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Parking in the Handicapped Zone: The Supreme Court's Attack against the ADA

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PARKING IN THE HANDICAPPED ZONE: THE SUPREME COURT'S ATTACK AGAINST THE ADA

I. INTRODUCTION

The Americans with Disabilities Act of 1990[1] (ADA) is undoubtedly the most significant advancement for the protection of disabled Americans' civil rights.[2] Congress' first finding in the preamble to the ADA is 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."[3] Throughout history,[4] "society has tended to isolate and segregate individuals with disabilities,[5] and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."[6] The continued discrimination suffered by this class of people permeates all realms of society,[7] and disabled individuals continue to encounter discrimination in every conceivable form.[8] A major effect of these discriminatory practices is that "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, *vocationally*, economically, and educationally."[9]

Despite the highly commendable and landmark legislative attempt to protect the civil rights of disabled individuals, the ADA's inherent ambiguity has undermined its essential purpose. The fundamental purpose of the ADA is "to

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1. *See* 42 U.S.C. §§ 12101-12213 (1994).

2. For an overview of the ADA, see Nancy Lee Jones, *Overview and Essential Requirements of The Americans With Disabilities Act*, 64 TEMP. L. REV. 471 (1991); Harvey S. Mars, *An Overview of Title I of The Americans With Disabilities Act and its Impact Upon Federal Labor Law*, 12 HOFSTRA LAB. L.J. 251 (1995). *See generally, e.g.*, Lisa, Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405 (1999).

3. 42 U.S.C. § 12101(a)(1).

4. Disability discrimination has existed throughout time. "And as Jesus passed by, he saw a man which was blind from his birth. And his disciples asked him, Master, who did sin, this man or his parents, that he was born blind?" John 9:1-2 (King James).

5. *See, e.g.*, TERRY F. PETTIJOHN, PSYCHOLOGY: A CONNECTEXT (4th ed. 1998) (discussing 17th Century approaches of treating the mentally ill and psychologically disturbed by imprisoning them in iron chains and using methods of torture and perpetual isolation to keep their evil impurities away from the rest of society).

6. 42 U.S.C. § 12101(a)(2) (1994).

7. Congress found that "discrimination against individuals with disabilities persists in such critical areas as *employment*, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services...." *Id.* § 12101(a)(3) (emphasis added).

8. Congress found that:

> [I]ndividuals with disabilities continually encounter various forms of discrimination including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, *overprotective rules and policies*, failure to make modifications to existing facilities and practices, *exclusionary qualification standards and criteria*, segregation, and relegation to lesser services, programs, activities, benefits, *jobs*, or other opportunities...."

Id. § 12101(a)(5) (emphasis added).

9. *Id.* § 12101(a)(6) (emphasis added).

provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . . ."[10] In the context of employment discrimination, the thrust of this purpose is "to protect individuals who have an underlying medical condition or other limiting impairment, but who are capable of doing the job, with or without the help of medications, prosthetic devices, or other ameliorative measures, and with or without a reasonable accommodation by the employer."[11]

One aspect of recent contention engendered by the ADA's inherent ambiguity has centered around whether the effects of measures taken to correct for, or mitigate, an individual's impairment must be taken into consideration when determining whether that individual is *substantially limited* in a *major life* activity within the meaning of the ADA. In June of 1999, the United States Supreme Court handed down three decisions interpreting the ADA in the context of mitigating measures.[12] In sum, the Supreme Court mandated that the effects of mitigating measures must be taken into consideration when determining whether an individual is substantially limited in a major life activity, and hence, disabled within the meaning of the ADA.[13]

The Supreme Court's interpretation and construction of the ADA in these decisions significantly abridged and narrowed the scope of protection afforded to individuals whom the ADA was intended and designed to protect. The interpretative rulings handed down by the Supreme Court in these cases contradict a massive amount of persuasive authority. Such authority ranges from Congressional Reports[14] and Executive Agencies' regulations, interpretations, and guidelines[15] to the prior decisions of the Supreme Court itself,[16] as well as decisions from eight of the Federal Courts of Appeals,[17] not to mention amicus curiae briefs[18] from highly distinguished organizations and individuals. Furthermore, the rulings by the Supreme Court are, arguably, in direct conflict with the explicit language of the

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10. *Id.* § 12101(b)(1). Other purposes of the ADA enunciated by Congress are:
[T]o provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; . . . to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and . . . to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.
Id. § 12101(b)(2)-(4).

11. Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 861 (1st Cir. 1998) (citing 42 U.S.C. § 12101(a)(7) (1994) as authority from which this proposition in derived).

12. *See* Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999) (stating that corrective lenses for severely myopic twin sisters must be considered in determining whether sisters were disabled under the ADA); Albertson's, Inc. v. Kirkingburg, 119 S. Ct. 2162 (1999) (stating that individual with monocular vision is not covered under ADA because of ameliorative effects of mitigating measures); Murphy v. United Parcel Serv., Inc., 119 S. Ct. 2133 (1999) (stating that ameliorative effects of medication on employee's high blood pressure took him out of ADA coverage).

13. *See Sutton*, 119 S. Ct. at 2146; *Albertson's*, 119 S. Ct. at 2169; *Murphy*, 119 S. Ct. at 2135.

14. *See* discussion *infra* Part VII.A.

15. *See* discussion *infra* Part VII.B.

16. *See* School Bd. of Nassau County. v. Arline, 480 U.S. 273 (1987).

17. *See* discussion *infra* Part IX.A.

18. *See* discussion *infra* Part VIII.

ADA. In light of these authorities, the rulings by the United States Supreme Court incorrectly interpreted and construed the ADA in the context of mitigating measures.

The ADA covers a plethora of situations where discrimination can occur.[19] The primary focus of this Comment is on the ADA's definition of disability and the question of *who is disabled* within the meaning of the ADA in the context of employment discrimination, which is the same focus that the three United States Supreme Court cases involved.[20]

II. THE DEFINITION OF DISABILITY: THE THREE PRONGS

There are three different circumstances (prongs) under which an individual can be considered to have a *disability*[21] within the meaning of the ADA. Under the *first prong*, the ADA defines *disability* to mean "a physical or mental impairment that substantially limits one or more of the major life activities of an individual."[22] The *second prong* extends the status of *disability* to individuals who have "a record of such an impairment."[23] This provision protects individuals "who have recovered from a physical or mental impairment which previously substantially limited them . . . in a major life activity."[24] The *third prong* affords *disability* status to those individuals who are "regarded as having such an impairment."[25] This provision protects an individual "who has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment or has no physical or mental impairment but is treated by a covered entity as having such an impairment."[26] These three prongs are not mutually exclusive, discrete categories.[27] Rather, the definitions constitute overlapping categories "aimed at ensuring that individuals who now have, or ever had, a substantially limiting impairment are covered by the Act."[28]

Within this statutory scheme, there are numerous words and phrases that are ambiguous. The statute does not define *physical or mental impairment*, *substantially limits*, or *major life activity*, all of which are subject to a wide variety of reasonable interpretations.[29]

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19. The ADA covers discrimination in employment, housing, transportation, and access to public and private buildings, program, and services. *See* 42 U.S.C. §§ 12101-12213 (1994).

20. *See generally Sutton*, 119 S. Ct. at 2139; *Albertson's*, 119 S. Ct. at 2162; *Murphy*, 119 S. Ct. at 2133.

21. The ADA defines *disability* to mean "(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." 42 U.S.C. § 12102(2) (1994).

22. *Id.* § 12102(2)(A).

23. *Id.* § 12102(2)(B).

24. S. REP. No. 101-116, at 23 (1989).

25. 42 U.S.C. § 12102(2)(C).

26. S. REP. No. 101-116, at 23 (1989).

27. *See Sutton*, 119 S. Ct. at 2153 (Stevens, J., dissenting).

28. *Id.*

29. All of the United States Courts of Appeals have considered this issue in one form or another, and the incongruity of these opinions and rulings provide an excellent illustration of the reasonable person's ability to interpret the statutory language as having different meanings. *Compare* Bartlett v. New York State Bd. of Law

III. PRINCIPLES OF STATUTORY CONSTRUCTION AND INTERPRETATION

Before proceeding to the discussion of the meaning of these words and phrases within the ADA's definition of disability, it is necessary to briefly mention some fundamental principles of statutory construction, interpretation, and implementation, both in general and in regard to the ADA.

A. The Chevron Doctrine

The Supreme Court has examined the issue of statutory construction on several occasions. Much of the wisdom and precedent passed down by the Court in regard to statutory construction is synthesized in what has become known as the *Chevron* doctrine.[30] Under the *Chevron* doctrine, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency charged with interpreting the statute has provided a permissible construction of the statute.[31] "The court need not conclude that the agency construction was the only one it permissible could have adopted to uphold the construction, or even [that it is] the reading the court would have reached if the question initially had arisen in a judicial proceeding."[32]

An administrative agency's power to interpret and administer a congressionally created statute inherently includes the ability to formulate policy and construct rules and guidelines to clarify ambiguities left, implicitly or explicitly, by Congress.[33] The *Chevron* doctrine acknowledges that an administrative agency necessarily requires the ability to formulate policy and fill in gaps left by Congress.[34] When Congress has left such a gap, in the form of an ambiguity for instance, then "there is an express delegation of authority to the agency to elucidate

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Exam'rs, 156 F.3d 321, 329 (2d Cir. 1998), *vacated*, 119 S. Ct. 2388 (1999); Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 629 (7th Cir. 1998); Arnold v. United Parcel Serv., 136 F.3d 854, 859 (1st Cir. 1998); Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933, 937 (3d Cir. 1997); Gilday v. Mecosta County, 124 F.3d 760, 765 (6th Cir. 1997); Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 693 (1998); Harris v. H & W Contracting Co., 102 F.3d 516, 521 (11th Cir. 1996); Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996), *cert. denied*, 520 U.S. 1162 (1997) (all holding that mitigating measures must not be considered when determining whether an individual is substantially limited in a major life activity and, hence, disabled within the meaning of the ADA), *and* Washington v. HCA Health Serv. of Tex., Inc., 152 F.3d 464, 470-71 (5th Cir. 1998), *vacated*, 119 S.Ct. 2388 (holding that whether mitigating measures should be taken into consideration should be determined on a case-by-case basis, with consideration given to the nature and seriousness of the impairment and types of mitigating measures available), *with* Ellison v. Software Spectrum, Inc., 85 F.3d 187, 191 (5th Cir. 1996); Schluter v. Industrial Coils, Inc., 928 F. Supp. 1437, 1445 (W.D. Wis. 1996) ("If an insulin-dependent diabetic can control her condition with the use of insulin . . . she cannot argue that her life is substantially limited by her condition."); Murphy v. United Parcel Serv. Inc., 946 F. Supp. 872, 881 (D. Kan. 1996) (holding that mitigating measures must be considered when determining if an individual is substantially limited and, hence, disabled within the meaning of the ADA).

30. *See* Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (dealing factually with the Environmental Protection Agency's construction of the Clean Air Act Amendments of 1977).

31. *See id.* at 843.

32. *Id.* at 843, n. 11 (citations omitted).

33. *See* Morton v. Ruiz, 415 U.S. 199 (1974).

34. *See Chevron*, 467 U.S. at 843.

a specific provision of the statute by regulation."[35] "Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[36]

B. Equal Employment Opportunity Commission and the ADA

Congress authorized the Equal Employment Opportunity Commission (EEOC) to issue regulations to carry out the ADA's statutory mandates.[37] Pursuant to such authority, the EEOC has promulgated regulations to govern industry in the employment of disabled persons. To clarify the broad and ambiguous language of the ADA, the EEOC has issued several regulatory provisions clarifying the language of the ADA.[38] For further guidance, Interpretive Guidelines are attached as an appendix to these regulations.[39] The EEOC's Interpretive Guidelines constitute a set of interpretive rules and are, therefore, not binding law.[40] Contrasted with legislative regulations, which carry the force of law, non-regulatory interpretations such as the Interpretive Guidelines, receive a lesser, but still some degree of judicial deference "as long as it is a permissible construction of the statute."[41] The Supreme Court has found that "such administrative interpretations of the [ADA] by the enforcing agency, 'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"[42]

IV. CLARIFICATION OF ADA BY THE EEOC

The Interpretive Guidelines promulgated by the EEOC,[43] pursuant to the authority granted to it by Congress, have served to clarify the broad and ambiguous language of the ADA. The following background information will be helpful in adequately understanding the subsequent discussion of mitigating measures.

A. Physical and Mental Impairment

The EEOC defines a *physical impairment* as "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting . . ." a wide array

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35. *Id.* at 843-44.
36. *Id.* at 844 (citations omitted).
37. 42 U.S.C. § 12116 (1994).
38. *See* 29 C.F.R. pt. 1630 (1999) (Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act).
39. *See* 29 C.F.R. pt. 1630, app. (1999) (Appendix to Part 1630 – Interpretive Guidance on Title I of the Americans with Disabilities Act).
40. *See* Gilday v. Mecosta County, 124 F.3d 760, 766 (6th Cir. 1997) (Kennedy, J., concurring in part).
41. *Arnold v. UPS*, 136 F.3d at 864.
42. *Gilday*, 124 F.3d at 766 (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986)). *See* Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2155 (1999) ("at the very least, these interpretations 'constitute a body of experience and informed judgment to which [we] may properly resort' for additional guidance." (alterations in original) (quoting Skidmore v. Swift & Co., 323 U.S. 134 (1994)). *See also* Bragdon v. Abbott, 524 U.S. 624, 642 (1998); *Arnold*, 136 F.3d at 864.
43. *See supra* notes 38-39 and accompanying text.

of body parts or systems."[44] The EEOC defines *mental impairment* as "[a]ny mental or psychological disorder[45] such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[46] Additionally, the EEOC states that "the existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices."[47]

The EEOC does not attempt the impossible task of categorically defining specific illnesses, diseases, and afflictions that would indisputably be covered by the ADA.[48] However, the legislative history does elucidate a list of specific illnesses, diseases, and afflictions. For instance, the Senate Committee on Labor and Human Resources[49] stated that the phrase *physical or mental impairment* includes, but is not limited to, the following examples: "orthopedic, *visual*, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis . . . [HIV], cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, drug addiction, and alcoholism."[50]

B. Substantially Limited

The EEOC has determined that an individual is *substantially limited*[51] because of a *disability* in the following situations:

> [If the individual is] (i) unable to perform a major life activity that the average person in the general population can perform; or (ii) significantly restricted as to the condition, manner or duration under which an individual 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.[52]

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44. According to the EEOC, physical impairment means: "Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine . . ." 29 C.F.R. § 1630.2(h)(1) (1999).

45. A psychological disorder can be defined as "a pattern of behavioral or psychological symptoms that causes persons significant distress, impairs the [individual's] ability to function in one or more important areas of life, or both." AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: Dsm-IV 13 (4th ed. 1994).

46. 29 C.F.R. § 1630.2(h)(2) (1999).

47. *Id.* The EEOC goes on to exemplify this point, which will be addressed in considerable detail in subsequent sections, by stating that an individual with epilepsy would be considered to have an impairment without regard to any medications taken by the individual.

48. *Id.*

49. *See* S. REP. NO. 101-116, at 22 (1989).

50. S. REP. NO. 101-116, at 22 (1989) (emphasis added). *See also* 28 C.F.R. § 35.104(1)(A)(ii) (1999) (Department of Justice has adopted this list in its regulations applicable to all services, programs, and activities provided or made available by governmental entities).

51. The EEOC states several "factors that should be considered in determining whether an individual is *substantially limited* in a major life activity: the nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment."
29 C.F.R. § 1620.2(j)(2) (1999) (emphasis added).

52. *Id.* at § 1630.2(j)(1)(i)-(ii).

Although this definition can be interpreted to indicate that a mere difference could satisfy the *substantially limited* requirement, in *Albertson's, Inc. v. Kirkingburg*, the United States Supreme Court expressly rejected this determination by the Ninth Circuit, stating that the legislative purpose of the ADA would be thwarted by such a construction.[53]

C. *Major Life Activities*

The EEOC has determined that *major life activities* include "functions such as caring for oneself, performing manual tasks, walking, *seeing*, hearing, speaking, breathing, learning, and working."[54] There is some question as to whether *working* should be considered a *major life activity*.[55] It is undisputed that "[w]hen the major life activity under consideration is . . . working, . . . 'substantially limits' requires, at a minimum, that [the individual be] unable to work in a broad class of jobs."[56] This does not mean that an individual must be completely unable to work.[57] However, an individual does not qualify as unable to work in a broad class of jobs when she or he is capable of using personal skills in some form of employment, or if there is a variety of available jobs in which the individual can work.[58] The EEOC was cautious about unequivocally including *working* as a *major life activity* and promulgated a separate definition for the *major life activity of working*, as follows:

> With respect to the major life activity of working[, t]he term substantially limits means 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. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.[59]

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53. *Id.* at 2164 (stating that "[b]y transforming 'significant restriction' into 'difference,' the [Ninth Circuit] undercut the fundamental statutory requirement that only impairments that substantially limit [an individual's] ability to perform a major life activity constitute disabilities.").

54. 29 C.F.R. § 1630.2(i) (1999) (emphasis added).

55. *See* Sutton v. United Air Lines, 119 S. Ct. 2139, 2151 (1999) (stating that defining *major life activities* to encompass working "seems 'to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others] . . . then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap.'" (alterations in original) (quoting Tr. of Oral Argument in *School Bd. of Nassau County v. Arline*, O.T. 1986, No. 85-1277, p. 15 (argument of Solicitor General))).

56. *Sutton*, 119 S. Ct. at 2151.

57. *See id. See also* 29 C.F.R. pt. 1630, app. § 1630.2(j) (1999) (stating that "an individual does not have to be totally unable to work in order to be considered substantially limited in the major life activity of working.").

58. *See Sutton* at 2151.

59. 29 C.F.R. § 1630.2(j)(3)(i) (1999). Additionally, the EEOC identified three factors that should be considered when determining whether an individual is *substantially limited* in the major life activity of *working*:

> (A) The geographical area to which the individual has reasonable access; (B) [t]he job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills, or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or (C) [t]he job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not

D. The ADA's Prohibition Against Discrimination

Under the ADA, a *covered entity*[60] is prohibited from *discriminating*[61] against a *qualified individual*[62] with a *disability*[63] because of the disability of such individual.[64] "[A] plaintiff claiming a cause of action under the ADA bears the burden of proving . . . that he is a qualified individual."[65] The ADA defines the phrase *qualified individual with a disability* to mean "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."[66] The ADA explicitly grants at least some deference to the employer's judgment as to what functions of a job are *essential*, and further states that "if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."[67]

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utilizing similar training, knowledge, skills, or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Id. at § 1630.2(j)(3)(ii)(A)-(C).

60. 42 U.S.C. § 12111(2) (1994) ("The term covered entity means an employer, employment agency, labor organization, or joint labor-management committee.").

61. The term discriminate, in the context of employment, includes:

(1) [L]imiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee; (2) participating in a contractual . . . arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by the title (such relationship includes a relationship with an employment or referral agency, labor union . . .); (3) utilizing standards, criteria, or methods of administration (A) that have the effect of discrimination on the basis of disability; or (B) that perpetuate the discrimination of others who are subject to common administrative control; (4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association; (5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee . . .; or (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant; (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and (7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills [and] aptitude . . . of such applicant or employee . . . rather than reflecting . . . [the disability].

42 U.S.C. § 12112(b)(1)-(7) (1994).

62. A *qualified individual* with a disability is identified 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." *See id.* § 12111(8).

63. *See supra* notes 21-26 and accompanying text. *See also* 42 U.S.C. § 12102(2) (1990) (definition of disability in the ADA).

64. *See* 42 U.S.C. § 12112(a) (1994).

65. Albertson's Inc. v. Kirkingburg, 119 S. Ct. 2162, 2175 (1999).

66. 42 U.S.C. § 12111(8) (1994) (emphasis added).

67. *Id. See also Albertson's*, 119 S.Ct. at 2175.

1. Qualification Standards

The ADA allows employers to establish *qualification standards* that result in excluding an individual with a disability.[68] However, "such standards [must be] job-related and consistent with business necessity."[69] Moreover, there can be no reasonable accommodations available for the employer to undertake to assist the disabled individual in satisfying the standard.[70] The EEOC's regulations implementing Title I define qualification standards to mean "the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired."[71]

a. Direct Threat

One type of qualification standard that an employer may mandate is "a requirement that an individual shall not pose a *direct threat* to the health or safety of other individuals in the workplace."[72] Direct threat is defined by the ADA as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[73] The ADA's direct threat "criterion ordinarily requires 'an individualized assessment of the individual's present ability to safely perform the essential functions of the job,' 'based on medical or other objective evidence' . . . ."[74] The EEOC Interpretive Guidelines to Title I of the ADA require that safety-related standards imposed by employers be evaluated under the ADA's direct threat standard.[75]

b. Federal Laws or Regulations

The ADA also allows an employer to establish a qualification standard that is

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68. *See* 42 U.S.C. § 12113(a).
69. *Id.*
70. *See id.*
71. 29 C.F.R. § 1630.2(q) (1999). *See also Albertson's*, 119 S. Ct. at 2170, n.4
72. 42 U.S.C. § 12113(b) (1994) (emphasis added).
73. *Id.* § 12111(3). *See also* 29 C.F.R. § 1630.2(r) (1999) (EEOC stating that "[d]irect [t]hreat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodations.").
74. *Albertson's* at 2170 (quoting 29 C.F.R § 1630.2(r); Bragdon v. Abbott, 524 U.S. 624, 649 (1998)) (citations omitted). *See also* 29 C.F.R. § 1630.2(r) (1999) (EEOC stating that individualized assessment of an individual's present ability to safely perform the essential functions of the job "shall be based on reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective means.").
75. *See* 29 C.F.R. pt. 1630, app., §§1630.15(b)-(c) (1999) (EEOC specifically stating that safety requirements that screen out individuals with disabilities must come under the scrutiny of the direct threat standard in 29 C.F.R. § 1630.2(r)).

"required or necessitated by another Federal law or regulation."[76] "When Congress enacted the ADA, it recognized that federal safety rules would limit application of the ADA as a matter of law."[77] Both houses of Congress addressed this matter within their respective reports:

> The Senate Labor and Human Resources Committee Report on the ADA stated that "a person with a disability applying for or currently holding a job subject to [DOT standards for drivers] must be able to satisfy these physical qualification standards in order to be considered a qualified individual with a disability under title I of this legislation." The two primary House Committees shared this understanding.[78]

V. RECENT UNITED STATES SUPREME COURT CASES

As previously mentioned,[79] in June of 1999 the United States Supreme Court handed down three decisions interpreting the scope of the ADA.[80] The Supreme Court's focus was on mitigating measures and the question of *who is disabled* within the meaning of the ADA. Brief factual and procedural descriptions of these cases follow.

A. Sutton v. United Air Lines, Inc.[81]

The plaintiffs in *Sutton* were twin sisters who both suffered from severe myopia.[82] Their respective visions, in an uncorrected state, were so bad that they could not see well enough to perform basic life tasks such as driving or partake in simple pastime activities such as watching television and shopping.[83] However, with glasses, each sister had 20/20 vision or better. Both sisters applied at United Air Lines for jobs as commercial airline pilots. They both met all Federal Aviation Administration requirements except the requirement that they have *uncorrected* visual acuity of 20/100 or better.[84] Consequently, both sisters were told that they could not fly commercial aircraft. After receiving right to sue letters from the EEOC, the sisters brought an action against United Air Lines alleging that it discriminated against each of them based on their disabilities, in violation of the

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76. *Albertson's*, 119 S. Ct. at 2171. "The implementing regulations of Title I also recognize a defense to liability under the ADA that 'a challenged action is required or necessitated by another Federal law or regulation.'" (quoting 29 C.F.R. pt. 1630, app., § 1630.15(e)). *Id.* at 2171, n.15.

77. *Id.* at 2172.

78. *Id.* at 2172-73 (quoting S. REP. NO. 101-116, at 27-28 (1998)) (alterations in original) (citations omitted). The House Reports referred to are H.R. REP. NO. 101-485, pt. 2, at 57 (1990) (House Education and Labor Committee Report); *id.* at pt. 3, at 34 (House Judiciary Committee Report).

79. *See* cases cited *supra* note 12.

80. *Id.*

81. 119 S. Ct. 2139 (1999).

82. *See Sutton*, 119 S. Ct. at 2143.

83. *See id.*

84. *See id.*

ADA, or, in the alternative, that United Air Lines had discriminated against them because it regarded them as having a disability, in violation of the ADA.[85]

The case originated in the United States District Court for the District of Colorado, which dismissed the claims.[86] The sisters then appealed to the United States Court of Appeals for the Tenth Circuit, which affirmed the district court's decision.[87] The Tenth Circuit held that although the sister's vision in an uncorrected state did render them disabled within the meaning of the ADA, such disability determination must be considered with regard to measures utilized by the individual to mitigate the effects of the disability.[88] Therefore, the court found that the sisters were not disabled within the meaning of the ADA when their respective visions were evaluated in a corrected state.[89] The sisters then appealed their cause to the United States Supreme Court, which in a seven-member majority opinion, affirmed the Tenth Circuit's ruling. Justice Stevens, joined by Justice Breyer, delivered a sharp and persuasive dissenting opinion in which he completely disagreed with the majority's construction and interpretation of the ADA concerning the issue of mitigating measures.[90]

B. Albertson's, Inc. v. Kirkingburg[91]

The plaintiff in *Albertson's* applied for a job as truck driver for defendant Albertson's Inc., a grocery-store chain.[92] Kirkingburg had "amblyopia, an uncorrectable condition that [left] him with 20/200 vision in his left eye and monocular vision in effect."[93] Kirkingburg was initially erroneously certified as meeting the Department of Transportation's visual acuity requirements; however, his visual problems were discovered upon retesting after a leave of absence from work. Thereafter, Albertson's refused to rehire him because of his visual impairment.[94]

Kirkingburg brought suit against Albertson's in the United States District Court for the District of Oregon. The District Court entered summary judgment for Albertson's, stating that Kirkingburg was not an otherwise qualified truck driver capable of performing the job without an accommodation because he could not meet the Department of Transportation's visual acuity requirements.[95] The United States Court of Appeals for the Ninth Circuit reversed, stating that Kirkingburg was substantially limited in the major life activity of seeing and, hence, disabled within the meaning of the ADA, and that Albertson's had discriminated against Kirkingburg because he had obtained a waiver of Department of Transportation

85. *See id.*
86. *See id.* at 2144.
87. *See* Sutton v. United Air Lines, Inc., 130 F.3d 893, 895 (10th Cir. 1997), *aff'd*, 119 S. Ct. 2139 (1999).
88. *See id.* at 893.
89. *See id.* at 906.
90. *See Sutton*, 119 S. Ct. at 2152-62 (Stevens, J., dissenting).
91. 119 S. Ct. 2162 (1999).
92. *See id.* at 2165.
93. *Id.* at 2165-66.
94. *See id.* at 2166.
95. *See id.*

Regulations.[96] The United States Supreme Court reversed the Ninth Circuit, ruling that Kirkingburg was not disabled within the meaning of the ADA because his brain had developed the ability to compensate for the lack of vision in his left eye.[97] This compensating ability of Kirkingburg's brain was held to constitute a mitigating measure that ameliorated the effects of his vision impairment.[98] Justice Stevens and Justice Breyer joined parts I and III of the opinion.[99] Part II of the opinion dealt with mitigating measures.[100]

C. Murphy v. United Parcel Service, Inc.[101]

The plaintiff in *Murphy* had been fired from his job as a United Parcel Service ("UPS") mechanic because an essential function of his job was driving commercial motor vehicles.[102] The reason for his termination was that he suffered from hypertension (high blood pressure).[103] Department of Transportation regulations prohibited an individual from driving "'a commercial motor vehicle' [in interstate commerce when that individual has been clinically diagnosed with] 'high blood pressure [that is] likely to interfere with his/her ability to operate a commercial motor vehicle safely.'"[104] With the exception of Mr. Murphy's blood pressure in an unmedicated state, he was completely qualified for the job.[105]

Murphy brought suit in the United States District Court for the District of Kansas, which granted summary judgment for UPS.[106] The United States Court of Appeals for the Tenth Circuit, affirmed in an unpublished opinion.[107] The action was then appealed to the United States Supreme Court which held, again in a seven-Justice majority, that Murphy was not substantially limited in a major life activity and, hence, not disabled within the meaning of the ADA because his high blood pressure medication ameliorated the effects of his hypertension.[108] As in *Sutton*, Justice Stevens and Justice Breyer dissented, stating that an individual should be evaluated in an unmitigated state to determine if she/he is substantially limited in a major life activity and, hence, disabled within the meaning of the ADA.[109]

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96. *See* Kirkingburg v. Albertson's Inc., 143 F.3d 1228 (9th Cir. 1998), *rev'd*, 119 S. Ct. 2162 (1999).
97. *See Albertson's*, 119 S. Ct. 2162.
98. *See id.*
99. *See id.* at 2165.
100. *See id.* at 2167-2169.
101. 119 S. Ct. 2133 (1999).
102. *See id.* at 2136.
103. *See id.*
104. *Id.* (quoting 49 C.F.R. § 391.41(a), (b)(6) (1998)).
105. *See id.* (citation omitted). *See also* Murphy v. United Parcel Serv., Inc., 946 F. Supp. 872, 875 (D. Kan. 1996). At the trial in the district court, testimony was received from Murphy's own physician and a medical expert called by UPS. *Id.* Both testified that "Murphy's hypertension [did] not significantly restrict his activities and that in general he can function normally and can engage in activities that other persons normally do." *Id.*
106. *See Murphy*, 946 F. Supp. at 874.
107. *See* Murphy v. United Parcel Serv., Inc., No. 96-3380, 1998 WL 105993, (10th Cir. 1998), *aff'd*, 119 S. Ct. 2133 (1999) (the 10th Circuit, in its unpublished opinion, held as it did in *Sutton v. United Air Lines, Inc.*, that mitigating measures must be considered). *See also supra* note 88 and accompanying text.
108. *See Murphy*, 119 S. Ct. at 2137.
109. *See id.* at 2139. *See also supra* note 90 and accompanying text.

VI. MITIGATING MEASURES

Mitigating measures have been the subject of much litigation since the ADA was signed into law by Congress in 1990.[110] The question of mitigating measures is an interesting one, and undoubtedly one that was in need of resolution. Practically every Federal Court of Appeals has addressed the issue and, although there was uniformity among the majority of the circuits, there were still widely divergent rulings being handed down.[111] As previously mentioned and explicated, in June of 1999 the United States Supreme Court stepped in to establish a final interpretation and construction of the ADA in the context of mitigating measures.[112] However, the effect of the Supreme Court's rulings in these three cases was to significantly and wrongfully exclude millions of Americans from the sanctuary of protection that Congress intended and designed the ADA provide.

The question that mitigating measures poses is, at first glance, relatively simple -- should the effects of measures taken to correct for, or mitigate, an individual's impairment be taken into account when assessing whether that individual is substantially limited in a major life activity and, hence, disabled within the meaning of the ADA?[113] Inherent within this question is the question -- who is disabled within the meaning of the ADA? As simplistic as these definitions may seem at first glance, when put within the broad and ambiguous language of the ADA, confusion and disagreement can easily result, especially when an overly active and intense analysis of Congress' implicit intent is undertaken. And a lengthy interpretation of congressional intent is exactly what the United States Supreme Court undertook in deciding these questions. However, the result reached by the majority of the Justices of the Supreme Court is contrary to a great weight of persuasive authority that had previously undertaken the task of answering these questions.[114]

A. The U.S. Supreme Court's Decision on Mitigating Measures

The United States Supreme Court decided that mitigating measures *must be* taken into consideration when determining if an individual is substantially limited in a major life activity and, hence, disabled within the meaning of the ADA.[115]

Mitigating measures include artificial aids such as medicines and prosthetic devices.[116] Additionally, the Supreme Court held that those things constituting

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110. *See supra* note 29.
111. *See id.*
112. *See supra* Part V.A-C.
113. *See Sutton*, 119 S. Ct. at 2146; *Albertson's*, 119 S. Ct. at 2164; *Murphy*, 119 S. Ct. at 2137.
114. *See* discussion *infra* Parts VII-IX.
115. *See supra* note 113.
116. *See Sutton*, 119 S. Ct. at 2145. *Accord Albertson's*, 119 S. Ct. at 2169.

mitigating measures do not stop merely at medicines and prosthetic devices.[117] Rather, the term mitigating measures includes compensating measures taken by the individual and the body's own adaptive systems.[118] In *Albertson's*, the Supreme Court stated that there is "no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not with the body's own systems."[119] In *Albertson's*, the Supreme Court determined that the plaintiff's "brain [had] developed subconscious mechanisms for coping with [his] visual impairment and thus his body compensate[d] for his disability."[120]

The use or non-use of medications, prosthetic devices, and other ameliorative measures is not, by itself, determinative of whether an individual is *disabled* within the meaning of the ADA.[121] Even if an individual is undertaking some mitigating measure, that individual may still qualify as disabled under "subsection A, if, notwithstanding the use of a corrective . . . [measure], that individual is substantially limited in a major life activity."[122] In assessing the effects of mitigating measures undertaken by an individual to correct for or alleviate a physical or mental impairment, the Court will examine not only the positive effects of such measures, but also any negative side effects that occur.[123]

B. The Majority's Justification Versus the Dissent's Reasoning

The majority of Justices of the United States Supreme Court justified their mitigating measures determination on three separate ADA provisions.[124] First, the Court reasoned that because the ADA uses the phrase *substantially limits*[125] "in the present indicative verb form, . . . the language is properly read as requiring that a person be presently – not potentially or hypothetically – substantially limited in order to demonstrate a disability."[126] According to the majority, an individual who can alleviate the effects of his/her disability through the use of medications or other ameliorative measures does not suffer from a disability that *substantially limits* a major life activity.[127]

Justice Stevens, in his dissenting opinion, expressly disagreed with the majority's view in this respect, stating that "the statute's three-pronged definition . . . makes it pellucidly clear that Congress intended the Act to cover such

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117. *See Albertson's* at 2168-69 (determining that "Kirkingburg's 'brain has developed subconscious mechanisms for coping with [his] visual impairment' . . . such as 'adjustments to the manner in which he sensed depth and perceived peripheral objects' . . . ." (quoting *Albertson's* 143 F.3d 1232) (citations omitted)).
118. *See id.*
119. *Id.*
120. *Id.* at 2168. *See also supra* note 93 and accompanying text.
121. *See Sutton*, 119 S. Ct. at 2149.
122. *Id.*
123. *See id.* at 2146.
124. *See Sutton*, 119 S. Ct. at 2146-48.
125. The phrase *substantially limits* appears in the first prong of the ADA's definition of disability. *See supra* text accompanying notes 21, 51-53.
126. *Sutton*, 119 S. Ct. at 2146.
127. *See id.* at 2146-47.

persons."[128] "The three parts of [the ADA's] definition [of disability] do not identify mutually exclusive, discrete categories. On the contrary, they furnish three overlapping formulas aimed at ensuring that individuals who now have, or ever had, a substantially limiting impairment are covered by the Act."[129] "The three prongs ... are most plausibly read together not to inquire into whether a person is currently "functionally" limited in a major life activity, but only into the existence of an impairment - present or past - that substantially limits, or did so limit, the individual before amelioration."[130]

The second provision cited by the majority in support of its ruling was that the ADA explicitly requires that determining whether a person has a disability is an individualized determination.[131] "The Act expresses that mandate clearly by defining 'disability' 'with respect to an individual,' and in terms of the impact of an impairment 'on such individual' . . . ."[132] Thus, "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."[133]

In the dissenting opinion, Justice Stevens does not quarrel with the majority's belief "that the letter and spirit of the ADA" requires an individualized determination of whether a person has a disability within the meaning of the ADA.[134] However, Justice Stevens argues that the majority's position concerning the issue of mitigating measures "actually condones treating individuals merely as members of groups."[135]

Finally, the majority relied on the *congressional findings*,[136] which they claimed clearly indicate that "Congress did not intend to bring under the . . .

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128. *Id.* at 2154 (Stevens, J., dissenting).

129. *Id.* at 2153 (Stevens, J., dissenting). Justice Stevens provides an example of why the three-pronged definition of disability in the ADA must be read as one formula:

> There are many individuals who have lost one or more limbs in industrial accidents, or perhaps in the service of their country .... With the aid of prostheses, coupled with courageous determination and physical therapy, many of these hardy individuals can perform all of their major life activities just as efficiently as an average couch potato. If the Act were just concerned with their present ability to participate in society, many of these individuals' physical impairments would not be viewed as disabilities. Similarly, if the statute were solely concerned with whether these individuals viewed themselves as disabled - or with whether a majority of employers regarded them as unable to perform most jobs - many of these individuals would lack statutory protection from discrimination based on their prostheses.

Id. at 2153-54 (Stevens, J., dissenting).

130. *Id.* at 2154 (Stevens, J., dissenting).

131. *See Sutton*, 119 S. Ct. at 2147 (relying on 42 U.S.C. § 12102(2) (1994) as authority for the proposition that the ADA calls for an individualized determination of disability). *Accord Albertson's* at 2169. *See also* 29 C.F.R. pt. 1630, app. background (1999) (stating that disability should be assessed on a case-by-case basis).

132. *Albertson's*, 119 S. Ct. at 2169 (quoting 42 U.S.C. § 12102(2); *Sutton*, 119 S. Ct. 2147) (citations omitted).

133. *Id.* (citing *Sutton* at 2139).

134. *Sutton*, 119 S. Ct. at 2159 (Stevens, J., dissenting).

135. *Id.* In the factual context of *Sutton*, Justice Stevens argues that the majority's "misdirected approach permits any employer to dismiss out of hand every person who has uncorrected eyesight worse than 20/100 without regard to the specific qualifications of those individuals or the extent of their abilities to overcome their impairment." *Id.* Justice Stevens then extends this analysis to factual situations involving a person with epilepsy or diabetes whose illness is controlled with medication. *Id.*

136. *See supra* text accompanying note 3.

[ADA's] protection all . . . [individuals] whose uncorrected conditions amount to disabilities."[137] According to the majority, if Congress had intended for the ADA's coverage to extend to all individuals with uncorrected and corrected physical and mental impairments, the number of disabled Americans in the congressional findings would have been much higher than 43 million.[138] "That it did not is evidence that the ADA's coverage is restricted to only those whose impairments are not mitigated by corrective measures."[139]

The dissent expressly rejects this argument, stating that the majority's "tenacious grip on Congress' finding that 'some 43,000,000 Americans have one or more physical or mental disabilities'" is a "'statement of congressional findings that is a rather thin reed upon which to base a statutory construction.'"[140] Furthermore, Justice Stevens argues that the 43 million figure was borrowed from a law review article and was certainly not intended by Congress as a ceiling on the ADA's intended protected class of individuals.[141]

VII. CONGRESSIONAL INTENT AND EXECUTIVE AGENCIES' GUIDELINES & REGULATIONS

The Judiciary was not the first branch of government that undertook the task of interpreting the ADA in the context of mitigating measures. Both the legislative and executive branches have spoken on the issue as well. In Congress, both the

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137. *Sutton*, 119 S. Ct. at 2142. The 43,000,000 figure relied out by the majority as support for their position is of questionable origin.

> Although the exact source of the 43 million figure is not clear, the corresponding finding in the 1988 precursor to the ADA was drawn directly from a report prepared by the National Council of Disability. That report detailed the difficulty of estimating the number of disabled persons due to varying operational definitions of disability. It explained that the estimates of the number of disabled Americans ranged from an overinclusive 160 million under a "health conditions approach," which looks at all conditions that impair the health or normal functional abilities of an individual, to an underinclusive 22.7 million under a "work disability approach," which focuses on individual's reported ability to work. It noted that "a figure of 35 or 36 million [was] the most commonly quoted estimate." . . . Roughly two years after issuing its 1986 report, the National Council on Disability issued an updated report. This 1988 report settled on a more concrete definition of disability. It stated that 37.3 million individuals have "difficulty performing one or more basic physical activities," including "*seeing*, hearing, speaking, walking, using stairs, lifting or carrying, getting around outside, getting around inside, and getting into or out of bed." The study from which it drew this data took an explicitly functional approach to evaluating disabilities.

Id. at 2147-48 (quoting NATIONAL COUNCIL ON DISABILITY, TOWARD INDEPENDENCE 10 (1986); ON THE THRESHOLD OF INDEPENDENCE 19 (1988)) (citations omitted) (alterations in the original) (emphasis added).

138. *See Sutton*, 119 S. Ct. at 2149 (stating that the if Congress had intended the ADA to cover all of these people that the number of disabled Americans cited in the congressional finding s would have easily exceeded 160 million.) *See also* NATIONAL ADVISORY EYE COUNCIL, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, VISION RESEARCH – A NATIONAL PLAN: 1999-2003 p.7 (1998) (more than 100 million Americans that suffer from vision impairments); NATIONAL INSTITUTES OF HEALTH, NATIONAL STRATEGIC RESEARCH PLAN: HEARING AND HEARING IMPAIRMENT v (1996) (the number of Americans that have impaired hearing exceeds 28 million); TINDALL, STALKING A SILENT KILLER: HYPERTENSION, BUSINESS & HEALTH 37 (1998) (the number of Americans with high blood pressure is approximately 50 million).

139. *Sutton*, 119 S. Ct. at 2149.

140. *Id.* at 2160 (Stevens, J., dissenting).

141. *Id.*

Senate and House of Representatives addressed the question of mitigating measures in various committee reports on the ADA.[142] Additionally, the EEOC, in furtherance of its obligation to issue regulations to carry out the statutory mandates of the ADA, has issued interpretive guidelines on mitigating measures.[143] Moreover, several executive agencies have delivered interpretations of the ADA that provide an answer to the question of mitigating measures.[144] All of these reports and interpretations express uniform answers to the question of mitigating measures, and all are completely contrary to the view elucidated by the United States Supreme Court in the *Sutton*, *Albertson's*, and *Murphy* decisions.[145]

A. Legislative History

The recent interpretation and construction by the majority of the United States Supreme Court[146] concerning the issue of mitigating measures was contrary to the legislative interpretation and construction of the statute. "The [Senate and House] Committee Reports on . . . the ADA make it abundantly clear that Congress intended the ADA to cover individuals who could perform all of their major life activities only with the help of ameliorative measures."[147] Indeed, all of the Congressional Reports are "replete with references to the understanding that the [ADA's] protected class includes individuals with various medical conditions that ordinarily are perfectly 'correctable' with medication or treatment."[148]

The Report of the Senate Committee on Labor and Human Resources,[149] while specifically addressing the legislature's intent regarding the *first prong*[150] of the ADA, 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."[151] This Senate Committee also states that an important objective of the *third prong*[152] of the ADA is 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."[153] For illustration, the Report explains that "individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified" because of negative attitudes and misinformation regarding their disabilities.[154]

These two propositions initially appear to be contradictory. On the one hand, the Report declares that mitigating measures should not be considered in determin-

142. *See* discussion *infra* Part VII.A.
143. *See* discussion *infra* Part VII.B.1.
144. *See* discussion *infra* Part VII.B.2.
145. *See supra* note 113.
146. *See Sutton*, 119 S. Ct. 2139; *Albertson's*, 119 S. Ct. 2162; *Murphy*, 119 S. Ct. 2133.
147. *Sutton*, 119 S. Ct. at 2154 (Stevens, J., dissenting).
148. *Id.* at 2155 (Stevens, J., dissenting).
149. *See* S. REP. No. 101-116 (1989).
150. *See supra* text accompanying note 22.
151. S. REP. No. 101-116, at 23 (1989).
152. *See supra* text accompanying notes 25-26.
153. S. REP. No. 101-116, at 24 (1989).
154. *Id.*

ing if an individual is disabled.[155] On the other hand, the Report indicates that if an individual is capable of controlling a disability, such as diabetes or epilepsy, the individual is not currently limited in a major life activity.[156] However, these two propositions, if viewed in concert and interpreted in the context of the primary purpose[157] of the ADA, are not contradictory but, rather, they are complementary. It is conceivable that the Senate Committee is expressing a dual form of protection.[158] Under the *first prong*,[159] individuals with disabilities such as diabetes or epilepsy are protected under the ADA because they are disabled when viewed without regard to mitigating measures.[160] In the alternative, these individuals are protected under the *third prong*[161] against irrational and prejudicial opinions and sentiments regarding their disabilities, even when their disabilities are under control.[162]

This interpretation is consistent with that of the United States Supreme Court in *School Board of Nassau County, Florida v. Arline*, where the Supreme Court concluded that the definition of a disabled individual includes "not only those [individuals] who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity."[163]

The House of Representatives took a stance similar to that of the Senate regarding the consideration of the effects of mitigating measures. For example, the Report of the House Committee on the Judiciary[164] states that "[t]he impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation."[165] The House Committee Report exemplifies this by stating that an individual with a hearing impairment is covered by the ADA, "even if the hearing loss is corrected by the use of a hearing aid."[166] As justification for this view, the House Committee relied upon the Supreme Court's opinion in *School Board of Nassau County, Florida v. Arline*, where the Supreme Court stated that "[s]uch an impairment might not diminish a person's physical or mental capabilities, but could

155. *See supra* text accompanying note 151.
156. *See supra* text accompanying notes 152-53.
157. *See supra* text accompanying note 10.
158. *See* S. REP. NO. 101-116, at 23-24 (1989); School Board of Nassau County, Fla. v. Arline, 480 U.S. 273 (1987). *See also supra* text accompanying notes 27-28.
159. *See supra* note 150.
160. *See supra* note 155.
161. *See supra* note 152.
162. *See supra* note 156.
163. 480 U.S. 273, 284 (1987). This case deals specifically with the Rehabilitation Act of 1973, which was the precursor to the ADA. *See* Bragdon v. Abbott, 118 S. Ct. 2196, 2198 (1998). Actually, much of the language of the ADA was taken directly from the Rehabilitation Act. *See* S. REP. NO. 101-116, at 2 (1989). For Example, the Rehabilitation Act defined a *handicapped individual* to be a person who "(i) has a physical or mental impairment which substantially limits one or more of such persons major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(7)(B). The ADA specifically requires that "nothing in [the ADA] should be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 . . . ." 42 U.S.C. § 12201(a).
164. *See* H.R. REP. NO. 101-485, p. III (1990).
165. *Id.* at 28.
166. *Id.* at 29.

nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment."[167] This reasoning is in line with Congress' acknowledgment that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from [the] actual impairment."[168]

The House Committee on Education and Labor[169] went even further in expressing Congress' intent to exclude mitigating measures from consideration when determining whether an individual is disabled with the meaning the ADA. This House Report explicitly states that an individual will still be protected under the *first prong*[170] of the disability definition even if the effects of the disability are ameliorated by mitigating measures.[171]

> Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, *persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.*[172]

It is clear from the House and Senate Reports explicated above that the widespread Congressional view, at the time of the ADA's enactment, was that mitigating measures should not be considered when determining if an individual falls within the ADA's protected class. Yet, the United States Supreme Court found it to be Congress' intent that mitigating measures be considered in determining whether an individual is substantially limited in a major life activity and, hence, disabled within the meaning of the ADA.[173] The majority of the Supreme Court either chose to ignore the Reports of Congress or put more weight on the congressional finding that 43,000,000 Americans are disabled.[174]

B. Executive Agencies' Interpretation of ADA

The Senate and House are not the only governmental bodies to interpret the ADA as excluding consideration of mitigating measures when determining if an individual is disabled within the meaning of the ADA. In addition, "each of the three Executive agencies charged with implementing the Act has consistently

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167. 480 U.S. 273, 283 (1987). *See also supra* note 163.
168. S. REP. NO. 101-116, at 24 (1989); S. REP. NO. 93-1297, at 50 (1974); H.R. REP. NO. 101-485, p. III, at 53 (1990).
169. H.R. REP. NO. 101-485, pt. II (1990).
170. *See supra* note 150.
171. H.R. REP. NO. 101-485, pt. II, at 52 (1990).
172. *Id.* (emphasis added).
173. *See supra* notes 113, 146.
174. *See supra* text accompanying notes 136-39.

interpreted the Act as mandating that the presence of disability turns on an individual's uncorrected state."[175] The interpretations by the EEOC, Department of Justice, and Department of Transportation are in unison with the interpretations embraced in the Senate and House of Representatives Committee Reports[176] concerning the issue of mitigating measures, and consequently, are in complete opposition to the view adopted by the United States Supreme Court.[177]

1. The EEOC's Answer to the Question of Mitigating Measures

The EEOC[178] has promulgated many regulations interpreting the ADA.[179] These interpretations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[180] "[A] court may not substitute its own construction of a statutory provision for a reasonable [agency] interpretation."[181]

In multiple instances, the EEOC has held 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.*"[182] The EEOC reiterates this same point stating that "[t]he existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices."[183] This principle is exemplified by the following illustrations:

> An individual who uses artificial legs would . . . be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication.[184]

The EEOC maintained its view on the issue of mitigating measures when it

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175. *Sutton*, 119 S. Ct. 2155 (Stevens, J., dissenting) ("executive agencies" refers to the EEOC, Department of Justice, and Department of Transportation).

176. *See supra* Part VII.A.

177. *See supra* note 173.

178. Congress authorized the EEOC to issue regulations to enforce and carry out the statutory mandates of the ADA. *See supra* text accompanying note 37.

179. Congress authorized the EEOC to issue regulations to carry out the statutory mandates of the ADA. *See* 42 U.S.C. § 12116 (1990). *See also supra* text accompanying notes 30-36 (discussing the persuasive force of these regulations).

180. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) (citations omitted).

181. *Id.*

182. 29 C.F.R. pt. 1630, app. § 1630.2(j) (1999) (emphasis added).

183. *Id.* § 1630.2(h) (citing S. REP. No. 101-116, at 23 (1989); H.R. REP. No. 101-485, pt. II, at 52 (1990); H.R. REP. No. 101-485, pt. III, at 28 (1990)).

184. *Id.* § 1630.2(j) (citing S. REP. No 101-116, at 23 (1989); H.R. REP. No. 101-485, pt. II, at 52 (1990)).

stated in its amicus curiae brief[185] to the United States Supreme Court in the *Sutton v. United Air Lines, Inc.*[186] case that "the question whether an individual has a disability under the ADA must be answered without regard to mitigating measures that the individual takes to ameliorate the effects of the impairment."[187] In the context of the factual circumstances of *Sutton*, the EEOC stated that "there is nothing about poor vision that would justify adopting a different rule in this case."[188]

2. The Department of Justice and Department of Transportation

This uniformity of views on excluding mitigating measures from consideration when determining whether an individual is disabled does not end with the Senate, House of Representatives, and EEOC. Additionally, the Department of Justice[189] and the Department of Transportation[190] have adopted identical views on mitigating measures in their respective regulations.

The Department of Justice has stated in its regulations that "[t]he question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids and services."[191] The Department of Transportation issued a regulation identical to that of the Department of Justice.[192] The regulations also provide the following familiar examples:

> [A] person with a hearing loss is substantially limited in the major life activity of hearing, even though the hearing loss may be improved through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, that substantially limit a major life activity, are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

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185. *See* Brief for the United States and the Equal Employment Opportunity Commission as Amicus Curiae Supporting Petitioners, Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999) (No. 97-1943) (the "United States" stated in the Brief designation refers to the Department of Justice).

186. 119 S. Ct. 2139 (1999).

187. Brief for the United States and the Equal Employment Opportunity Commission as Amicus Curiae Supporting Petitioners at 6, *Sutton* (No 97-1943). Numerous other organizations and individuals submitted Amicus Curiae Briefs in support of this same proposition. *See* discussion *infra* Part VIII.

188.

189. The Department of Justice has been granted authority by Congress to implement regulations applicable to all services, programs, and activities provided or made available by public entities. *See* 42 U.S.C. § 12134(a) (1994).

190. The Department of Transportation has been granted authority by Congress to implement regulations to carry out the transportation related provisions of Title II and III of the ADA. *See* 42 U.S.C. §§ 12149(a), 12186(a)(1) (1994). *See also* 49 C.F.R. § 37.1 (1999).

191. 28 C.F.R. pt. 35, app. A, § 35.104 (1999)

192. *See* 49 C.F.R. § 37.3 (1999).

VIII. PERSUASIVE OPINIONS - AMICUS CURIAE BRIEFS

The Supreme Court's decisions in the *Sutton*,[193] *Albertson's*,[194] and *Murphy*[195] cases were of great interest to numerous organizations and individuals, which was evidenced by the submission of over twenty amicus curiae briefs between the three cases. Although there were numerous amicus briefs submitted that opined a view requiring the consideration of mitigating measures,[196] the majority of the amicus briefs supported the exclusion of mitigating measures as a consideration when determining whether an individual is substantially limited in a major life activity and, hence, disabled within the meaning of the ADA.

The amicus curiae briefs supporting exclusion of mitigating measures were submitted by highly respected and distinguished organizations and individuals.[197] Although amicus briefs do not carry the weight of legal authority,[198] these briefs present highly persuasive opinions because of the esteem with which the proponents are held.[199]

A few of the organizations submitting amicus briefs that supported the exclusion of mitigating measures as a consideration in determining whether an individual is disabled within the meaning of the ADA include: The Equal Employment Opportunity Commission (EEOC),[200] The American Civil Liberties Union (ACLU),[201] The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO),[202] AIDS Action,[203] The National Employment Lawyers

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193. 119 S.Ct. 2139 (1999).

194. 119 S.Ct. 2162 (1999).

195. 119 S.Ct. 2133 (1999).

196. Among the distinguished organizations that submitted amicus briefs supporting the consideration of mitigating measures were: The Society for Human Resource Management, the Labor Policy Association, the Air Transport Association of America, The Equal Employment Advisory Council, the Chamber of Commerce of the United States of America, and the Michigan Manufacturers Association. Not surprisingly, all of these organizations represent *employers*.

197. *See infra* text accompanying notes 200-05.

198. Amicus curiae briefs are merely briefs submitted by "friends of the court" who hold a "strong interest in or views on the subject matter of [the] action, . . . ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views." BLACK'S LAW DICTIONARY 82 (6th ed. 1990).

199. *See infra* notes 202-04, 217-22 and accompanying text.

200. *See* Brief for the United States and the Equal Employment Opportunity Commission as Amicus Curiae Supporting Petitioners, Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999) (No. 97-1943) (the "United States" stated in the Briefs designation refers to the Department of Justice).

201. *See* Brief Amicus Curiae of The American Civil Liberties Union in Support of Petitioners, Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999) (No. 97-1943).

202. *See* Brief of The American Federation of Labor and Congress of Industrial Organizations as Amici Curiae in Support of the Petitioners, Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999) (No. 97-1943). "The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) [is] a federation of 75 national and international unions with a total membership of approximately 13,000,000 working men and women . . ." *Id.* at 1.

203. Brief of AIDS Action, et al., as Amici Curiae in Support of Petitioners Sutton and Murphy, Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999) (No. 97-1943); Murphy v. United Parcel Serv., Inc., 119 S. Ct. 2133 (1999) (No. 98-1992) (the "et al." refers to over 25 organizations joining as amici curiae). "The amici curiae joining this brief are organizations that represent individuals with disabilities, including individuals with disabilities that are ameliorated or treated with mitigating measures such as medications." *Id.* at 1.

Association (NELA),[204] as well as a brief submitted by Senators Harkin and Kennedy, Representatives Hoyer and Owens, and Former Senator Dole.[205] Following are some short excerpts from several of these amicus briefs to illustrate the positions taken, as well as several unique arguments supporting their positions.

The EEOC[206] states that mitigating measures should not be considered when determining whether an individual is substantially limited in a major life activity and, hence, disabled within the meaning of the ADA.[207]

> Congress's intent in this regard is set forth with unusual clarity in . . . relevant committee reports. . . . [A]ssessing the existence of a disability without regard to mitigating measures is most consistent with the ADA's basic purpose . . . . To take mitigating measures into account . . . would distort the analysis required under the scheme that Congress enacted.[208]

The ACLU stated that mitigating measures should not be considered when determining whether an individual is disabled within the meaning of the ADA because "the ADA was intended to broadly protect qualified persons with physical and mental impairments from discrimination in employment."[209]

The National Employment Lawyers Association (NELA) also championed the position of excluding mitigating measures from consideration, relying upon arguments and rationale identical to those enunciated by the EEOC and ACLU.[210] Additionally, the NELA put forth a unique public policy argument for excluding mitigating measures.[211] Relying primarily upon the First Circuit's rationale in *Arnold v. United Parcel Service, Inc.*,[212] the NELA argues that "[t]he ADA should not be interpreted in a manner that would discourage individuals from attempting to control their impairments."[213]

> [A person] should not be denied the protections of the ADA because he has

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204. *See* Brief Amicus Curiae of the National Employment Lawyers Association in Support of Petitioners, Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999) (No. 97-1943). "The National Lawyers Association (NELA) is a voluntary membership organization of over 3,000 lawyers who regularly represent employees in labor, employment, and civil rights disputes." *Id.* at 1. NELA has "represented thousands of individuals in this country who are victims of employment discrimination based on disability status." *Id.* at 2.

205. *See* Brief of Senators Harkin and Kennedy, Representatives Hoyer and Owens and Former Senator Dole as Amici Curiae in support of Respondent Kirkingburg and Petitioners Sutton and Murphy, Albertson's Inc. v. Kirkingburg, 119 S. Ct. 2162 (1999); Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999); Murphy v. United Parcel Serv., Inc., 119 S. Ct. 2133 (1999) (No. 97-1943, 97-1992, 98-591).

206. *See supra* Part III.B.

207. *See* Brief for the United States and the Equal Employment Opportunity Commission as Amicus Curiae Supporting Petitioners at 6, *Sutton* (No. 97-1943)

208. *Id.* at 7-8.

209. Brief Amicus Curiae of The American Civil Liberties Union in Support of the Petitioners at 12, *Sutton* (No. 97-1943).

210. *See* Brief Amicus Curiae of the National Employment Lawyers Association in Support of Petitioners at 6, *Sutton* (No. 97-1943).

211. *See id.* at 17-19.

212. 136 F.3d 854 (1st Cir. 1998).

213. Brief Amicus Curiae of the National Employment Lawyers Association in Support of Petitioner Sutton at 17, *Sutton* (No. 97-1943).

> independently taken the initiative and successfully brought his [disability] under control. It is hard to imagine that Congress wished to provide protection to workers who leave it to their employer to accommodate their impairments but to deny protection to workers who act independently to overcome their disabilities, thereby creating a disincentive to self help.[214]

The NELA also cites decisions by the Eighth Circuit in *Doane v. City of Omaha*[215] and the Second Circuit in *Bartlett v. New York State Board of Law Examiners*[216] in support of this argument.

The amicus brief filed by Senators Harkin[217] and Kennedy,[218] Representatives Hoyer[219] and Owens,[220] and former Senator Dole[221] also supports the position of excluding mitigating measures from consideration.[222] These distinguished "Senators and Congressmen were primary authors and sponsors of the Americans with Disabilities Act and have been leaders in shaping this nation's disability policy."[223] These Congressmen explicitly state that Congress intended the ADA's definition of disability in the first prong to be "determined without consideration of mitigating measures."[224]

> The plain language of the statute simply looks at whether the impairment substantially limits a major life activity. Requiring a court to look at the impairment in its mitigated state . . . would undermine the purpose of the first prong, which is to prohibit discrimination on the basis of the impairment itself.[225]

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214. Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 863 n.7 (1st Cir. 1998).

215. 115 F.3d 624 (8th Cir. 1997) (holding that even though Doane's brain had developed subconscious ways to mitigate the effects of his blindness in one eye, he was still disabled under the first prong because mitigating measures should not be considered).

216. 156 F.3d 321 (2d Cir. 1998) (holding that despite Bartlett's self-accommodations to overcome her learning disability, she was still protected under the first prong of the ADA).

217. Senator Tom Harkin "was the chief sponsor and a principal author of the ADA. As Chair of the Subcommittee on Disability Policy of the Senate Committee on Labor and Human Resources, and floor manager, he was involved in all aspects of the passage of the ADA." Brief of Senators Harkin and Kennedy, Representatives Hoyer and Owens and Former Senator Dole as Amici Curiae in support of Respondent Kirkingburg and Petitioners Sutton and Murphy at 1, *Sutton* (No. 97-1943).

218. Senator Edward Kennedy, "a principal author of the ADA, was the Chair of the Senate Committee on Labor and Human Resources during its passage." *Id.*

219. Congressman Steny Hoyer "was the lead House co-sponsor of the ADA. He led the House passage of the legislation and was intimately involved in all aspects of its consideration." *Id.*

220. Congressman Major Owens "was Chair of the Subcommittee on Select Education of the Committee of Education and Labor during the deliberations on the ADA and was involved in all deliberations in the House." *Id.*

221. Former Senator Bob Dole, "a war veteran with a disability, was a key proponent of securing equal opportunity for people with disabilities during his years in the Senate, including playing a leadership role in the development of the ADA." *Id.*

222. *See* Brief of Senators Harkin and Kennedy, Representatives Hoyer and Owens and Former Senator Dole as Amici Curiae in support of Respondent Kirkingburg and Petitioners Sutton and Murphy at 9, *Sutton* (No. 98-591).

223. *Id.* at 1.

224. *Id.* at 9. Considering the distinguished Congressmen's involvement in the sponsorship and drafting of the ADA, one could argue, albeit unsuccessfully due to the medium of transmission, that these statements constitute highly persuasive authority.

225. *Id.* at 10.

All of the amicus briefs recommending the exclusion of mitigating measures from consideration are replete with arguments identical to those in the above excerpts. This great weight of persuasive opinions is further evidence that the United States Supreme Court's rulings in the *Sutton*, *Albertson's*, and *Murphy* decisions[226] incorrectly interpreted the ADA in the context of mitigating measures.

IX. DECISIONS OF THE FEDERAL COURTS OF APPEALS

The question of whether to consider mitigating measures has been addressed and answered by the majority[227] of the Federal Courts of Appeals within the last four years.[228] The vast majority[229] of the Federal Courts of Appeals decided the issue in conformity with the views embraced in the legislative history[230] and by the EEOC,[231] Department of Justice, and Department of Transportation.[232]

A. The Vast Majority of the Circuit Courts

The First Circuit considered the question of mitigating measures in *Arnold v. United Parcel Service, Inc.*,[233] which involved a individual with diabetes who was denied employment on the grounds that the position required him to have a license to operate commercial motor vehicles, and Arnold could not obtain the license because the Department of Transportation precludes insulin-dependent diabetics from obtaining such certification.[234] Arnold sued alleging that UPS discriminated against him on the basis of his disability, in violation of the ADA.[235] Relying upon the legislative history[236] and the EEOC's regulations,[237] the First Circuit held that Arnold was disabled within the meaning of the ADA because the ameliorative effects of mitigating measures should not be considered when determining whether an individual is disabled within the meaning of the ADA.[238]

In *Bartlett v. New York State Board of Law Examiners*,[239] the Second Circuit examined the issue of mitigating measures. Dr. Bartlett suffered from a reading

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226. *See supra* notes 193-95.
227. All of the Federal Courts of Appeals except the Fourth Circuit and the Circuit for the District of Columbia have considered the issue of mitigating measures.
228. *See supra* note 29.
229. Eight out of ten of the Circuit Courts that have addressed the issue have determined that disability status should always be determined without regard to mitigating measures. *See supra* Part IX.A.
230. *See supra* Part VII.A.
231. *See supra* Part VII.B.1.
232. *See supra* Part VII.B.2.
233. 136 F.3d 854 (1st Cir. 1998).
234. *See id.* at 856-57. *See also* 49 C.F.R. § 391.41 (1999) (Department of Transportation regulation).
235. *See id.* at 857.
236. *See supra* note 230.
237. *See supra* note 231.
238. *See Arnold*, 136 F.3d at 866.
239. 156 F.3d 321 (2d Cir. 1998), *vacated*, 119 S.Ct. 2388 (1999).

disorder that caused her to read significantly slower than the average person.[240] However, she had developed *self accommodations*[241] that allowed her read better than the typical person with a reading disability.[242] After graduating from Vermont School of Law, Dr. Bartlett attempted to pass the New York State Bar Exam five times.[243] She had applied several times to be considered as a reading disabled candidate so that she could take the bar examination with accommodations, but the Board of Law Examiners rejected her application for reading disabled status each time.[244] Dr. Bartlett brought suit alleging violations of the ADA. The Second Circuit held that Dr. Bartlett was disabled within the meaning of the ADA irrespective of her *self accommodations* because mitigating measures are not to be considered when determining whether an individual is substantially limited within a major life activity.[245]

The Third Circuit, in *Matczak v. Frankford Candy and Chocolate Co.*,[246] looked at the issue of mitigating measures, which involved an individual with epilepsy who was fired from his job less than six months after having an epileptic seizure at work.[247] Matczak controlled his epilepsy with medication and had not had a seizure episode for nearly 30 years.[248] Matczak sued alleging that his employer fired him because he had epilepsy.[249] The Third Circuit held that Matczak could be considered disabled under the ADA because "disabled individuals who control their disability [sic] with medication may still invoke the protections of the ADA."[250]

In *Gilday v. Mecosta County*,[251] which involved an individual with non-insulin dependent diabetes, for which he took oral medication and maintained a strict diet,[252] the Sixth Circuit considered the question of mitigating measures. Gilday was terminated for rude conduct.[253] He alleged that his termination would not have occurred if his employer had honored his request for accommodations.[254] Gilday had requested that he be reassigned to a position that was less chaotic because stress aggravated his disease.[255] The Sixth Circuit determined that Gilday was disabled within the meaning of the ADA because "the existence of a mitigating measure should not be taken into account when deciding whether a disability exists."[256]

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240. *See id.* at 329.
241. Dr. Bartlett developed her self accommodations while teaching phonics as a schoolteacher.
242. *See Bartlett*, 156 F.3d at 326.
243. *See id.* at 324.
244. *See id.* Dr. Bartlett wanted accommodations that would allow her "unlimited or extended time to take the test, permission to tape record her essays and to circle her multiple choice answers in the test booklet." *Id.*
245. *See id.* at 329.
246. 136 F.3d 933 (3d Cir. 1997).
247. *See id.* at 935.
248. *See id.*
249. *See id.*
250. *Id.* at 937.
251. 124 F.3d 760 (6th Cir. 1997).
252. *See id.* at 761.
253. *See id.*
254. *See id.*
255. *See id.*
256. *Id.* at 765 (citing Griggs v. Duke Power Co. 401 U.S. 424, 433-34 (1971)).

In *Baert v. Euclid Beverages, Ltd.*,[257] which involved an individual with insulin-dependent diabetes,[258] the Seventh Circuit considered the question of mitigating measures. Baert was diagnosed with diabetes while he was working as a truck driver for Euclid Beverages.[259] After being diagnosed, he was no longer able to drive the commercial trucks because of Department of Transportation regulations.[260] Euclid Beverages offered him a transfer to a position that paid substantially less than the truck driving position.[261] Baert sued alleging violations of the ADA.[262] The Seventh Circuit held that Baert was disabled for purposes of the ADA because "whether a condition constitutes an impairment, and the extent to which the impairment limits an individual's major life activities [should be assessed] without regard to mitigating measures such as medicines, or assistive or prosthetic devices."[263]

The Eighth Circuit examined mitigating measures in *Doane v. City of Omaha*,[264] which involved a police officer who lost vision in one eye because of glaucoma.[265] He continued to work for seven years.[266] Seven years later, the City of Omaha told him that he could no longer work as a police officer because of his condition, relying upon a job requirement that police officers be able to see out of both eyes.[267] The Eighth Circuit held that Doane was covered by the ADA despite the fact that his brain had developed subconscious adjustments to compensate for his monocular vision.[268]

In *Holihan v. Lucky Stores, Inc.*,[269] which involved an individual who suffered from several psychological problems that, allegedly, caused him to behave abusively toward subordinates at the grocery store he managed,[270] the Ninth Circuit looked at mitigating measures. The Ninth Circuit considered Holihan in an *unmitigated* state and determined that he was not disabled within the meaning of the ADA because he was not substantially limited in a major life activity.[271] The Ninth Circuit also considered mitigating measures in *Kirkingburg v. Albertson's Inc.*,[272] where it held that Kirkingburg's subconscious adjustments to his monocular vision should not be considered, and he was disabled within the meaning of the ADA.[273]

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257. 149 F.3d 626 (7th Cir. 1998).
258. *See id.* at 628.
259. *See id.*
260. *See id. See also* 49 C.F.R. § 391.41 (1999) (Department of Transportation regulation).
261. *See Baert*, 149 F.3d at 628.
262. *See id.*
263. *Baert*, 149 F.3d at 629 (citing Roth v. Lutheran General Hospital, 57 F.3d 1446, 1454 (7th Cir. 1995); Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 861 (1st Cir. 1998)).
264. 115 F.3d 624 (8th Cir. 1997); *cert. denied*, 118 S.Ct. 693 (1998).
265. *See id.* at 625.
266. *See id.*
267. *See id.* at 625-26.
268. *See id.* at 627-28.
269. 87 F.3d 362 (9th Cir. 1996), *cert. denied*, 117 S. Ct 1349 (1997).
270. *See id.* at 364.
271. *See id.* at 366.
272. 143 F.3d 1228 (9th Cir. 1998), *rev'd*, 119 S. Ct. 2162 (1999).
273. *See supra* text accompanying note 96.

The Eleventh Circuit examined mitigating measures in *Harris v. H & W Contracting Co.*,[274] which involved an individual with Graves' disease that was being controlled by medication.[275] Harris experienced a panic attack and was hospitalized due to an accidental overdose of her medication.[276] While Harris was on sick leave, the employer hired a person to replace her.[277] Shortly after returning to work, she was told that she would need to seek employment elsewhere once she was feeling better.[278] Harris sued claiming she was discriminated against in violation of the ADA.[279] The Eleventh Circuit determined that Harris was disabled within the meaning of the ADA because "there is nothing illogical about determining the existence of a substantial limitation without regard to mitigating measures . . . and there is nothing in the language of the statute itself that rules out that approach."[280]

B. The Fifth Circuit: A Unique Approach

The Fifth Circuit examined the issue of mitigating measures in *Washington v. HCA Health Services of Texas, Inc.*.[281] In *Washington*, the plaintiff suffered from "Adult Stills Disease, a degenerative rheumatoid condition affecting his bones and joints."[282] Washington was able to control his disease through the use of medication.[283] Without the medication, he would have been bedridden and unable to work.[284] The demands of his job were intensifying, and Washington collapsed at work.[285] His doctor recommended that he reduce his working hours, and he asked his employer to accommodate his need for a lighter schedule.[286] Shortly thereafter, Washington was terminated from his job, and he sued alleging that he was terminated in violation of the ADA.[287]

The Fifth Circuit took a unique approach to the issue of mitigating measures. The court acknowledged that the legislative history contained in the congressional reports and the EEOC's regulations called for the exclusion of mitigating measures when determining disability status under the ADA.[288] However, the Fifth Circuit refused to "make a broad pronouncement that all impairments must be considered in their unmitigated state."[289] Rather, the court gave a narrower interpretation, reasoning that only some impairments and ailments "fall within the scope of the

274. 102 F.3d 516 (11th Cir. 1996).
275. *See id.* at 517.
276. *See id.* at 518.
277. *See id.*
278. *See id.*
279. *See id.*
280. *Harris*, 102 F.3d at 521.
281. 152 F.3d 464 (5th Cir. 1998), *vacated*, 119 S. Ct. 2388 (1999).
282. *Id.* at 466.
283. *See id.*
284. *See id.*
285. *See id.*
286. *See id.*
287. *See Washington*, 152 F.3d at 466.
288. *See id.* at 469.
289. *Id.* at 471.

EEOC Guidelines and the legislative history."[290] The Fifth Circuit concluded that "whether an individual must be evaluated without regard to mitigating measures depends on both the nature of the impairment and the mitigating measures employed by the individual."[291] The Fifth Circuit believed that only serious impairments and ailments were to be considered in an unmitigated state.[292] Moreover, the court determined that the mitigating measures must be employed on a frequent, continuous, and recurring basis in order to be excluded from consideration.[293] Conversely, the Fifth Circuit maintained "if the mitigating measures amount to permanent corrections or ameliorations, then they may be taken into consideration."[294]

> If an individual has a permanent correction or amelioration, such as an artificial joint or a pin or a transplanted organ, that individual must be evaluated in his mitigated state and cannot claim that he is disabled because he would be "substantially limited in a major life activity" if he had not had his hip joint replaced.[295]

In light of the principles enunciated above, the Fifth Circuit held that Washington's disease was the type of ailment that should be evaluated without regard to mitigating measures because it was a serious disease that required him to take medication every day.[296]

C. The Tenth Circuit: All Alone

In *Sutton v. United Air Lines, Inc.*[297] and *Murphy v. United Parcel Service, Inc.*,[298] the Tenth Circuit considered the issue of mitigating measures. As previously mentioned, the Tenth Circuit held, in both of these cases, that mitigating measures must be considered when determining whether an individual is substantially limited in a major life activity and, hence, disabled within the meaning of the ADA.[299]

In sum, it is more than apparent that the United States Supreme Court's rulings in *the Sutton, Albertson's*, and *Murphy* cases[300] were contrary to a great weight of persuasive authority from the Federal Courts of Appeals.

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290. *Id.*
291. *Id.*
292. *See id.* at 470.
293. *See Washington*, 152 F.2d at 470.
294. *Id.* at 470-71.
295. *Id.* at 471 (citing Ray v. Glidden Co., 85 F.3d 227 (5th Cir. 1996).
296. *See id.*
297. 130 F.3d 893 (10th Cir. 1997), *aff'd*, 119 S. Ct. 2139 (1999).
298. 141 F.3d 1185 (10th Cir. 1998), *aff'd*, 119 S. Ct. 2133 (1999).
299. *See supra* text accompanying notes 106-08.
300. *See supra* note 226.

X. CONCLUSION

The Americans with Disabilities Act was drafted and enacted to protect the civil rights of disabled Americans.[301] Congress intended and designed the ADA to be construed broadly so as to effectuate the purposes of the Act.[302] The recent rulings by the United States Supreme Court[303] addressing the question of mitigating measures had the opposite effect, resulting in a curtailment of the scope of the ADA's coverage. The consequence of these decisions is to exclude from the ADA's coverage individuals whom Congress undoubtedly intended and designed the Act to protect.

For illustration, consider an individual with diabetes mellitus, type I.[304] With the aid of daily injections of insulin,[305] a mitigating measure,[306] this individual is *not* substantially limited[307] in a major life activity.[308] Such an individual functions as normally as any other person *with* the insulin injections.[309] However, in an unmedicated state, this individual would, in a relatively short period of time, lapse into a diabetic coma,[310] and without medical intervention, certainly die.[311] Therefore, if evaluated in an unmedicated state this individual is substantially limited in the major life activity of producing insulin[312] and hence, disabled within the meaning of the ADA. Conversely, if evaluated in a medicated state, the methodology advocated by the Supreme Court,[313] this individual is not substantially

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301. *See supra* notes 1-2 and accompanying text.

302. *See supra* text accompanying note 11.

303. *Supra* note 146.

304. Type I diabetes occurs when an individual's "immune system mistakenly destroys the insulin-producing beta cells in the pancreas, treating them as if they were a foreign invader." AMERICAN DIABETES ASSOCIATION, COMPLETE GUIDE TO DIABETES 15 (1996). As a result, the individual's body ceases the production of insulin. *See id.* at 36. The onset of type I is typically from childhood to teenage years, which is one characteristic that distinguishes it from type II, which is usually diagnosed in overweight individuals over the age of 40. *See id.* at 12. With Type II diabetes, the individual's body is still producing insulin, but the insulin is not being used properly by the body. *See id.* at 22. *See also supra* text accompanying note 50 (Senate Committee on Labor and Human Resources including diabetes in a list of specific diseases and ailments that it considered to be a *physical impairment* constituting a disability within the meaning of the ADA).

305. Insulin is a hormone that helps cells use glucose by allowing glucose to enter cells and be used as energy. *See* AMERICAN DIABETES ASSOCIATION, COMPLETE GUIDE TO DIABETES 94 (1996). Cells must have energy to survive and grow. *See id.* at 139. A type I diabetic individual must give himself/herself regular insulin injections. *See id.* at 36.

306. *See supra* text accompanying note 116 (referring to medications as mitigating measures).

307. *See* discussion *supra* Part IV.B.

308. After having lived the majority of my life with a brother who has successfully and courageously coped with diabetes, the last thing I would call him is substantially limited in a major life activity.

309. It must be conceded that there are occasional ups-and-downs, even for a well controlled diabetic condition. Several factors other than insulin injections affects glucose distribution to the cells, including: diet, exercise, stress, and illness. *See* AMERICAN DIABETES ASSOCIATION, COMPLETE GUIDE TO DIABETES 138-43.

310. When the body's cells are not getting enough glucose, a hypoglycemic reaction will occur. *See id.* at 158. If not treated immediately with insulin, the individual will lapse into a coma. *See id.* at 164.

311. An individual with type I diabetes is dependent upon injected insulin to stay alive. *See id.* at 139.

312. *See supra* text accompanying note 54 (discussion of major life activities). Although not specifically listed as a major life activity by the EEOC, considering the fact that insulin production is necessary to stay alive, it is more than reasonable to say that the body's production of insulin is a major life activity.

313. *See supra* text accompanying note 115.

limited in any major life activity because the daily insulin injections mitigate the effects of the disease.[314] Is it not apparent from this illustration alone that something is wrong with the Supreme Court's rulings?[315] Did Congress really intend and design the ADA so that an individual, who, in an unmedicated state will lapse into a coma and potentially die from a serious chronic disease, could easily be found non-disabled within the meaning of the ADA because he/she undertakes measures necessary to keep himself/herself alive.

The immediate question that seems pressing is why did seven Justices of the United States Supreme Court decide that the ameliorative effects of mitigating measures must be considered when determining whether an individual is substantially limited in a major life activity and, hence, disabled within the meaning of the ADA. Obviously, the majority did not rely on the legislative history or administrative guidelines and regulations, nor did it lend credence to the persuasive voice of eight Federal Courts of Appeals. Moreover, the majority ignored the recommendations of several of the distinguished Congressmen involved in the creation and authoring of the ADA.

The Supreme Court's majority wanted to achieve this result before ever selecting the cases to effect the result. The cases that the Supreme Court granted certiorari to decide the issue of mitigating measures were factually easy to justify the result. Of course it seems sensible to require the consideration of eye glasses or contact lenses when determining whether an individual with poor vision is disabled within the meaning of the ADA. To do otherwise, would open the doors of the ADA's coverage to every person who has imperfect vision. In this regard, it must be conceded that the majority's rulings on mitigating measures were not wholly incorrect and unjustifiable, for it is doubtful that when Congress drafted the ADA it intended to render individuals with mere visual acuity impairments as disabled. However, if the factual situation had dealt with an individual suffering from diabetes or epilepsy, the majority's position would have been much more difficult to justify, as the diabetes example above illustrates.

In light of the massive amount of persuasive authority that the Supreme Court's majority sided against, one must wonder if the rulings in these cases were an attempt to set a lower limit on the ADA's coverage, or perhaps a measure taken to induce Congress to amend the ADA and clarify the overly ambiguous language of the Act. In any event, it would be a far stretch to proclaim that the issue has been decided once and for all. Differing factual situations will require a different result, a clarification of the law, or an exception to be made. As the Supreme Court has repeatedly stated, they "sit to decide concrete cases and not abstract propositions of law."[316]

Whatever the underlying reason for the majority's decisions, the congressional purpose and intent of the ADA is not being achieved. This is obvious from the legislative history alone, without even considering agency guidelines and

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314. *See supra* notes 304-08.
315. *See supra* text accompanying notes 115-23.
316. UpJohn Co. v. United States, 449 U.S. 386 (1981).

regulations. The Supreme Court's decisions were at a minimum overly broad, and at a maximum entirely incorrect.

At the present time, the Fifth Circuit's decision in *Washington v. HCA Health Services of Texas, Inc.*[317] appears to be the most amicable and rational solution to the problem of mitigating measures.[318] A distinction between impairments of a serious nature that must be continuously controlled through the use of mitigating measures and minor impairments or impairments that are corrected through a final measure would serve to protect those individuals whom Congress intended the ADA to cover while excluding individuals who are not substantially limited in a major life activity and, hence, not disabled within the meaning of the ADA.

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317. *See* 152 F.3d 464 (5th Cir. 1998), *vacated*, 119 S. Ct. 2388 (1999).
318. *See* discussion *supra* Part IX.B.