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

I. INTRODUCTION

The Americans with Disabilities Act of 19901 (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, “society has tended to isolate and segregate individuals with disabilities,” and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.”4 The continued discrimination suffered by this class of people permeates all realms of society, and disabled individuals continue to encounter discrimination in every conceivable form.5 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.”6

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

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. PETTUGH, 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).
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
Reports14 and Executive Agencies’ regulations, interpretations, and guidelines15 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 briefs18 from highly
distinguished organizations and individuals. Furthermore, the rulings by the
Supreme Court are, arguably, in direct conflict with the explicit language of the

10. Id. § 12101(b)(1). Other purposes of the ADA enunciated by Congress are:
[To 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).
supporting authority from which this proposition is derived).
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.
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. 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.

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 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.” The second prong extends the status of disability to individuals who have “a record of such an impairment.” This provision protects individuals “who have recovered from a physical or mental impairment which previously substantially limited them . . . in a major life activity.” The third prong affords disability status to those individuals who are “regarded as having such an impairment.” 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.” These three prongs are not mutually exclusive, discrete categories. 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.”

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.

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).
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

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.C. 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).

31. See id. at 843.
32. Id. at 843, n. 11 (citations omitted).
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).
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.
43. See supra notes 38-39 and accompanying text.
of body parts or systems." The EEOC defines mental impairment as "[a]ny mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 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."

The EEOC does not attempt the impossible task of categorically defining specific illnesses, diseases, and afflictions that would indisputably be covered by the ADA. However, the legislative history does elucidate a list of specific illnesses, diseases, and afflictions. For instance, the Senate Committee on Labor and Human Resources 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."

B. Substantially Limited

The EEOC has determined that an individual is substantially limited 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.

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.
50. S. REP. No. 101-116, at 22 (1989) (emphasis added). See also 28 C.F.R. § 35.104(I)(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."
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.\(^5\)

### 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."\(^5\) There is some question as to whether working should be considered a major life activity.\(^5\) 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."\(^5\)

This does not mean that an individual must be completely unable to work.\(^5\) 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.\(^5\) 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.\(^5\)


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\(^5\) 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.").

\(^5\) 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))).

\(^5\) See *Sutton*, 119 S. Ct. at 2151.


\(^5\) 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 is prohibited from discriminating against a qualified individual with a disability because of the disability of such individual. "[A] plaintiff claiming a cause of action under the ADA bears the burden of proving . . . that he is a qualified individual." 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." 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."
The ADA allows employers to establish qualification standards that result in excluding an individual with a disability. However, "such standards [must be] job-related and consistent with business necessity." Moreover, there can be no reasonable accommodations available for the employer to undertake to assist the disabled individual in satisfying the standard. 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."

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." 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." 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'..." 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.

b. Federal Laws or Regulations

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

The case originated in the United States District Court for the District of Colorado, which dismissed the claims. The sisters then appealed to the United States Court of Appeals for the Tenth Circuit, which affirmed the district court’s decision. 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. 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. 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.

B. Albertson’s, Inc. v. Kirkingburg

The plaintiff in Albertson’s applied for a job as truck driver for defendant Albertson’s Inc., a grocery-store chain. Kirkingburg had “amblyopia, an uncorrectable condition that [left] him with 20/200 vision in his left eye and monocular vision in effect.” 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.

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. 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.
88. See id. at 893.
89. See id. at 896.
90. See id. at 2152-62 (Stevens, J., dissenting).
92. See id. at 2165.
93. Id. at 2165-66.
94. See id. at 2166.
95. See id.
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. This compensating ability of Kirkingburg's brain was held to constitute a mitigating measure that ameliorated the effects of his vision impairment. Justice Stevens and Justice Breyer joined parts I and III of the opinion. Part II of the opinion dealt with mitigating measures.

C. Murphy v. United Parcel Service, Inc.

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. The reason for his termination was that he suffered from hypertension (high blood pressure). 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.'" With the exception of Mr. Murphy's blood pressure in an unmedicated state, he was completely qualified for the job.

Murphy brought suit in the United States District Court for the District of Kansas, which granted summary judgment for UPS. The United States Court of Appeals for the Tenth Circuit, affirmed in an unpublished opinion. 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, was not disabled within the meaning of the ADA because his high blood pressure medication ameliorated the effects of his hypertension. 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.

97. See Albertson's, 119 S. Ct. 2162.
98. See id.
99. See id. at 2165.
100. See id. at 2167-2169.
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.
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

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.
mitigating measures do not stop merely at medicines and prosthetic devices.\textsuperscript{117} Rather, the term mitigating measures includes compensating measures taken by the individual and the body's own adaptive systems.\textsuperscript{118} In \textit{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."\textsuperscript{119} In \textit{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."\textsuperscript{120}

The use or non-use of medications, prosthetic devices, and other ameliorative measures is not, by itself, determinative of whether an individual is \textit{disabled} within the meaning of the ADA.\textsuperscript{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."\textsuperscript{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.\textsuperscript{123}

\textbf{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.\textsuperscript{124} First, the Court reasoned that because the ADA uses the phrase \textit{substantially limits}\textsuperscript{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."\textsuperscript{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 \textit{substantially limits} a major life activity.\textsuperscript{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

\begin{itemize}
  \item[\textsuperscript{117}] See \textit{Albertson's} at 2168-69 (determining that "Kirkburg'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 \textit{Albertson's} 143 F.3d 1232) (citations omitted)).
  \item[\textsuperscript{118}] See \textit{id}.
  \item[\textsuperscript{119}] Id.
  \item[\textsuperscript{120}] Id. at 2168. See also \textit{supra note 93 and accompanying text}.
  \item[\textsuperscript{121}] See \textit{Sutton}, 119 S. Ct. at 2149.
  \item[\textsuperscript{122}] Id.
  \item[\textsuperscript{123}] See \textit{id.} at 2146.
  \item[\textsuperscript{124}] See \textit{Sutton}, 119 S. Ct. at 2146-48.
  \item[\textsuperscript{125}] The phrase \textit{substantially limits} appears in the first prong of the ADA's definition of disability. See \textit{supra text} accompanying notes 21, 51-53.
  \item[\textsuperscript{126}] \textit{Sutton}, 119 S. Ct. at 2146.
  \item[\textsuperscript{127}] See \textit{id.} at 2146-47.
\end{itemize}
persons.” 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.” 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.

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. 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’ . . . .

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. However, Justice Stevens argues that the majority’s position concerning the issue of mitigating measures “actually condones treating individuals merely as members of groups.”

Finally, the majority relied on the congressional findings, which they claimed clearly indicate that “Congress did not intend to bring under the . . .
[ADA’s] protection all... [individuals] whose uncorrected conditions amount to disabilities.” 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. “That it did not is evidence that the ADA’s coverage is restricted to only those whose impairments are not mitigated by corrective measures.”

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.’” 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.

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

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 Y (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. 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. Moreover, several executive agencies have delivered interpretations of the ADA that provide an answer to the question of mitigating measures. 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.

A. Legislative History

The recent interpretation and construction by the majority of the United States Supreme Court 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.” 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.”

The Report of the Senate Committee on Labor and Human Resources, while specifically addressing the legislature’s intent regarding the first prong 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.” This Senate Committee also states that an important objective of the third prong 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.” 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.

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).
150. See supra text accompanying note 22.
152. See supra text accompanying notes 25-26.
154. Id.
ing if an individual is disabled. 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. However, these two propositions, if viewed in concert and interpreted in the context of the primary purpose 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. Under the first prong, individuals with disabilities such as diabetes or epilepsy are protected under the ADA because they are disabled when viewed without regard to mitigating measures. In the alternative, these individuals are protected under the third prong against irrational and prejudicial opinions and sentiments regarding their disabilities, even when their disabilities are under control.

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." 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 states that "the impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation." 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." 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 "such 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.
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).
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

170. See supra note 150.
172. Id. (emphasis added).
173. See supra notes 113, 146.
interpreted the Act as mandating that the presence of disability turns on an individual’s uncorrected state.\textsuperscript{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\textsuperscript{176} concerning the issue of mitigating measures, and consequently, are in complete opposition to the view adopted by the United States Supreme Court.\textsuperscript{177}

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

The EEOC\textsuperscript{178} has promulgated many regulations interpreting the ADA.\textsuperscript{179} These interpretations “are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”\textsuperscript{180} “[A] court may not substitute its own construction of a statutory provision for a reasonable [agency] interpretation.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{184}

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

\begin{itemize}
  \item \textsuperscript{175} Sutton, 119 S. Ct. 2155 (Stevens, J., dissenting) ("executive agencies" refers to the EEOC, Department of Justice, and Department of Transportation).
  \item \textsuperscript{176} See supra Part VII.A.
  \item \textsuperscript{177} See supra note 173.
  \item \textsuperscript{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.
  \item \textsuperscript{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).
  \item \textsuperscript{181} Id.
  \item \textsuperscript{182} 29 C.F.R. pt. 1630, app. § 1630.2(j) (1999) (emphasis added).
  \item \textsuperscript{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)).
  \item \textsuperscript{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)).
\end{itemize}
stated in its amicus curiae brief to the United States Supreme Court in the *Sutton v. United Air Lines, Inc.* 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." 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."

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 and the Department of Transportation 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." The Department of Transportation issued a regulation identical to that of the Department of Justice. 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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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. *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).*
189. *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).*
192. *See 49 C.F.R. § 37.3 (1999).*
VIII. PERSUASIVE OPINIONS - AMICUS CURIAE BRIEFS

The Supreme Court's decisions in the Sutton,\textsuperscript{193} Albertson's,\textsuperscript{194} and Murphy\textsuperscript{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,\textsuperscript{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.\textsuperscript{197} Although amicus briefs do not carry the weight of legal authority,\textsuperscript{198} these briefs present highly persuasive opinions because of the esteem with which the proponents are held.\textsuperscript{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),\textsuperscript{200} The American Civil Liberties Union (ACLU),\textsuperscript{201} The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO),\textsuperscript{202} AIDS Action,\textsuperscript{203} The National Employment Lawyers

\textsuperscript{193} 119 S.Ct. 2139 (1999).
\textsuperscript{194} 119 S.Ct. 2162 (1999).
\textsuperscript{195} 119 S.Ct. 2133 (1999).
\textsuperscript{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.
\textsuperscript{197} See infra text accompanying notes 200-05.
\textsuperscript{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).
\textsuperscript{199} See infra notes 202-04, 217-22 and accompanying text.
\textsuperscript{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.
\textsuperscript{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.
American Association (NELA),\(^2\) as well as a brief submitted by Senators Harkin and Kennedy, Representatives Hoyer and Owens, and Former Senator Dole.\(^3\) 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\(^4\) 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.\(^5\)

Congress’s intent in this regard is set forth with unusual clarity in . . . relevant committee reports. . . . Assessing 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.\(^6\)

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.”\(^7\)

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.\(^8\) Additionally, the NELA put forth a unique public policy argument for excluding mitigating measures.\(^9\) Relying primarily upon the First Circuit’s rationale in *Arnold v. United Parcel Service, Inc.*\(^10\), the NELA argues that “[t]he ADA should not be interpreted in a manner that would discourage individuals from attempting to control their impairments.”\(^11\)

*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.


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.


211. See id. at 17-19.

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

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

The NELA also cites decisions by the Eighth Circuit in \textit{Doane v. City of Omaha}\footnote{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).} and the Second Circuit in \textit{Bartlett v. New York State Board of Law Examiners}\footnote{216}{156 F.3d 321 (2nd 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).} in support of this argument.

The amicus brief filed by Senators Harkin\footnote{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, \textit{Sutton} (No. 97-591).} and Kennedy,\footnote{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." \textit{Id.}} Representatives Hoyer\footnote{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." \textit{Id.}} and Owens,\footnote{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." \textit{Id.}} and former Senator Dole\footnote{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." \textit{Id.}} also supports the position of excluding mitigating measures from consideration.\footnote{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, \textit{Sutton} (No. 98-591).} 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."\footnote{223}{\textit{Id.} at 1.} 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."\footnote{224}{\textit{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.}

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.\footnote{225}{\textit{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 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 of the Federal Courts of Appeals within the last four years. The vast majority of the Federal Courts of Appeals decided the issue in conformity with the views embraced in the legislative history and by the EEOC, Department of Justice, and Department of Transportation.

A. The Vast Majority of the Circuit Courts

The First Circuit considered the question of mitigating measures in Arnold v. United Parcel Service, Inc., which involved an 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. Arnold sued alleging that UPS discriminated against him on the basis of his disability, in violation of the ADA. Relying upon the legislative history and the EEOC’s regulations, 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.

In Bartlett v. New York State Board of Law Examiners, the Second Circuit examined the issue of mitigating measures. Dr. Bartlett suffered from a reading...
disorder that caused her to read significantly slower than the average person.240 
However, she had developed self accommodations241 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

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 265-26.
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.
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.
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.” 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.” The Fifth Circuit believed that only serious impairments and ailments were to be considered in an unmitigated state. 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. Conversely, the Fifth Circuit maintained “if the mitigating measures amount to permanent corrections or ameliorations, then they may be taken into consideration.”

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.

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.

C. The Tenth Circuit: All Alone

In Sutton v. United Air Lines, Inc. and Murphy v. United Parcel Service, Inc., 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.

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

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. Congress intended and designed the ADA to be construed broadly so as to effectuate the purposes of the Act. The recent rulings by the United States Supreme Court 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. With the aid of daily injections of insulin, a mitigating measure, this individual is not substantially limited in a major life activity. Such an individual functions as normally as any other person with the insulin injections. However, in an unmedicated state, this individual would, in a relatively short period of time, lapse into a diabetic coma, and without medical intervention, certainly die. Therefore, if evaluated in an unmedicated state this individual is substantially limited in the major life activity of producing insulin and hence, disabled within the meaning of the ADA. Conversely, if evaluated in a medicated state, the methodology advocated by the Supreme Court, this individual is not substantially

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.\textsuperscript{314} Is it not apparent from this illustration alone that something is wrong with the Supreme Court's rulings?\textsuperscript{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."\textsuperscript{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

\textsuperscript{314} See supra notes 304-08.
\textsuperscript{315} See supra text accompanying notes 115-23.
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. appears to be the most amicable and rational solution to the problem of mitigating measures. 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.

Eric D. Wade

318. See discussion supra Part IX.B.