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***Sutton v. United Air Lines, Inc.*: The Role of Mitigating Measures in Determining Disabilities**

Julia J. Hall

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***Sutton v. United Air Lines, Inc.*: The Role of Mitigating Measures in Determining Disabilities**

In *Sutton v. United Air Lines, Inc.*,¹ the United States Supreme Court held that the determination of “disability” under the Americans with Disabilities Act of 1990 (“ADA”)² requires a consideration of any mitigating or corrective measures.³ The Court further held that an individual is “regarded as” disabled under the ADA if a covered entity mistakenly believes that the individual’s actual, yet nonlimiting, impairment substantially limits a major life activity.⁴ This Casenote focuses only on the issue of whether the determination of disability under the ADA should be made with reference to any mitigating measures for the impairment.

I. FACTUAL BACKGROUND

Karen Sutton and Kimberly Hinton, twin sisters suffering from severe myopia, applied for employment as commercial airline pilots with United Air Lines (“United”), a major commercial airline carrier. The sisters met United’s various employment criteria such as age, education, experience, and FAA certification. After the sisters submitted their applications, United invited them to participate in interviews and flight simulator tests. However, when they arrived for the interviews and tests, they were told that there had been a mistake in inviting them to interview because they did not meet the airline’s minimum vision requirement, which was 20/100 uncorrected visual acuity or better. Neither Sutton nor Hinton could meet this requirement because each sister had visual acuity of 20/200 or worse in her right eye and 20/400 or worse in her left eye; however, corrective lenses made each sister’s eyesight 20/20 or better. Nevertheless, both Sutton’s and Hinton’s interviews were

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1. 119 S. Ct. 2139 (1999) (7-2 decision).
 2. 42 U.S.C. §§ 12101-12213 (1994 & Supp. III 1997).
 3. 119 S. Ct. at 2149.
 4. *Id.*

terminated, and United did not offer either sister a commercial pilot position.⁵

Sutton and Hinton then filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on the basis of United's refusal to interview or hire them because of their uncorrected vision impairments.⁶ After they received their right-to-sue letter, they filed suit in the United States District Court for the District of Colorado, alleging that United had violated the ADA by discriminating against them "on the basis of their disability, or because [United] regarded [Sutton and Hinton] as having a disability."⁷ In their complaint Sutton and Hinton specifically alleged that as a result of suffering from severe myopia, "they actually have a substantially limiting impairment or are regarded as having such an impairment . . . and are thus disabled under the Act."⁸

The district court dismissed the sisters' complaint because it failed to state a claim upon which relief could be granted.⁹ First, plaintiffs were not actually and substantially limited in any major life activity because their vision impairments could be fully corrected, and thus they had not stated a claim that they were disabled within the meaning of the ADA.¹⁰ Second, Sutton and Hinton had not sufficiently alleged that United regarded them as having an impairment that substantially limits a major life activity because they only alleged that United regarded them as unable to satisfy the specific job requirements of global airline pilots.¹¹ Upon the sisters' appeal, the Court of Appeals for the Tenth Circuit affirmed the district court's decision.¹² The United States Supreme Court granted certiorari to resolve a circuit split among the courts of appeals.¹³ As to the role that mitigating measures should play in determining disability, the Supreme Court held that "disability" within the meaning of the ADA "is to be determined with reference to corrective measures."¹⁴ Thus, the Court affirmed the decision of the court of appeals, which had affirmed the district court's dismissal of

5. *Id.* at 2143.

6. *Id.*; *see also* Sutton v. United Airlines, Inc., Civ. A. No. 96-S-121, 1996 WL 588917, at *1 (D. Colo. Aug. 28, 1996).

7. 119 S. Ct. at 2143 (internal quotation marks omitted).

8. *Id.* at 2144.

9. 1996 WL 588917, at *6.

10. *Id.* at *3-4.

11. *Id.* at *5.

12. Sutton v. United Air Lines, Inc., 130 F.3d 893, 906 (10th Cir. 1997).

13. 119 S. Ct. at 2144.

14. *Id.* at 2149.

plaintiffs' claim that they are substantially limited in any major life activity by their severe myopia.¹⁵

II. LEGAL BACKGROUND

The ADA provides that no covered employer "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."¹⁶ The ADA defines a "qualified individual with a disability" as "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."¹⁷ The term "disability" is defined by the ADA as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."¹⁸

The definition of "disability" is part of the ADA's generally applicable provisions, and Congress did not delegate the responsibilities of interpreting the term "disability" to any particular agency such as the EEOC or the Justice Department. Nevertheless, both agencies have promulgated regulations interpreting the definition of "disability" under the ADA. Most notably, the EEOC regulations set forth three necessary elements of a disability under the ADA: (1) "physical or mental impairment," (2) "substantially limits," and (3) "major life activities."¹⁹ Additionally, the EEOC issued an Interpretative Guidance along with these regulations to aid in their implementation. The guidelines in this document provide that "[t]he determination 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.*"²⁰

15. *Id.* The Court also affirmed the lower court's decision that Sutton and Hinton had failed to state a claim that they had been regarded by United as having a disability. *Id.* at 2152. To be disabled within the meaning of the ADA, plaintiffs should have alleged and demonstrated that United's "vision requirement reflects a belief that petitioners' vision substantially limits them." *Id.*

16. 42 U.S.C. § 12112(a).

17. *Id.* § 12111(8).

18. *Id.* § 12102(2).

19. 29 C.F.R. § 1630.2(h)-(j) (1999).

20. *Id.* app. § 1630.2(j) (emphasis added).

In *Sutton* the Supreme Court identified five decisions of the federal circuit courts as being "in tension" with the Tenth Circuit's decision.²¹ In each of these five decisions, the circuit court held that disabilities should be determined without regard to any mitigating measures; however, each court placed a varying degree of importance on the statute's language, the EEOC regulations, and the ADA's legislative history in reaching its decision to disregard mitigating measures.²² Because the First Circuit's decision in *Arnold v. United Parcel Service, Inc.*²³ is representative of the logic these courts used to conclude that the determination of disability should disregard any mitigating or corrective measures, it will be discussed in detail as illustrative of the analysis adopted by a majority of circuit courts prior to the Supreme Court's decision in *Sutton*.

In *Arnold* the First Circuit held that plaintiff's diabetes, without regard to any treatment for it, is a disability within the meaning of the ADA.²⁴ Arnold met with representatives of United Parcel Service ("UPS") to discuss his application for a position as a mechanic. At that time the representatives assured Arnold that he could have the position. After Arnold accepted the job offer the next day, a UPS representative informed him that he would be required to pass a driving test, submit his fingerprints, complete more paperwork, and submit to a Department of Transportation ("DOT") physical. Arnold was informed at his physical that he could not obtain DOT certification because he was an insulin-dependent diabetic, and another UPS representative later informed Arnold that the company could not hire him as a mechanic, but offered him an alternate position.²⁵

Arnold brought suit against UPS, alleging that UPS violated the ADA in refusing to hire him because of his diabetes.²⁶ The district court granted summary judgment for UPS on the ground that Arnold failed to

21. 119 S. Ct. at 2144. According to the dissent in *Sutton*, eight of the nine federal circuit courts that have heard cases involving this issue have held that mitigating measures should not be considered in determining whether an individual is substantially limited in a major life activity. *Id.* at 2153 & n.1 (Stevens, J., dissenting).

22. See *Bartlett v. New York State Bd. of Law Exam'rs*, 156 F.3d 321, 329 (2d Cir. 1998); *Washington v. HCA Health Servs. of Tex., Inc.*, 152 F.3d 464, 470-71 (5th Cir. 1998); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 629-30 (7th Cir. 1998); *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 859-66 (1st Cir. 1998); *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937-38 (3d Cir. 1997).

23. 136 F.3d 854 (1st Cir. 1998).

24. *Id.* at 866.

25. *Id.* at 857.

26. *Id.* at 856.

show that he had a disability within the meaning of the ADA.²⁷ The district court's decision turned in large part on the "ameliorative effects of [Arnold's] insulin medication."²⁸ The Court of Appeals for the First Circuit reversed, concluding that Arnold's diabetes would place him under the ADA's protection "if he is disabled based on his underlying medical condition, without regard to whether some of his limitations are ameliorated through medication or other treatment."²⁹

In reversing the district court, the court of appeals relied on tools of statutory construction after it determined that the ADA's language was not clear with respect to the role that ameliorative measures should play in determining whether a disability falls within the protection of the ADA.³⁰ The court reached its decision by analyzing the legislative history of the ADA, but it also found persuasive authority in both the EEOC regulations and the decisions of other federal circuit courts.

First, the court considered the legislative history of the ADA and concluded that Congress intended for the determination of disability under the ADA to not include consideration of any mitigating or corrective measures.³¹ The court cited House and Senate committee reports that expressly stated that plaintiff's impairment "should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation."³² The court noted that in two different committee reports Congress directly addressed diabetes and the effect that medication might have upon it: "[P]ersons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity,' are considered to have an actual disability, 'even if the effects of the impairment are controlled by medication.'³³ Thus, the legislative

27. *Id.*

28. *Id.*

29. *Id.* at 866.

30. *Id.* at 859.

31. *Id.*

32. *Id.* at 859-60 (citing H.R. REP. NO. 101-485, pt. III, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 451); *see also* H.R. REP. NO. 101-485, pt. II, at 52, *reprinted in* 1990 U.S.C.C.A.N. 303, 334; S. REP. NO. 101-116, at 23 (1989).

33. 136 F.3d at 860 (quoting H.R. REP. NO. 101-485, pt. II, at 52, *reprinted in* 1990 U.S.C.C.A.N. 303, 334); *see also* S. REP. NO. 101-116, at 22. Similarly, the district court focused on language in a Senate Report indicating that one of the goals of defining "disability" was "to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions" to conclude that mitigating measures should be considered. 136 F.3d at 860 (quoting S. REP. NO. 101-116, at 24). However, the court of appeals questioned the weight that the district court gave this single passage because it was limited to proving three of the definition of disability while other explicit passages stated

history revealed explicit congressional intentions to make the determination of whether a disability falls within the ADA independent of any consideration of mitigating measures to control the impairment.

Second, the court looked to the congressional objective to be served by the ADA and how the definition of "disability" fit into that objective.³⁴ The court observed that the overall objective of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."³⁵ As to employment discrimination, the court noted that the statute was aimed at protecting persons who have an impairment, "but who *are* in fact capable of doing the job."³⁶ The court stated that the ADA's remedial purpose called for a broad interpretation of the term "individual with a disability" and that such a broad interpretation does not rob employers of any protection because other ADA provisions balance their interests.³⁷ Statistics cited in the ADA's preamble show a large and increasing number of Americans with physical or mental disabilities, and these statistics convinced the court that Congress intended for the ADA's "protective umbrella" to cover a large percentage of the population.³⁸

Based on the ADA's legislative history and broad remedial purposes, the court concluded that the district court should not have considered the ameliorative effects of Arnold's medication in determining whether his diabetes constituted a disability under the ADA.³⁹ However, the court did not end its analysis of the issue there; it also considered the position taken by the EEOC, as well as the decisions of other federal courts of appeals following the EEOC interpretation, to be persuasive authority that the district court had ignored.⁴⁰

The court recognized that the EEOC Interpretative Guidance was not controlling on the issue because it did not carry the weight of an actual regulation; nevertheless, the court stated that it was entitled to some

that such measures should not be considered. *Id.* Moreover, the court of appeals reconciled these seemingly inconsistent statements by suggesting that a person could have a disability under prong one (having an impairment that actually and substantially limits a major life activity) and prong three ("regarded as" having such an impairment). *Id.* In other words, the two prongs are not mutually exclusive.

34. 136 F.3d at 861.

35. *Id.* (quoting 42 U.S.C. § 12101(b)(1)).

36. *Id.*

37. *Id.* For instance, the court noted that the "individual with a disability" must still be "qualified" or able to perform the essential functions of the job. *Id.* (citing 42 U.S.C. §§ 12111(8), 12112(a)).

38. *Id.* at 862.

39. *Id.* at 863.

40. *Id.* at 863-65.

deference.⁴¹ For several reasons the court noted that the EEOC interpretation was consistent with the court's decision based on the ADA's legislative history and broad remedial purposes. First, the court stated that it had looked to that same Interpretative Guidance in its effort to interpret the ADA on other occasions.⁴² Second, the existence of a nearly identical interpretation by the Department of Justice bolstered the reasonableness of the EEOC's interpretation.⁴³

Finally, the court followed the majority of federal circuit courts that had considered the issue when it decided that mitigating measures should not be considered in determining whether an impairment substantially limits a plaintiff's major life activities.⁴⁴ Moreover, the court refuted the contentions of UPS that these other courts "merely acknowledged the existence of the EEOC guidelines" by pointing out that the other courts cited the guidelines as support for the principle on which they based their rationale.⁴⁵ Even though the Eleventh Circuit gave full deference to the EEOC interpretation in *Harris v. H & W Contracting Co.*,⁴⁶ the court in *Arnold* stated that the decision in that case was still well grounded.⁴⁷ Furthermore, the court in *Arnold* gave a lesser degree of deference to the guidelines and instead based its decision on the legislative history and broad remedial purposes of the ADA.⁴⁸

It is worth noting that the First Circuit limited its holding in *Arnold* to the facts surrounding plaintiff's diabetes and refused to speculate generally on other medical conditions, instead reiterating that the determination of disability under the ADA must be done on a case-by-case basis.⁴⁹ However, in a footnote at the end of the opinion, the court suggested that a different outcome might result in a case in which the impairment was myopia that might be fully correctable with eyeglasses or contact lenses: "The availability of such a simple, inexpensive remedy, that can provide assured, total and relatively permanent control of all symptoms, would seem to make correctable myopia the kind of

41. *Id.* at 864.

42. *Id.*

43. *Id.*

44. *Id.* at 865-66 (citing *Matczak*, 136 F.3d at 936-37; *Doane v. City of Omaha*, 115 F.3d 624, 627-28 (8th Cir. 1997); *Harris v. H & W Contracting Co.*, 102 F.3d 516, 520-21 (11th Cir. 1996); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995)).

45. *Id.*

46. 102 F.3d at 521.

47. 136 F.3d at 866.

48. *Id.*

49. *Id.*

'minor, trivial impairment' . . . that would not be considered a disability under the ADA."⁵⁰

When the Supreme Court granted certiorari in *Sutton* and its companion case, *Murphy v. United Parcel Service, Inc.*,⁵¹ eight of the nine federal courts of appeals that had heard cases involving this issue had held as the court in *Arnold* did: Such mitigating or corrective measures were not to be considered in determining what constituted a disability within the ADA.⁵² Therefore, it would not have been surprising for the Supreme Court to follow the interpretations of eight federal circuit courts and several federal agencies on the issue of mitigating measures. However, the Court took a different route.

III. RATIONALE OF THE COURT

Writing for the majority, Justice O'Connor first gave an overview of the legislative and administrative framework surrounding the ADA.⁵³ In analyzing whether plaintiffs stated a claim under subsection (A) of the ADA's disability definition, the Court recognized that deciding whether the two sisters sufficiently alleged that their physical impairment substantially limits them in a major life activity specifically "turns on whether disability is to be determined with or without reference to corrective measures."⁵⁴ *Sutton* and Hinton argued that "the Court should defer to agency interpretations of the statute" because the ADA does not explicitly address the issue.⁵⁵ On the other hand, United argued that the EEOC guidelines were in direct conflict with the plain meaning of the ADA, in which case the Court should not defer to the agency interpretations.⁵⁶ United also maintained that disregarding mitigating measures would, in turn, disregard the statutory command to examine impairments on a case-by-case basis.⁵⁷ The Court agreed with United and concluded that both the positive and negative effects of mitigating measures should be considered in determining whether an

50. *Id.* at 866 n.10 (quoting S. REP. NO. 101-116, at 23 (1989)).

51. 119 S. Ct. 2133 (1999).

52. *Sutton*, 119 S. Ct. at 2153 & n.1 (Stevens, J., dissenting). In fact, the only federal circuit to hold otherwise was the Tenth Circuit from which *Sutton* originated.

53. 119 S. Ct. at 2144-46.

54. *Id.* at 2146.

55. *Id.*; see also Brief for Petitioners at 6, *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999) (No. 97-1943).

56. 119 S. Ct. at 2146; see also Brief for Respondent at 26-27, *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999) (No. 97-1943).

57. 119 S. Ct. at 2146; see also Brief for Respondent at 28, *Sutton* (No. 97-1943).

individual "is 'substantially limited' in a major life activity and thus 'disabled' under the Act."⁵⁸

As support for its conclusion that a determination of disability must take into account mitigating measures, the majority relied solely on the textual provisions of the ADA without resorting to legislative history or agency interpretations.⁵⁹ Justice O'Connor's analysis followed the three statutory provisions for support for the proposition that mitigating measures must be considered. First, the Court found that the actual language used to define "disability" was critical.⁶⁰ The ADA defines disability as "a physical or mental impairment that substantially limits one or more of the major life activities."⁶¹ The Court thought the verb phrase "substantially limits" indicates a requirement that the individual be "presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability."⁶² The Court based this on the drafters' use of the present indicative verb form, implying that the individual must be currently limited and not simply that he "might" or "could" or "would" be limited but for the mitigating measures.⁶³

Second, the Court agreed with United that the individual inquiry requirement would be sacrificed if courts and employers were required to speculate about an individual's condition, leading to disability determinations based only on general information.⁶⁴ The individualized inquiry goes hand-in-hand with the definition of disability; generalized information could lead to lumping members with similar impairments in one group rather than considering each member's impairment individually.⁶⁵ Moreover, as the Court pointed out, disregarding mitigating measures under the agency approach would lead to an anomalous result whereby courts and employers could not take into account any negative side effects associated with the mitigating measures.⁶⁶ Ignoring the negative side effects that might play a decisive role in determining whether a person is disabled under the ADA does nothing to further the congressional concerns for an individualized inquiry.⁶⁷

58. 119 S. Ct. at 2146.

59. *Id.*

60. *Id.*

61. 42 U.S.C. § 12102(2)(A).

62. 119 S. Ct. at 2146.

63. *Id.*

64. *Id.* at 2147.

65. *Id.*

66. *Id.*

67. *Id.*

Finally, the Court relied on statistical findings enacted as part of the ADA in its general provisions, indicating 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."⁶⁸ Under this analysis the Court essentially stated that if Congress intended to bring every individual with a correctable limitation within the ADA's protection, it would have cited a number higher than forty-three million.⁶⁹ The majority arrived at this conclusion by analyzing several different statistical reports from the same period as the ADA's drafting and enactment. From all of the statistical data, the majority was able to extrapolate that the thirty-six million included in the findings of the ADA's predecessor bill reflected a "work disabilities approach" to defining disability rather than the "health conditions approach."⁷⁰

The Court also examined a 1988 report from the National Council on Disability that described a study of 37.3 million disabled persons based on a functional approach, focusing on basic physical activities such as "seeing, hearing, speaking, walking, using stairs, lifting or carrying, getting around outside, getting around inside, and getting into or out of bed."⁷¹ However, because this report did not account for any institutionalized persons with physical disabilities, the Court attributed the 5.7 million gap between the ADA's findings and the Council's report to this shortcoming.⁷² As a practical matter, currently the estimated number of people throughout the United States with vision impairments is one hundred million,⁷³ with impaired hearing is twenty-eight million,⁷⁴ and with hypertension is fifty million.⁷⁵ The fact that the ADA's findings are not large enough to incorporate these correctable impairments led the Court to believe that Congress did not intend to extend the ADA's protection to those individuals whose impairments are correctable.⁷⁶

68. *Id.* (quoting 42 U.S.C. § 12101(a)(1)).

69. *Id.* at 2149.

70. *Id.* at 2147-48. The "work disabilities approach" focuses on the individual's reported ability to work and in 1986 was estimated to total 22.7 million disabled individuals; the "health conditions approach," on the other hand, considers all conditions that impair an individual's health or normal functional abilities, leading to an estimated total of 160 million disabled Americans. *Id.*

71. *Id.* at 2148 (internal quotation marks omitted).

72. *Id.*

73. *Id.* at 2149.

74. *Id.*

75. *Id.*

76. *Id.*

The Court concluded by addressing some of the concerns voiced in Justice Stevens's dissent. First, the majority pointed out that the mere use of a corrective device or medication does not cancel out an individual's disability; rather, a court must still determine whether that individual is substantially limited in a major life activity notwithstanding the mitigating measure.⁷⁷ For example, an individual with high blood pressure may take hypertension medication and still be substantially limited in one of his major life activities such as running or lifting.⁷⁸ For the Court it was critical to preserve the individual inquiry, and considering mitigating measures does nothing to harm this determination, but rather aids the court in this endeavor.⁷⁹ Additionally, as the Court noted, an individual may alternatively be included under the ADA if a covered employer regarded her as disabled even if she is not substantially limited in a major life activity (perhaps by the use of mitigating or corrective measures).⁸⁰ The Court considered neither of these concerns by the dissent to be valid, and thus the Court affirmed the circuit court's holding that Sutton and Hinton had not stated a claim that they are substantially limited in a major life activity.⁸¹

In a concurring opinion, Justice Ginsburg stated that the strongest evidence supporting the decision was, in fact, the congressional finding that "some 43 million have one or more physical or mental disabilities."⁸² Justice Ginsburg also keyed in on other language in the ADA's prefatory findings that stated 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.'"⁸³ Justice Ginsburg stated that extending the ADA's protection to those correctable impairments that do not substantially limit a major life activity contradicts the nature of protecting the disabled as a discrete and insular minority.⁸⁴ She was careful to note that there was no "constitutional dimension" in *Sutton*, but rather Congress's use of equal protection language is evidence of intent in the statute not to consider such a large group disabled, as Sutton and Hinton urged.⁸⁵ Therefore, she agreed with the majority

77. *Id.*

78. *See id.*

79. *Id.* at 2147.

80. *Id.* at 2149.

81. *Id.*

82. *Id.* at 2152 (Ginsburg, J., concurring) (quoting 42 U.S.C. § 12101(a)(1)).

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

84. *Id.*

85. *Id.*

that subsection (A) of the ADA's disability definition does not extend to persons who correct or mitigate their disabilities.⁸⁶

Justice Stevens offered a different line of analysis in his dissenting opinion, which Justice Breyer joined.⁸⁷ According to Justice Stevens, a Court must first decide whether the determination of disability should consider the individual's impairment in its unmitigated or mitigated condition.⁸⁸ If the unmitigated condition is the basis for the determination of disability, the court should next ask if the general rule should be applied to what could be regarded as a "minor, trivial impairment."⁸⁹

Beginning with a consideration of the ADA's text and the legislative purpose behind the statute, Justice Stevens stated, "The sweep of the statute's three-pronged definition, however, makes it pellucidly clear that Congress intended the Act to cover [persons who correct or mitigate their impairments]."⁹⁰ Under the majority's analysis of the present indicative verb tense, subsection (A) of the disability definition would not apply, according to Justice Stevens.⁹¹ Likewise, Justice Stevens stated that the majority's focus on "presen[t]—not potentia[l] or hypotetica[l]" substantial limitations would make subsections (B) and (C) of the disability definition inapplicable as well.⁹² Justice Stevens hypothesized that if Congress meant to exclude persons who are not presently and substantially limited in a major life activity, subsection (B) would be useless because it is geared towards individuals with a record of disability, implying that they may not be substantially limited at the time of the alleged disability discrimination.⁹³

Justice Stevens then surveyed the ADA's legislative history to resolve any ambiguity that may remain after a textual analysis and found what he considered clear support in the committee reports on the bill.⁹⁴ Justice Stevens laid out a chronological sequence of events involving the

86. *Id.*

87. *Id.* at 2152-53 (Stevens, J., dissenting). Justice Breyer also contributed a dissenting opinion that basically followed Justice Stevens's reasoning; however, Justice Breyer also added that the EEOC could remedy any onslaught of litigation that might result from a broader interpretation disregarding mitigating measures through tightened regulations. *See id.* at 2161 (Breyer, J., dissenting). This argument turns on how much authority the EEOC has to interpret the ADA, and the issue of deference was not certified by the Court.

88. *Id.* at 2153 (Stevens, J., dissenting).

89. *Id.* (quoting *Arnold*, 136 F.3d at 866 n.10). Interestingly, the court in *Arnold* was merely quoting language in a Senate Report that suggested there might be some "trivial" impairments that fall outside the ADA's protection. *See S. REP. NO. 101-116*, at 23 (1989).

90. 119 S. Ct. at 2154 (Stevens, J., dissenting).

91. *Id.*

92. *Id.* (internal quotation marks omitted) (alterations in original).

93. *Id.*

94. *Id.*

committee reports and the ADA bill, noting that the bill originated in the Senate.⁹⁵ As the federal circuit courts discussed in many decisions on this issue, the Senate Report stated 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.”⁹⁶ He further noted the Senate Report’s emphasis under prong three, or the “regarded as” prong, on ensuring that employers do not discriminate against individuals who have corrected their impairments.⁹⁷ As Justice Stevens pointed out, when the House of Representatives considered the ADA legislation, the House committees only slightly modified the Senate’s expression of how far the ADA coverage extends by clarifying that “correctable” or “controllable” disabilities were covered under the ADA’s protection under prong one as well.⁹⁸

Additionally, Justice Stevens relied on the interpretations of the three agencies responsible for implementing the ADA’s provisions, suggesting that they were entitled to some degree of deference because they “played a pivotal role in setting [the statutory] machinery in motion.”⁹⁹ Most notably, the EEOC regulations, such as its Interpretative Guidance, persuaded Justice Stevens that the determination of disability within the ADA should be made without regard to mitigating measures.¹⁰⁰

In addressing the majority’s reliance on the statistical finding of forty-three million disabled Americans and Justice Ginsburg’s reliance on the equal protection language, Justice Stevens proposed a new question to address: Whether, in light of these two considerations, the Court “should construe the term ‘disability’ to exclude individuals with impairments that Congress probably did not have in mind.”¹⁰¹ Justice Stevens stated that the ADA’s umbrella should be extended to cover those individuals with mitigated conditions to effectuate the ADA’s broad

95. *Id.* at 2154-55.

96. *Id.* at 2154 (quoting S. REP. NO. 101-116, at 23 (1989)).

97. *Id.* at 2154-55 (citing S. REP. NO. 101-116, at 24). Prong three refers to the element of “major life activities” within the statutory definition of “disability.” Likewise, prong one refers to the “physical or mental impairment” element of the term “disability.” *Id.*

98. *Id.* at 2155 (citing H.R. REP. NO. 101-485, pt. III, at 28-29 (1990), reprinted in 1990 U.S.C.A.N. 445, 451; H.R. REP. NO. 101-485, pt. II, at 52, reprinted in 1990 U.S.C.A.N. 303, 334).

99. *Id.* (quoting *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980)) (alteration in original).

100. *Id.* at 2156. Justice Stevens quoted the EEOC regulations and Department of Justice regulations at great length and noted that the Department of Transportation had adopted a similar definition of “disability.” *Id.*

101. *Id.*

remedial purposes.¹⁰² Justice Stevens compared the need for consulting legislative history and agency interpretations in reaching this conclusion to the role that the Court played in interpreting Title VII of the Civil Rights Act of 1964 to include races other than African-Americans, which was the primary race sought to be protected by the drafters of Title VII.¹⁰³

IV. IMPLICATIONS

After *Sutton* the new standard for interpreting subsection (A) of the disability definition of the ADA is, notwithstanding any mitigating or corrective measures, whether the plaintiff's impairment substantially limits him in a major life activity. Post-*Sutton* cases have followed the new standard by carefully analyzing the actual effects of the impairment as well as the positive and negative side effects of the individual's treatment or medication. This new consideration of mitigating measures will effectively redefine or limit which major life activities are substantially limited by the impairment because trial courts will have to look at the actual, present limitation under the standard dictated by *Sutton*. In *EEOC v. R.J. Gallagher Co.*,¹⁰⁴ the Court of Appeals for the Fifth Circuit addressed this issue soon after the Supreme Court decided *Sutton* and concluded that plaintiff did not come within the protection afforded by the ADA under section 12102(2)(A).¹⁰⁵ Because plaintiff's cancer was in remission when he returned to work and his doctors gave him an unqualified clearance to return to work, the court held that he could not be substantially limited in the major life activity of working.¹⁰⁶

Shortly after the Fifth Circuit's decision in *R.J. Gallagher*, the District Court for the Southern District of Texas concluded in *Todd v. Academy Corp.*¹⁰⁷ that plaintiff did not meet the definition of "disability" when he only alleged general evidence of side effects from his medication rather than a particular limitation on a major life activity.¹⁰⁸ The court stressed the Supreme Court's emphasis in *Sutton* on the individualized inquiry to be made in determining whether a plaintiff has a

102. *Id.* at 2157.

103. *Id.* Justice Stevens found it ironic that in Title VII cases the Court relied on legislative history and gave a greater degree of deference to the EEOC interpretation. *Id.*

104. 181 F.3d 645 (5th Cir. 1999).

105. *Id.* at 655.

106. *Id.*

107. 57 F. Supp. 2d 448 (S.D. Tex. 1999).

108. *Id.* at 454.

disability under the ADA.¹⁰⁹ “[T]he disability status of a person under the ADA is determined on the basis of whether the particular ailment suffered by that person, in its corrected or mitigated state, is a substantial limitation on that particular person in his particular life situation.”¹¹⁰ The court also noted the Supreme Court’s instructions for trial courts to weigh negative as well as positive effects of any mitigating measures, such as side effects of medication.¹¹¹ In evaluating the facts in *Todd*, the court acknowledged the decreased intellectual functioning associated with epilepsy medications.¹¹² However, plaintiff merely cited evidence of general negative side effects and did not particularize any decrease in intellectual capacity to his situation.¹¹³ This made it impossible for the court to evaluate whether the decrease in intellectual functioning was a substantial limitation on plaintiff’s major life activities, and the court granted defendant’s motion for summary judgment on this ground.¹¹⁴

The court in *Todd* seemed to hint that the outcome might have been different if plaintiff had only presented more specific evidence regarding his particular side effects and particular substantial limitations on major life activities.¹¹⁵ Thus, it seems that to survive summary judgment despite mitigating measures, a plaintiff must allege and show three factors: (1) the plaintiff has an impairment that substantially limits one of his major life activities; (2) the plaintiff has taken measures to correct or mitigate that impairment; and (3) notwithstanding this mitigating or corrective measure, the plaintiff is still substantially limited in one or more of his major life activities. This is supported by the recent decision of the Court of Appeals for the Ninth Circuit in *McAlindin v. County of San Diego*.¹¹⁶ In that case the court noted the Supreme Court’s recognition that “in some cases the use of medication may not eradicate the effects of illness, and a disability may remain either due to symptoms of the condition itself which persist despite the effects of medication, or as a result of the medication’s side-effects.”¹¹⁷ Plaintiff in *McAlindin* alleged that his mental impairment of “fear reaction” and

109. *Id.* at 453 (citing *Sutton*, 119 S. Ct. at 2142).

110. *Id.*

111. *Id.* at 454 (citing *Sutton*, 119 S. Ct. at 2142).

112. *Id.*

113. *Id.*

114. *Id.* The only reference that plaintiff made in this regard to his situation was that he was “somewhat” limited; therefore, the court did not find that to be a “substantial limitation” under 42 U.S.C. § 12102(2)(A). *Id.*

115. *See id.*

116. 192 F.3d 1226 (9th Cir. 1999), amended by 201 F.3d 1211 (9th Cir. 2000).

117. 192 F.3d at 1236 (citing *Sutton*, 119 S. Ct. at 2149).

“communicative paralysis” still “affected him [d]espite the medications.”¹¹⁸ The court determined that this presented a genuine issue of material fact because it could not be said as a matter of law whether plaintiff’s impairment substantially limited his major life activities notwithstanding his medication and other treatment.¹¹⁹ Thus, this decision appeared to bring this particular plaintiff within the class of persons described in *Sutton* as protected by subsection (A) of the ADA’s disability definition.

To be protected by the ADA under 42 U.S.C. § 12102(2)(A), it is now critical that plaintiffs allege that they are still substantially limited in a major life activity notwithstanding any measures taken to mitigate or correct their impairments. As the decision in *McAlindin* shows, plaintiffs who sufficiently allege this will probably survive a motion for summary judgment. However, as the post-*Sutton* cases have indicated, the focus will then turn to what constitutes a substantial limitation and major life activity for that particular person.

JULIA J. HALL

118. *Id.* at 1235-36.

119. *Id.*