might be characterized as a 'minor, trivial impairment.'"[129]

The dissent acknowledged that Congress did not intend to require airline companies to hire unsafe pilots, but argued that the petitioners' uncorrected vision was entitled to ADA protection.[130] Based on customary rules of statutory construction, the "threshold question [of] whether an individual is 'disabled' within the meaning of the Act . . . focuses on her past or present physical condition without regard to mitigation that has resulted from rehabilitation, self-improvement, prosthetic devices, or medication."[131] According to the dissent, the issue in this case is not whether the petitioners fit into the definition of disability, but whether they "can perform the job of an airline pilot without presenting an undue safety risk."[132] The question is simply "whether the ADA lets petitioners in the door in the same way the Age Discrimination in Employment Act of 1967 does for every person who is at least 40 old [citation omitted] and Title VII of the Civil Rights Act of 1964 does for every single individual in the work force."[133] Once past the threshold, the employee is protected from "irrational and unjustified discrimination because of a characteristic that is beyond a person's control."[134] This places the burden on the employer to come forward with some legitimate explanation for refusing employment, in order to determine if the employment action is motivated by irrational fears and stereotypes associated with the disability.[135] One might argue, the dissent acknowledged, that the general rule should not apply to a minor impairment such as a nearsighted person needing glasses, but "it has long been a rule 'of statutory construction that remedial legislation should be construed broadly to effectuate its purpose.'"[136]

---

129. *Id.* at 496 (Stevens, J., dissenting).
130. *See id.* at 495.
131. *Id.*
132. *Id.* at 503-04.
133. *Sutton,* 527 U.S. at 504 (Stevens, J. dissenting).
134. *Id.*
135. *See id.*
136. *Id.* (quoting Tcherepnin v. Knight, 389 U.S. 332, 336 (1997)).

The dissent went on to state that three executive agencies have interpreted the ADA to mean that impairments should be considered in their uncorrected state.[137] Their analysis centered on the legislative intent and the purpose of the ADA.[138] They reasoned that, in surveying legislative history, all the reports and guidelines make it clear that the ADA intended to define disability in its unmitigated state.[139]

The dissent further argued that the majority in *Sutton* relied too heavily on the congressional findings that "some 43,000,000 Americans [citation omitted] have one or more physical or mental disabilities," and that Congress, therefore, could not have intended to include persons whose impairments were correctable.[140] The fact that the legislature may not have foreseen that the ADA would encompass "not just some 43,000,000 Americans, but perhaps two or three times that number," does not necessarily exclude all persons whose impairments are correctable.[141] In fact, the Court's "narrow approach may have the perverse effect of denying coverage for a sizable portion of the core group of 43 million."[142] Likewise, it does not imply a 43 million cap on the Act's protected class, since the categories "record of" and "regarded as" show that "Congress fully expected the Act to protect individuals who lack, in the Court's words, 'actual' disabilities."[143] Congress expressly provided that the purpose of the ADA "is to provide a clear. . . national mandate for the elimination of discrimination against individuals with disabilities."[144] The holding "appears to exclude from the Act's protected class individuals with controllable conditions such as diabetes and severe hypertension," individuals whom the ADA was expressly designed to protect.[145]

In his dissent, Justice Breyer argued that if the EEOC thought it necessary, then it could draw more narrow definitional lines as to what constitutes a disability, excluding indi-

137. *See id.* at 501.
138. *Sutton*, 527 U.S. at 499.
139. *Id.* at 499-500.
140. *Id.* at 494 (quoting the ADA, 42 U.S.C. § 12101(a)(1) (1990)).
141. *Id.* at 495.
142. *Id.* at 512.
143. *Sutton*, 527 U.S. at 512.
144. *Id.* at 504 (quoting the ADA, 42 U.S.C. § 12101(b)(1) (1990)).
145. *Id.* at 512.

viduals with minor or trivial impairments such as "those with certain vision impairments who readily can find corrective lenses."[146] He further stated that the Court should give deference to the standards set out by the EEOC.[147]

PART IV. THE IMPLICATIONS OF *SUTTON V. UNITED AIR LINES* – UNANSWERED QUESTIONS AND NEW AMBIGUITIES

By redefining the scope of disabilities protected by the ADA, the Supreme Court in *Sutton v. United Air Lines* has left a stream of questions with which future litigants and practitioners will have to grapple. Additionally, many ambiguities never clarified before *Sutton* remain unclear after the decision. In an attempt to bring forth the issues with which courts will undoubtedly be presented and required to further clarify, this analysis will provide a roadmap to future employment litigation under the ADA.

A. *Definition of impairments and standards used to assess whether an impairment is corrected or mitigated*

The *Sutton* case's controlling precedent demonstrates the need for more exacting definitions and standards. Black's Law Dictionary defines "mitigation" as "to make less severe."[148] "Corrected," by contrast, means "to make right or exact."[149] As is frequently the case with statutes and regulations, "one definition begets several more."[150] The *Sutton* decision failed to clarify the standard that courts should apply in determining what constitutes mitigation and correction, and whether the two terms are synonymous, or whether there is a subtle but critical difference between them.

The dissent in *Sutton* anticipated some of the future problems that would arise with regard to measuring the impairment in its corrected state.[151] Depending on whether future courts use an individualized approach as mandated by the ADA

146. *See id.* at 514 (Breyer, J., dissenting).
147. *See id.* at 514-15.
148. BLACK'S LAW DICTIONARY 364 (6th ed. 1993).
149. WEBSTER'S DICTIONARY (R. F. Patterson ed., 1991).
150. *See* Locke, *supra* note 3, at 110.
151. *See* Sutton v. United Air Lines, 527 U.S. 471, 509-11 (1999).

or a case by case analysis as suggested by the EEOC guidelines, individuals taking medications which result in serious side effects may be excluded from the ADA, even if those side effects are severe.[152] As the majority in *Sutton* suggests, it is essential when "a person is taking measures to correct for. . . a physical or mental impairment [that] the effects of those measures - both positive and negative - be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act."[153]

A major area of concern is that courts may determine disability based solely on whether the impairment is generally considered correctable. However, the fact that an impairment is generally considered correctable, does not mean that in any given case, it ceases to limit a major life activity. According to the *Sutton* analysis, both corrected and uncorrected impairments are subject to a further analysis of whether the impairment substantially limits a major life activity.[154] Since the requirement under *Sutton* continues to be a substantial limitation of a major life activity, it seems unreasonable to confuse the issue by questioning whether or not to view the impairment in its corrected state. A more appropriate test would be to determine disability based on a fact-specific inquiry of such factors as whether medications or corrective measures are readily available, and whether they allow the person to function as an average person in the population. Some impairments are more readily correctable than others; for example, vision impairments that are easily mitigated by corrective lenses or medications taken for chronic headaches.[155]

Additionally, even when mitigating measures are used to treat an impairment, the resulting condition may remain uncorrected. Some individuals may stop using mitigating measures because of the risk of deleterious future health effects. An individual's choice not to use mitigating measures may be based on several factors: the risk of the mitigating measures, the cost of the measures, and the side effects of those measures, as de-

152. *See id.* at 484.

153. *Id.* at 482.

154. *See id.* at 488-89.

155. *See id.* at 513-14 (Stevens, J., dissenting).

scribed in *McAlindin v. County of San Diego*.[156] In *McAlindin*, the plaintiff suffered from psychiatric impairments, including anxiety disorders and panic attacks, which left him essentially paralyzed and unable to interact.[157] As a result of his illness, he was forced out of his position as a systems analyst with the County's Housing and Community Development Department.[158] Without his medication he was unable to function and even with aggressive medications and psychotherapy, the symptoms of his illness persisted and caused a side effect of extreme drowsiness.[159] The court grappled with the issue of how such an impairment should be analyzed after *Sutton*, where the condition persists despite the use of medication and where side-effects continue to substantially limit major life activities.[160] Ultimately, the facts alleged in *McAlindin* bring this case within the corrected impairment category which was held to be unprotected by *Sutton*.[161]

Finally, defining disabilities in their "mitigated" state may produce the anomalous result that individuals with cured impairments are protected under the Act, while those with treatable impairments remain unprotected. In *School Board of Nassau County v. Arline*,[162] the Court held that an elementary school teacher who no longer had an impairment, but tested positive for tuberculosis and was therefore contagious to others, was protected under the ADA.[163] By using the third prong, "regarded as," the fully cured individual was protected, yet those who have prevailed in controlling their impairment through the use of mitigating measures may be left unprotected. For example, in *Albertson's, Inc. v. Kirkingburg*,[164] the Supreme Court determined that, in addition to external mitigating measures such as medication and corrective devices, mitigating measures that are a result of the body's adaptation to an impairment must be considered when making the determination of disabil-

156. 192 F.3d 1226 (9th Cir. 1999).
157. *See id.* at 1230-31.
158. *See id.* at 1232.
159. *See id.* at 1231-32.
160. *See McAlindin*, 192 F.3d at 1236.
161. *See id.* at 1236.
162. 480 U.S. 273 (1987).
163. *See id.* at 282.
164. 527 U.S. 555, 564-65 (1999).

ity.[165] The plaintiff, Kirkingburg, had prevailed in overcoming his disability so that he would be otherwise qualified, but once the impairment was mitigated, he was no longer protected by the ADA.[166]

B. *Burden on the employer to justify safety standards while remaining in compliance with the ADA*

Employers risk liability under one federal law for not enforcing government safety standards and under another federal law for enforcing those same standards.[167] The Occupational Health and Safety Act ("OSHA") and the ADA were designed with different policy objectives in mind and compliance with both Federal Acts often causes conflict.[168] The ADA's purpose is to expand opportunities and provide protection for people with disabilities,[169] while OSHA's goal is safety in the workplace.[170] An employer may have difficulty complying with both standards, since disabled individuals may be at higher risk for accidents in the work environment.[171] For instance, a conflict can arise when an employee is precluded from wearing special safety glasses but the glasses are required to accommodate an impairment.[172] If an employer fires the employee in compliance with the OSHA requirement for safety glasses, the employer may be liable under the ADA for not accommodating the employee.[173] Likewise, where an employee has a communicable disease, the employer must insure that he takes all precautionary measures to prevent spread of the disease, while at the same time insuring that he does not engage in discrimination by singling out the employee or by treating him differently. The employer may be faced with a choice of whether to violate the ADA by firing the employee or to face liability for negligence, should he or his fellow employees be injured or infected.[174]

---

165. *See id.* at 565-66.
166. *See id.* at 556.
167. *See* Gaskill, *supra* note 57, at 1030-31.
168. *See id.* at 1030-31.
169. *See id.* at 1030-32.
170. *See id.*
171. *See id.*
172. *See* Gaskill, *supra* note 57, at 1031.
173. *See id.*
174. *See id.* at 1031-32.

Employers may respond to a discrimination claim under the ADA by defending that the employee poses a "direct threat" to other employees in the workplace.[175] They can decline to hire or refuse reasonable accommodations if they can prove that the employee would pose a health or safety risk to other employees.[176] In order to have a defense under the ADA, the employer would have to meet the considerable burden of proving that the disabled employee posed a "direct threat," usually by demonstrating that he is at a higher risk of causing workplace accidents because of his disability. Because the determination of direct threat is a difficult one to prove, it will likely result in litigation over whether the employer merely "regarded" the employee as an undue safety risk.

The 1999 U.S. Supreme Court case *Albertson's, Inc. v. Kirkingburg*[177] illustrates the conflict between compliance with the ADA and safety standards.[178] In Albertson's, the employee, Kirkingburg, was blind in one eye due to a condition called amblioplia and had learned to compensate for it through a subconscious mechanism which left him with normal vision when using both eyes.[179] Kirkingburg was fired when he failed to meet Department of Transportation ("DOT") safety standards because his eyesight could not be medically corrected.[180] Although he had obtained a waiver in the past because of his natural ability to compensate for the impairment, Albertson's presently failed to grant him a waiver of the DOT requirement.[181] The Court ruled that an employer that has a job qualification that requires an employee to meet a federal safety regulation does not have to justify that requirement, where it can be waived in a particular case.[182] Kirkingburg had argued that his condition fell under the definition of disability because,

175. *See How to Hire Right and Fire Right Under the Americans with Disabilities Act*, *supra* note 55.

176. *See id.*

177. 527 U.S. 555 (1999).

178. *See id.* at 558.

179. *See id.* at 559.

180. *See id.* at 560-61.

181. *See id.* at 560.

182. *See Albertson's*, 527 U.S. at 577-78.

due to his monocular vision, he had a different method of using his vision than the general population.[183]

The Supreme Court disagreed, stating that the relationship between the impairment and the major life activity was based not on whether the person performed the major life activity differently, but rather on whether the activity was substantially limiting.[184] Furthermore, the Court reasoned, although most people with his condition would be considered disabled, Kirkingburg did not prove that he was substantially limited, as required under the ADA.[185] The Court stated that the subconscious mechanisms that Kirkingburg had developed to compensate for his vision impairment precluded him from protection under the ADA.[186] Yet, Albertson's was not required to defend its compliance with DOT standards, since it was required by law to comply with those very standards.[187]

C. *The relationship between the burden of showing that selection standards are based on "the essential functions" of the job and the ability to show that the impaired person is "otherwise qualified"*

To be considered "otherwise qualified," an employee must be able to satisfy the basic prerequisites of his employment position.[188] A selection standard will not be upheld if it screens out potential employees who are otherwise qualified, because reasonable selection standards are a necessary component of being otherwise qualified.[189] A person is not otherwise qualified when he is unable to perform the essential function of the job due to a mental or physical disability.[190] The essential functions under the ADA are "the fundamental job duties of the employment position held or desired," and "not the marginal duties of the

183. *See id.* at 561.
184. *See id.* at 565-66.
185. *See id.* at 566-67.
186. *See id.* at 565-66.
187. *See Albertson's*, 527 U.S. at 578-80 (Thomas, J., concurring).
188. *See* 29 C.F.R. app. § 1630.2(m) (2000).
189. ADA, 42 U.S.C. § 12112(b)(5)-(b)(6) (1994).
190. *See* Janet E.Goldberg, *Employers With Mental and Emotional Problems - Workplace Security and Implications of the State Discrimination Laws, The Americans with Disabilities Act, the Rehabilitation Act, Worker's Compensation and Related Issues*, 24 STETSON L. REV. 201, 206 (1994).

job."[191] For example, a "typist with a mental disability who types forty-five words-per-minute would not be qualified for a word processing job that requires the ability to type sixty words-per-minute (provided the employer actually had and legitimately enforced such a requirement)."[192] However, it is often difficult to differentiate between those criteria that are considered essential functions and those that constitute non-essential functions for a specific employment position.

An employer is permitted under the ADA "to decide [that] physical characteristics or medical conditions that do not rise to the level of impairment — such as one's height, build, or singing voice — are preferable to others, just as it is free to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job."[193] However, it is only fair that where an uncorrected physical attribute is deemed a valid job disqualification, that the court be required to use that same uncorrected standard in determining whether the person fits into the definition of disability, such that he is protected by the ADA. For example, if United Air Lines regards petitioners as unqualified because they do not meet the vision requirements without glasses, the Court should "use uncorrected vision as the basis for evaluating the petitioners' life activity of seeing."[194]

Even if an individual does not fall under the subsection (2)(A) definition of a disability, he may fall under subsection (2)(C), "regarded as" having a disability.[195] In *Murphy v. United Parcel Service, Inc.*,[196] the plaintiff, Murphy, was fired as a mechanic for United Parcel Service because he was unable to meet the job requirement of obtaining a Department of Transportation Health Certificate because of his high blood pressure.[197] The Court ruled that mitigating measures should be considered when determining whether an individual's impairment substantially limits one or more major life activities.[198]

191. *Id.* at 206.
192. *Id.*
193. Sutton v. United Air Lines, 527 U.S. 471, 490-91 (1999).
194. *Id.* at 511 (Stevens, J., dissenting).
195. *See* ADA, 42 U.S.C § 12102(2)(C).
196. 527 U.S. 516 (1999).
197. *See id* at 519-20.
198. *See id.* at 521.

Although his successfully treated high blood pressure did not allow him to fall under either the first prong definition of a disability or the third prong, "regarded as" having a disability, Murphy failed to meet the essential requirements of the job based on his impairment in its unmitigated state.[199] Yet he was "otherwise qualified" to meet the requirements of his job, based on twenty years of successful employment as a mechanic.[200] Reason would seem to dictate that if a disability does not result in a substantial limitation of the major life activity of working, the termination of the employee is unjustified in the first place.

Additionally, to determine that an employee is not substantially limited in the major life activity of working, an employer must be careful to exclude the employee only from a narrow and specific job function, not a broad class of jobs.[201] In *Murphy*, the plaintiff was excluded only from his job as a mechanic, but not from other jobs within the company.[202] Therefore, the Court reasoned, his preclusion did not constitute being "substantially limited in the major life activity of working."[203] Under the analysis in *Sutton*, the essential function must be narrow and even unique in order to determine that the individual is not otherwise qualified.[204] Future judicial decisions must resolve the contradiction by insuring that an individual who is deemed incapable of performing the "essential functions" of a job, cannot, at the same time, be deemed "otherwise qualified" for that same job under the ADA.

D. *Although the Sutton ruling is generally viewed as a win for employers, it leaves the employer making important employment decisions while uncertain about whether they have complied with the law*

Although *Sutton* may decrease the number of employees who come under the protection of the ADA, it may also serve to increase employers' uncertainty as to the standards with which they must comply. While narrowing the scope of protected disa-

199. *See id.* at 521-22.
200. *See id.* at 524-25.
201. 29 C.F.R. app. § 1630.2 (j)(3) (2000).
202. *See Murphy*, 527 U.S. at 524.
203. *Id.* at 525.
204. *See* Sutton v. United Air Lines, 457 U.S. 471, 491-92 (1999).

bilities will allow employers to avoid some frivolous lawsuits, it will almost certainly create further conflicts for employers in balancing business concerns with concerns for complying with the ADA. New ambiguities resulting from changed standards will add confusion to old ambiguities that have never been clearly interpreted. Employers who are uncertain as to what constitutes a disability under the Act can no longer look to the EEOC for clarification, because certain aspects of the guidelines do not still apply. Additionally, employers are unclear as to whether or not an employee is "otherwise qualified" under the ADA to perform the "essential functions" of the job, "with or without reasonable accommodation."[205] Increased uncertainty on both sides may negatively impact employers' attitudes toward the disabled, which would reverse the significant improvement in public perception toward disabled workers brought about by the ADA.

Several issues frequently arise in employment situations, which are crucial for the employer to understand in order to comply with the ADA. Employment decisions should be made much as they had been made prior to *Sutton*, with a careful analysis of the potential legal problems associated with the ADA.[206] "[T]he underlying premise of the ADA is that employment decisions should be made in a neutral manner, focusing upon an individual's ability to do the job without regard to non-job related criteria."[207] However, since a person's disability may effect his ability to perform the specific job in question, the parameters of the ADA must be carefully analyzed to avoid confusion.[208]

The ADA and EEOC guidelines provide employers with basic information to help them comply with the ADA during pre-employment and testing stages.[209] Since equal opportunities for the disabled extend to the hiring process, the employer must be careful to list qualifications for the job before conducting an in-

205. ADA, 42 U.S.C. § 12111(8) (1994).

206. *See How to Hire Right and Fire Right Under the Americans with Disabilities Act*, *supra* note 55.

207. *Id.*

208. *See id.*

209. *See* Richardson, *supra* note 77, at 191-92 .

terview (e.g., a CPA certification, a college diploma).[210] If the advertisement includes any information about the requirements of the position, the essential job functions should also be included.[211] References to a certain level of physical or mental ability should be omitted from advertisements unless an essential job function requires them.[212] An advertisement may state that certain qualities are preferred, but this could lead to an ADA claim where the "preferred" criteria are simply a means of screening out disabled persons.[213]

An employer is prohibited at the hiring stage from requesting information relating to any disability that the individual may have. Certain topics should not be addressed in the interview process: the nature or severity of a disability; the existence of past or present medical problems; whether the applicant has filed any worker's compensation claims; why the applicant was absent from his previous job; and whether the applicant is an alcoholic or a drug user.[214] An employer may request documentation of a disability at the interview stage only where he has a reasonable belief that the applicant will require reasonable accommodation.[215] The reasonable belief may be based on "an obvious disability," a "voluntary disclo[sure]," or a request for "reasonable accommodation" by the applicant.[216] In these situations, the employer may ask whether the applicant needs reasonable accommodation and what type of accommodation is needed.[217] For example, if an applicant with cancer states that he will need breaks during the day to take medication, the employer may ask how frequently he will need the breaks or how

210. *See How to Hire Right and Fire Right Under the Americans with Disabilities Act*, *supra* note 55.

211. *See id.*

212. *See id.*

213. *See id.*

214. *See* Gaskill, *supra* note 57, at 981.

215. *See How to Hire Right and Fire Right Under the Americans with Disabilities Act*, *supra* note 55.

216. *See id.*

217. *See id. See e.g.*, Beck v. University of Wis. B. of Regents, 75 F.3d 1130, 1135 (7th Cir. 1996).

long the breaks must be.[218] However, he may not ask questions regarding the applicant's medical condition.[219]

Pre-offer medical tests to determine physical or mental impairments are prohibited by the ADA, unless those tests are related to the ability to perform the essential job function.[220] An employer may not use a test that disproportionately screens out individuals with disabilities and tests are permitted only if they are required of all applicants.[221] Medical information is confidential whether or not the applicant is accepted for the job.[222]

Before an employer may decide to terminate an employee, in addition to carefully analyzing the requirements of the ADA, it is advisable to have written documentation as to whether an accommodation was requested and as to all steps taken to provide the accommodation to that employee.[223] The question that usually comes up in a termination context is whether regular attendance constitutes an "essential job function," such that noncompliance may justify termination.[224] Regular attendance is generally considered to be an essential job function and an employer can require employees to come to work on a regular basis.[225] In *Tyndall v. National Education Center*,[226] the court held that an employee who was not able to meet regular and reliable attendance requirements of a job was not considered an "otherwise qualified" individual under the ADA.[227] In some situations, however, attendance may not be considered an essential job function, especially in the absence of a uniformly applied policy by the company.[228] For instance, in *Dutton v. Johnson City Board of Commissioners*,[229] the court held that the re-

218. *See How to Hire Right and Fire Right Under the Americans with Disabilities Act*, *supra* note 55.

219. *See id.*

220. *See* Gaskill, *supra* note 57, at 982-83.

221. *See The Americans With Disabilities Act: Great Progress, Greater Potential*, *supra* note 37, at 1605.

222. *See How to Hire Right and Fire Right Under the Americans with Disabilities Act*, *supra* note 55.

223. *See id.*

224. *See id.*

225. *See* Locke, *supra* note 3, at 128.

226. 31 F.2d 209 (4th Cir. 1995).

227. *See How to Hire Right and Fire Right Under the Americans with Disabilities Act*, *supra* note 55.

228. *See id.*

229. 859 F. Supp. 498 (D. Kan. 1994).

quested accommodation was not unreasonable where an employee with migraine headaches requested that he use scheduled sick leave and vacation time to cover his absences.[230]

Additionally, the ability to "adhere to production and professional standards" of the job are usually held to be a "necessary component of being otherwise qualified."[231] For example, an employee diagnosed as manic depressive, who was unable to maintain an objectively acceptable standard of behavior in the work environment, was held not to be "otherwise qualified."[232] To be "otherwise qualified," the individual must be capable of performing the essential functions of the job.[233] However, a termination based on a failure to adhere to professional standards is not lawful where it has been motivated by discriminatory bias.[234]

E. *Conflict between the text of the Act, the Equal Employment Opportunity Act (EEOC), and the Supreme Court's holding*

Although the ADA does not specifically discuss whether courts are required to consider mitigating measures in making the threshold determination of disability, legislative and judicial authority have consistently held that corrective measures should not be considered in the determination.[235] The legislative history of the ADA makes it "clear that Congress intended the Act to cover individuals who could perform all of their major life activities only with the help of ameliorative measures."[236] The Senate 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."[237] The Report illustrates that individuals with

230. *See id.* at 508.

231. *See How to Hire Right and Fire Right Under the Americans with Disabilities Act, supra* note 55.

232. Carrozza v. Howard County Md., 45 F.2d 425, 425 (4th Cir. 1995).

233. *See How to Hire Right and Fire Right Under the Americans with Disabilities Act, supra* note 55.

234. *See id.*

235. *See* Sutton v. United Air Lines, 527 U.S. 471, 499-500 (1999) (Stevens, J., dissenting).

236. *Id.* at 499 (Stevens, J., dissenting).

237. *Id.* at 499-500 (Stevens, J., dissenting) (quoting S. REP. No. 101-116, at 23 (1989)).

epilepsy or diabetes, for example, are often denied jobs based on employers' negative attitudes, even though their impairments are completely controlled by medication.[238] Likewise, the Report of the House Committee on Education and Labor states "[w]hether a person has a disability should be assessed without regard to the availability of mitigating measures."[239] Additionally, the EEOC's Interpretive Guidance, the Department of Justice[240] and the Department of Transportation[241] have issued guidelines adopting this same definition of disability. Finally, eight of the nine courts of appeals who have addressed the issue have held that the intent of the statute was to define the impairment in its unmitigated state.[242]

The only holding contrary to this line of authority is the Tenth Circuit's opinion that the Supreme Court affirmed in *Sutton*.[243] The *Sutton* analysis specifically rejects the EEOC guidelines regarding mitigating measures, stating "the approach adopted by the agency guidelines — that persons are to be evaluated in their hypothetical uncorrected state — is an impermissible interpretation of the ADA."[244] The Court reasoned that, if a person is taking measures to correct his impairment, the "effects of those measures — both positive and negative — must be taken into account when judging whether the person is 'substantially limited' in a major life activity and thus 'disabled' under the Act."[245] The Court relied on three separate provisions of the ADA which lead to the conclusion that the disability analysis should be made based on whether an individual is substantially limited in a major life activity when the impairment is viewed in its mitigated state.[246] First, the Court reasoned that since the phrase " 'substantially limits' appears in the Act in the present indicative verb form,. . . [it] is properly read as requiring that a person be presently — not potentially or hypotheti-

238. *See id.* (quoting S. REP. No. 101-116, at 24 (1989)).

239. *See id* at 500 (quoting H.R.REP. No. 101-485, pt. II, p.52, *reprinted in* 1990 U.S.C.C.A.N. 303, 334 (1990)).

240. *See Sutton* 527 U.S. at 502 (Stevens, J., dissenting).

241. *See id.*

242. *See id.* at 495-96.

243. *See id.* at 477.

244. *Id.* at 482.

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

246. *See id.*

cally — substantially limited in order to demonstrate a disability."[247] Second, the Court stated that since the determination of disability is an "individualized inquiry" under the ADA, it "is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual."[248] Third, the majority reasoned that the findings associated with the ADA enactment "require the conclusion that Congress did not intend to bring under the statute's protection all those whose uncorrected conditions amount to disabilities" because some "43 [million] Americans have one or more physical or mental disabilities."[249] The Court went on to say that viewing individuals in their corrected state will not exclude certain disabled persons who are worthy of protection, because only those mitigated impairments that are no longer substantially limiting will cease to be protected.[250] The majority suggests that those individuals that simply have improvements in their condition will continue to be protected under the Act if they meet the other requirements of the ADA definition.[251]

The legislative history, including committee reports, uniform agency regulations, and judicial opinions are consistent with the legislative goals of the Act.[252] If narrowing the scope of coverage under the ADA is a reaction to the sheer number of potential litigants, differentiating between corrected and uncorrected disabilities will not solve the problem. Historically, "it has been a familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes."[253] As the dissent in *Sutton* suggests, the words of the statute must be interpreted in light of the purpose that Congress sought to serve, which was "the elimination of discrimination against individuals with disabilities."[254]

---

247. *Id.*

248. *Id.* at 483 (quoting 29 C.F.R. app. § 1630.2(j)).

249. *Id.* at 484.

250. Sutton v. United Airlines, 527 U.S. 471, 488. (1999)

251. *See id.*

252. *See id.* at 502 (Stevens, J. dissenting).

253. *See id.* at 504 (quoting Tcherepnin v. Knight, 389 U.S. 332, 336 (1967)).

254. *Id.* at 497 (quoting 42 U.S.C. §12112(a)) (Stevens, J. Dissenting).

F. *Clarification needed for the terms "reasonable accommodation" and "undue hardship"*

Many of the terms in the ADA were intentionally left undefined, and their meanings remain vague after *Sutton*.[255] Though the ADA and the EEOC regulations provide a "basic framework for understanding the employer's obligation to accommodate a disabled individual . . . the courts will set the boundaries that define employers' responsibilities through judicial interpretation of who is a 'qualified individual with a disability.'"[256] The two terms in the ADA which cause the greatest confusion and which result in the most variation in judicial opinion are "reasonable accommodation" and "undue hardship."

The most fact-intensive inquiry under the ADA surrounds the question of whether reasonable accommodation" was made for the disabled employee. However, there are certain general rules that the employer should consider in every analysis. First, the employer has a right to demand verification of the disability for which the employee requires accommodation.[257] This generally comes in the form of written verification of the impairment by a physician or psychiatrist.[258] For example, in *Dumas v. Keebler Co.*,[259] the court held that it was not a violation of the ADA when the employer required that the employee verify her need for a handicapped parking spot.[260] Second, the employee must participate in the accommodation process by providing information regarding the form of accommodation needed.[261] In *Beck v. University of Wisconsin Board of Regents*,[262] the court held that the employer was not liable for failing to provide reasonable accommodation, where an employee did not provide the specific information necessary to make ap-

255. *See The Americans With Disabilities Act: Great Progress, Greater Potential*, *supra* note 37, at 1615.

256. Richardson, *supra* note 77, at 191.

257. *See How to Hire Right and Fire Right Under the Americans with Disabilities Act*, *supra* note 55.

258. *See id.*

259. 5 A.D. Cas. (BNA) 69 (M.D. Ga. 1995).

260. *See id.*

261. *See How to Hire Right and Fire Right Under the Americans with Disabilities Act*, *supra* note 55.

262. 75 F.3d 1130 (7th Cir. 1996).

propriate accommodations.[263] Third, the employer is required to provide only reasonable accommodation, not the best possible accommodation.[264] The courts and federal guidelines have generally defined this to mean that, although the employee's preference should be given consideration, the employer has "the ultimate discretion to choose between effective accommodations and may choose the less expensive accommodation or the accommodation that is easier to provide."[265] In *Vande Zande v. Wisconsin Department of Administration*,[266] the court found a lap-top computer for the employee to use at home to be a reasonable accommodation, although the employee had requested a desk-top computer and a laser printer.[267] Fourth, the employer is generally not obligated to reallocate the basic requirements of the job.[268] The EEOC provides that "[a]n employer or other covered entity is not required to reallocate essential functions."[269] The essential functions are those requirements of the job that would have to be performed by the employee, "with or without reasonable accommodation."[270] Fifth, the requirement of reasonable accommodation is dependent on the employer's knowledge of the disability.[271] Courts have rejected claims of discrimination under the ADA where the employee has not been able to show that the employer had knowledge of the employee's impairment.[272] For instance, in *R.G.H. v. Abbott Laboratories*,[273] the terminated employee's ADA claim failed where he was unable to prove that his employers were aware that he was HIV positive when they fired him.[274] Sixth, employer liability will depend on whether accommodations were made within a

263. *See How to Hire Right and Fire Right Under the Americans with Disabilities Act*, *supra* note 55.

264. *See id.*

265. 29 C.F.R. app. § 1630.9 (4) (2000).

266. 44 F. 3d 538 (7th Cir. 1995).

267. *See id.* at 543-44.

268. *See How to Hire Right and Fire Right Under the Americans with Disabilities Act*, *supra* note 55.

269. 29 C.F.R. app. § 1630.2 (o) (2000).

270. *See How to Hire Right and Fire Right Under the Americans with Disabilities Act*, *supra* note 55.

271. *See id.*

272. *See id.* (citing R.G.H. v. Abbott Labs., 4 A.D. Cas. (BNA) 289 (N.D. Ill. 1995).

273. R.G.H. v. Abbott Labs., 4 A.D. Cas. (BNA) 289 (N.D. Ill. 1995).

274. *See id.* at 289.

"reasonable time," depending on the situation.[275] For example, three months was held to be a "reasonable time" for a company to respond to a request for special computer equipment to accommodate a disabled employee, where the equipment had to be authorized, researched, purchased and installed.[276]

To defend against a claim for failure to provide a reasonable accommodation, the employer may allege that either the accommodation would pose an "undue hardship" to the business enterprise, that selection standards are "consistent with business necessity," or that the individual poses a "direct threat" to persons in the workplace.[277] The determination of a direct threat is an individualized inquiry that requires a balance of factors including the nature and duration of the risk, the probability of potential harm, and the alternatives available to mitigate the risk.[278] For instance, in *Scoles v. Mercy Health Corp. of Southeastern Pennsylvania*,[279] the court held that an employer was justified in restricting a surgeon's practice because of his HIV status.[280] Although the risk of transmission to a patient was low, the magnitude of the potential harm was so significant that the court found a direct threat.[281] A clarification of the definitions by Congress would allow employers to balance the requirements and practitioners to accurately evaluate whether employers are in complience with the ADA.

G. *The "case by case" analysis is in direct conflict with the EEOC's individualized approach*

There has been a gradual change in judicial perspective since the first ADA cases were litigated.[282] Early cases focused on the issues of "employer motive or employee qualifications,"

---

275. *See How to Hire Right and Fire Right Under the Americans with Disabilities Act*, *supra* note 55.

276. *See* Davis v. York Int'l., Inc. 2 A.D. Cas. (BNA) 1810 (D. Md. 1993).

277. *The Americans With Disabilities Act: Great Progress, Greater Potential*, *supra* note 37, at 1606-07. *See e.g.*, Jansen v. Food Circus Supermarkets, Inc., 541 A.2d 682 (1988).

278. *Id.* at 1607. *See also* School Board of Nassau County v. Arline, 480 U.S. 273 (1987).

279. *See* Scoles v. Mercy Health Corp. of Southeastern Pa., 887 F. Supp. 765 (E.D. Pa. 1994).

280. *See id.* at 771-72.

281. *See id.* at 772.

282. *See* Locke, *supra* note 3, at 112-13.

rather than on the issue of whether a disability was present.[283] The general assumption was that courts would accept a plaintiff's disability status without further analysis of the definition, based on the guidelines produced by the ADA Committee Reports and the interpretive guidelines to the EEOC.[284] Although both denied the guidelines to be a "laundry list" of disabilities, they contained a non-exhaustive list of named disabilities, including examples of physical conditions that constituted per se disabilities.[285] Additionally, there was a "significant body of Rehabilitation Act case law indicating that courts were willing to accept the concept of per se disability status,"[286] resulting in employers who were reluctant to challenge the determination based on the existing definition of disability.[287]

More recently, courts have responded by "becom[ing] increasingly intolerant of what they perceive to be attempts by minimally impaired individuals to manipulate the law."[288] In an effort to minimize the proliferation of claims for minor impairments, courts may have gone too far and excluded legitimate disability claims.[289] Employers have bolstered their side of the disability issue "by seizing upon the language in the EEOC guidelines which states that a determination should be made on a case by case basis."[290] This is based on the premise that that "the determination of whether an individual has a disability, is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual."[291] Based on these premises, employers have increasingly used the "case by case analysis" language to contest the disability issue.[292] In this way, courts have "dismantle[d] the per se disability roster," criticizing the EEOC's regulations as contrary to the ADA's individualized approach.[293] Replacing the named disabilities with a

283. *Id.* at 112.
284. *See id.* at 112-113.
285. *Id.*
286. *Id.* at 113.
287. Locke, *supra* note 3, at 113.
288. *Id.* at 114.
289. *See id.* at 114.
290. *Id.* at 113.
291. 29 C.F.R. app. § 1630.2(j) (2000).
292. Locke, *supra* note 3, at 113-15.
293. *Id.* at 114.

case by case model has served to narrow the scope of disabilities, thus decreasing the number of disability claims for impairments that are generally thought to be correctable.[294]

However, the *Sutton* Court held that the EEOC guideline's directive that the determination of a disability should be made on a case by case basis "is an impermissible interpretation of the ADA."[295] The Court argued that the EEOC interpretation is likely to lead to "the anomalous result . . . [that] courts and employers could not consider any negative side effects suffered by the individual in the use of mitigating measures, even when those side effects are very severe."[296] It further stated that the agency's approach would cause courts to make a disability determination based on stereotypes about how that disability generally affects individuals, rather than how any particular individual is affected.[297] Under this analysis, the majority reasoned, courts would "almost certainly find all diabetics to be disabled, because if they failed to monitor their blood sugar levels and administer insulin, they would almost certainly be substantially limited in one or more major life activities."[298] The court favored the mandate in subsection (2)(A) of the ADA that an individualized approach be used, requiring that disabilities be evaluated "with respect to an individual."[299]

The altering of judicial perspective to an individualized approach may actually serve to invite rather than to curtail litigation. While other anti-discrimination statutes do not require proof that a plaintiff is a member of a protected class, the ADA requires that each individual prove he has a disability in each case.[300] Although this is not difficult where there is an obvious physical disability, it is much more difficult to ascertain where the disability is "hidden" and "without recognizable manifestations."[301] Most ADA litigation to date has dealt with hidden impairments, such as back injuries, headaches, and neurological

294. *See id.*
295. Sutton v. United Air Lines, 527 U.S. 471, 482 (1999).
296. *Id.* at 484.
297. *See id.* at 483.
298. *Id.*
299. *Id.*
300. *See* Locke, *supra* note 3, at 114-15.
301. *Id.* at 115.

or emotional disorders.[302] Likewise, since mitigated impairments are frequently hidden and therefore difficult for employers to recognize, it is likely that "mitigated" disabilities will make up the bulk of future ADA cases.

Furthermore, legal scholars are in disagreement as to whether or not regarding individuals in their mitigated state results in a tendency to improperly group them according to their impairment. Since standards remain unclear, each employer and employee will approach litigation expecting to win on his interpretation of the facts, which will have the ultimate effect of increasing litigation.

H. *Sutton may shift the balance back to the employer, in contrast to the original intention of the ADA*

In light of the Supreme Court ruling, the prima facie standard applied by courts in determining whether an individual has a disability may run counter to the original intent of the statute. The current judicial approach may place an unreasonable burden on the plaintiff, leading to an unbalance in favor of employers in ADA litigation.[303] In their concern to eradicate frivolous lawsuits, the ADA has become increasingly narrowed to the point where it is no longer effective in its original goal of "aiding disadvantaged individuals' integration into the job market."[304] The statute may ultimately serve to exclude those individuals with serious impairments that it was specifically designed to benefit. Individuals with "corrected" disabilities who are left unprotected after *Sutton*, are often those individuals who have persevered in overcoming substantial limitations in major life activities through medication, adaptation, or rehabilitation. In response to concerns that too many people with minor or correctable conditions were bringing lawsuits under the ADA, the courts seem to be "ratcheting up the prima facie standard" for qualifying under the Act.[305] The shift may be due in part to society's evolving stereotypes as to what is considered a disability.[306] Though the concern of the ADA was that individ-

302. *See id.*
303. *See id.* at 112-15.
304. *Id.* at 108-09.
305. *See* Locke, *supra* note 3, at 108.
306. *Id.* at 146 n.34.

uals with disabilities not be excluded from employment based on stereotypes about their impairments, individuals may now be excluded from the protected class based on stereotypes about certain correctable impairments.[307] Courts have expressed a concern that only deserving persons with true disabilities should be protected by the ADA, which suggests "a preconceived notion of the parameters of the protected class."[308]

Additionally, the courts are increasingly faced with non-traditional disability claims brought under the ADA.[309] The most common disability claim (approximately 31% of all claims) in the first year of the ADA, involved back impairments, e.g., worker's compensation-type claims.[310] A study performed by David Blanck contrasted that statistic with claims involving more traditionally based disabilities, such as mental retardation, HIV, cancer, diabetes, and mental illness.[311] The study concluded that the majority of cases regarding more serious disabilities had been noticeably absent from ADA litigation.[312] Blanck's study concluded that categorizing people by the name of the disability "leads to value judgments [being] made by bigots and latitudinarians alike as to what should be considered a disability."[313]

In an attempt to weed out allegedly undeserving applicants, the courts may create an unreasonable burden for plaintiffs, which will lead to an unbalanced process which favors employers.[314] The unanticipated result may be to steer the focus away from the ADA's original intent, which was to "aid the disabled individual's integration into the job market."[315] Likewise, courts may leave unprotected the group of disabled indi-

307. *See id.* at 113-15.

308. *Id.* at 146 n.34. *See also* Roth v. Lutheran Gen. Hosp., 57 F.3d 1446, 1460 (7th Cir. 1995) (Roth brought a suit under the ADA for strabismus).

309. *See* Peter David Blanck, *Employment Integration, Economic Opportunity, and the Americans with Disabilities Act: Empirical Study from 1990-1993*, 79 IOWA L. REV. 853, 921 (1994).

310. *See id.* (citing EEOC, National Database Charge Receipt Listing, Aug. 8, 1993, at 55).

311. *See* Blanck, *supra* note 309, at 921-22.

312. *See id.*

313. Locke, *supra* note 3, at 146 n.34.

314. *See id.* at 108-9.

315. *Id.* at 109.

viduals who have correctable impairments, yet are still suffering from discrimination.

I. *Sutton ruling may have a devastating effect on HIV positive persons*

A pre *Sutton* case, *Doe v. Kohn Nast*,[316] is an example of the "divergence between statutory standard and lay perception" which individuals with disabilities may confront in future cases.[317] This case presented the issue of whether an HIV positive person who was asymptomatic was protected under the purview of the ADA.[318] The court determined that even without symptoms, the plaintiff had a physiological disorder of the blood and lymphatic system, and was thus protected under the ADA.[319] By asserting that HIV-positive individuals are covered under the first prong of the ADA, courts had stretched the statutory language to fit the disease.[320] If not covered under the first prong, courts have generally held that HIV-positive persons are disabled under the third prong, *i.e.* that the employer has "regarded" the employee as disabled.[321] Even though asymptomatic, the court here has made HIV-positive status comport with the definition "substantially limits" one or more "major life activities."[322] The danger after *Sutton* is that future courts may interpret HIV status as the judge did in *Kohn* when he likened it to hypertension.[323] He stated:

> Tens of millions of Americans walk around and live full and active lives, hypertense though they may be . . . I must read with care the definitions of disability that Congress and the EEOC gave us, and decide whether this plaintiff's disease and its symptoms fall within one or more of those express statutory and regulatory definitions, as anomalous as the statutory result might seem to some.[324]

316. 862 F. Supp. 1310 (E.D. Pa. 1994).

317. Rhonda K. Jenkins, *Square Pegs, Round Holes: HIV and The Americans with Disabilities Act*, 20 S. ILL. U. L. J. 637, 648 (1996).

318. *See id.* at 644.

319. *See id.* at 645.

320. *See id.* at 647.

321. ADA, 42 U.S.C. § 12102(2)(c) (1994).

322. *See* Jenkins, *supra* note 317, at 646.

323. *See* Doe v. Kohn Nast & Graf, P.C., 862 F. Supp. 1310, 1319-20 (E.D. Pa. 1994).

324. *Id.* at 1319-20.

Similarly, after *Sutton*, courts may "deem it more reasonable to exclude an individual HIV carrier from the statute's protection, rather than further attenuate the plain meaning of the ADA."[325] The alternative is to stretch the definition of disability to accommodate AIDS specifically, which would create a system where we treat individuals as members of a group with like disabilities, and provide them with protection under the Act. This would run counter to the ADA's mandate of individualized inquiry. However, some action is necessary, as HIV positive individuals are uniquely vulnerable to discrimination based on fear and stereotype. The worldwide estimate of AIDS cases now exceeds 10 million, with additional millions estimated to be infected with the HIV virus.[326] The reports and statistical predictions require that courts' adopt a rational precedent with which to deal with the inevitably large number of HIV discrimination cases in the future. To insure a consistent statutory approach, Congress should create a fourth prong under the ADA. The prong should expressly designate HIV positive status, symptomatic as well as asymptomatic, as a covered disability under the ADA. In its absence, HIV positive individuals "will be at the mercy of uncertain judicial interpretation and vulnerable to the discrimination the ADA seeks to prevent."[327]

PART V. CONCLUSION

The Supreme Court in *Sutton v. United Air Lines* created a fundamental change in the law regarding the scope of coverage for persons with disabilities. In an attempt to curtail frivolous litigation, the Court has narrowed the coverage under the Act to those disabilities which, in their mitigated state, continue to fall within the definition of disability. By doing so, they may be excluding worthy individuals who simply cannot meet the threshold definition because their impairment is one generally recognized as controllable by medication or medical aids. This may result in treating individuals as members of a group with that particular "correctable" impairment, which is itself a violation of the ADA. Furthermore, the holding leaves the already

325. Jenkins, *supra* note 317, at 648.
326. *See id.* at 649-50.
327. *Id.* at 650.

ambiguous standards in the Act open to further questions of interpretation for future courts and practitioners. To make the disability analysis consistent with the inclusive spirit of the ADA, employers must have the clear and practical guidelines necessary to balance important business decisions with compliance with disability law. It is equally important to provide disabled individuals with an understanding of their rights, without inserting cloudy threshold definitions that effectively keep them from getting their foot in the door. Education about the rights of the disabled will help to promote positive employer attitudes and public perception of disabled persons in the workplace, which has been a significant accomplishment of ADA legislation to date. Communication amongst employers and individuals with disabilities should be directed at determining the cause of unemployment in their communities and in determining how best to implement the ADA's provisions. The EEOC must develop clear quantitative standards, as courts further clarify which of the EEOC provisions still apply. In its goal of eliminating discrimination toward the disabled in the workplace, courts and legislature must together recast the inquiry, not by using an exclusionary process separating those with corrected disabilities from those without, but by focusing on the critical issue - the effect of the disability on the individual's ability to perform the job.