

THE SUPREME COURT'S DEFINITION OF DISABILITY UNDER THE ADA: A RETURN TO THE DARK AGES

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I. INTRODUCTION

In June 1999, the United States Supreme Court entered rulings in three cases addressing the manner in which the definition of a person with a disability should be interpreted under the Americans with Disabilities Act ("ADA"):¹ *Sutton v. United Air Lines, Inc.*,² *Murphy v. United Parcel Service, Inc.*,³ and *Albertson's, Inc. v. Kirkingburg*.⁴ In those three decisions, the Court drastically curtailed the number of persons who may seek protection from discrimination on the basis of disability under the ADA and seriously limited the circumstances under which even individuals with obvious disabilities may seek protection from discrimination.

This Article will explain the practical effects of the Court's three rulings and offer a few suggestions that may, in limited situations, assist plaintiffs in asserting claims under the ADA, despite those seriously detrimental rulings. In Part II, I will provide a brief overview of the ADA and the definition of disability set forth in the Act. In Part III, I will provide brief synopses of the three Supreme Court cases. In Part IV, I will present a hypothetical situation involving an individual who seeks to invoke the protections of the ADA. I will analyze each aspect of the definition of a person with a disability, as interpreted by the Court in the above trilogy of cases, and discuss: (a) the means by which our hypo-

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1. 42 U.S.C. §§ 12101-12213 (1994).
2. 527 U.S. 471 (1999).
3. 527 U.S. 516 (1999).
4. 527 U.S. 555 (1999).

thetical individual may or may not successfully utilize the ADA to prevent or remedy the allegedly discriminatory conduct at issue; and (b) the fallacy of the Court's short-sighted interpretation of the term "individual with a disability," an interpretation that produces results contrary to the stated purposes of the ADA. In Part V, I will offer conclusions and suggestions.

II. A BRIEF OVERVIEW OF THE ADA

The ADA was enacted in 1990 with overwhelming support from Congress.⁵ Congress sought to prevent against 43 million Americans with disabilities continuing discrimination⁶ that takes the form of "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. . . ."⁷

Congress found that Americans with disabilities: (i) have been historically segregated and isolated;⁸ (ii) face discrimination in areas of "employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;"⁹ and (iii) "occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally."¹⁰ Congress further found that Americans with disabilities

have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society¹¹

To remedy this "serious and pervasive social problem,"¹² Congress

5. The Act passed the House by a vote of 377-28 and the Senate by a vote of 91-6. See 42 U.S.C. § 12101(a) (1994).

6. 42 U.S.C. § 12101(a)(1) (1994).

7. *Id.* § 12101(a)(5).

8. *Id.* § 12101(a)(2).

9. *Id.* § 12101(a)(3).

10. *Id.* § 12101(a)(6).

11. 42 U.S.C. § 12101(a)(7) (1994).

12. *Id.* § 12101(a)(2).

enacted the ADA to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"¹³ and "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."¹⁴

The ADA contains five principal sections. Title I prohibits employment discrimination on the basis of disability by employers who have fifteen or more employees.¹⁵ Title II prohibits discrimination on the basis of disability by state and local government entities.¹⁶ Title III prohibits discrimination on the basis of disability by places of public accommodation.¹⁷ Title IV amends the Communications Act of 1934¹⁸ to require that all common carriers (generally telephone companies) provide equivalent telecommunication services to allow individuals with hearing or speech impairments to communicate with hearing people via telephone.¹⁹ Title V contains various miscellaneous provisions.²⁰

The ADA sets forth the definition of a person with a disability so as to be covered by the ADA in the "Definitions" section of the ADA.²¹ This ADA's definition is identical to that found in Section 504 of the Rehabilitation Act of 1973, the predecessor to the ADA, which prohibits discrimination on the basis of disability by recipients of federal financial assistance.²² Under both Section 504 and the ADA, an individual with a disability is one who has: (a) a physical or mental impairment that substantially limits one or more of that individual's major life activities, (b) has a record of such an impairment, or (c) is regarded as having such an impairment.²³ An individual is disabled within the meaning of these laws if she falls within any one of the above three prongs, which are in many respects mutually exclusive. An individual cannot, for example, have an actual disability and at the same time be erroneously "regarded as" having an actual disability. The "regarded as" prong of the definition encompasses individuals who do not have a physical or mental impairment that substantially limits a major life activity, but who are erroneously viewed or treated by a covered entity as having a physical or mental impairment that substantially limits a major life activity.²⁴

13. *Id.* § 12101(b)(1).

14. *Id.* § 12101(b)(2).

15. *Id.* §§ 12111-12117.

16. 42 U.S.C. §§ 12131-12165 (1994).

17. *Id.* §§ 12181-12189.

18. 47 U.S.C. §§ 151-757 (1994).

19. 47 U.S.C. § 225(a)(3) (1994) and 47 U.S.C. § 225(b) (1994) (amending § 225(a)(3) & (c) of the Communications Act of 1934).

20. 42 U.S.C. §§ 12201-12213 (1994).

21. *Id.* § 12102(2).

22. See 29 U.S.C. § 794(a) (1994).

23. 42 U.S.C. § 12102(2) (1994)(ADA); 29 U.S.C. § 705(20)(B)(Section 504).

24. 29 C.F.R. § 1630.2(L) (1999). The Equal Employment Opportunity Commission's ("EEOC") ADA Title I regulations explain that the term "regarded as" having an impairment that

Thus, the ADA's statutory definition of an "individual with a disability" requires a three-part analysis: (i) does the individual have, does the individual have a record of, or is the individual regarded as having, a physical or mental impairment? If so, does the physical or mental impairment the individual either has, has a record of, or is regarded as having (ii) substantially limit (iii) one or more of that individual's major life activities?²⁵

The two federal agencies responsible for promulgating regulations under, and enforcing, Titles I through III of the ADA have addressed the ADA's definition of an individual with a disability in its respective regulations.²⁶ The Department of Justice ("DOJ") is responsible for promulgating regulations under, and enforcing, Titles II and III.²⁷ The DOJ's Title II regulations dealing with that definition are found at 28 C.F.R. § 36.104 (1999), and the definition is further discussed in the DOJ's ADA Title II Technical Assistance Manual at §§ II-2.2000-II-2.7000.²⁸ The DOJ's Title III regulations discussing that definition are found at 29 C.F.R. § 36.104 (1999), and the definition is further discussed in the DOJ's ADA Title III Technical Assistance Manual at §§ III-2.1000 - III-2.7000.²⁹ Both the EEOC and the DOJ have addressed the questions of (i) what constitutes a physical or mental impairment, (ii) what constitutes a major life activity, (iii) what constitutes a substantial limitation of a major life activity, (iv) when does an individual have a record of a disability, and (v) when is an individual regarded as having a disability.³⁰ Because case law on these and other issues is confusing

substantially limits a major life activity means that the individual:

(A) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(B) 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

(C) Has none of the impairments defined [in the regulations] but is treated by a covered entity as having a substantially limiting impairment.

Id.

25. See generally BONNIE P. TUCKER & BRUCE A. GOLDSTEIN, *LEGAL RIGHTS OF PERSONS WITH DISABILITIES: AN ANALYSIS OF FEDERAL LAW* 4.1 & 21.1 (1991 & Supp. 1991-99).

26. The EEOC is responsible for promulgating regulations under, and enforcing, Title I. 42 U.S.C. § 12116 (1994). The EEOC's regulations dealing with that definition are found at 29 C.F.R. § 1630.2(g)-(l) (1999). The EEOC also addressed that definition in its Technical Assistance Manual. See *EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ADA TITLE I TECHNICAL ASSISTANCE MANUAL* §§ I-2.1 - I-2.2(c) (1992). See also RUTH COLKER & BONNIE P. TUCKER, *THE LAW OF DISCRIMINATION HANDBOOK STATUTES AND REGULATORY GUIDANCE* 41-50 (2d ed. 1999). In addition, the EEOC published an Interim Enforcement Guidance dealing with the definition of the term "disability" as that term applies under ADA Title I. *EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, INTERIM ENFORCEMENT GUIDANCE: DEFINITION OF THE TERM "DISABILITY"* § 902 (1999).

27. 42 U.S.C. §§ 12134, 12186(b) (1994).

28. See also COLKER & TUCKER, *supra* note 26, at 254-56.

29. See also COLKER & TUCKER, *supra* note 26, at 383-85.

30. COLKER & TUCKER, *supra* note 26, at 41-55, 116-39.

and conflicting, both under Section 504 and the ADA,³¹ the EEOC and DOJ sought to clarify the issues to the maximum extent possible. This Article will now focus on the four aspects of the EEOC's interpretation of the definition of "an individual with a disability" that were at issue in the ADA Title I cases of *Sutton*,³² *Murphy*,³³ and *Albertson's*.³⁴

A. Substantially Limited in a Major Life Activity

The first and second of these issues involves the means by which we must determine whether an individual with a physical or mental impairment is *substantially limited* in any major life activity.

1. Mitigating Measures

Prior to the Court's rulings, the EEOC had instructed that the determination of whether an individual with an impairment 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" that might reduce the ramifications of the impairment.³⁵ In formulating that rule, the EEOC relied in part on the legislative history of the ADA. The House Labor Report on the ADA stated that the question of whether an individual is disabled for purposes of the ADA

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.

31. Many commentators have noted the vast amount of litigation on the question of who is disabled under the ADA (or Section 504), and have recognized that too often cases are resolved against plaintiffs on the disability issue without ever reaching the issues of the plaintiffs' qualifications or the defendants' allegedly discriminatory conduct. See, e.g., Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 623-24 (1999) (discussing with disapproval the "rash of litigation" on the question of whether individuals are disabled); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999) (noting that the overwhelming number of cases filed under ADA Title I have been decided in favor of defendants on motions for summary judgment—many premised on the issue of whether plaintiff was disabled within the meaning of the Act).

32. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

33. *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999).

34. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

35. COLKER & TUCKER, *supra* note 26, at 19. The DOJ takes the same position. See, e.g., COLKER & TUCKER, *supra* note 26, at 234.

The 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. For example, a person with hearing loss is substantially limited in the major life activity of hearing, even though the loss may be improved through the use of a hearing aid.

COLKER & TUCKER, *supra* note 26, at 234.

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.³⁶

Similarly, the House Judiciary Report on the ADA stated that when determining whether an impairment substantially limits a major life activity, and thus constitutes a disability, "[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."³⁷

Numerous Circuit Courts of Appeals agreed with the EEOC's interpretation of this issue.³⁸ In *Sutton and Murphy*, to the converse, the Tenth Circuit disagreed with that interpretation.

2. Comparison to Other Individuals

The EEOC's regulations provided that the term "substantially limiting" means, *inter alia*, "[s]ignificantly 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."³⁹ The regulations further provided that when considering whether an individual is substantially limited in a major life activity we should consider:

- (i) The nature and severity of the impairment;
- (ii) The duration or expected duration of the impairment; and
- (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.⁴⁰

At issue in *Albertson's* was the manner in which the principles underlying those regulations should be interpreted.⁴¹

B. Substantial Limitation of the Major Life Activity of Working

The third and fourth issues in this trilogy of cases involve the question of whether working is a major life activity within the meaning of the ADA and, if so, the means of determining whether an individual

36. H.R. REP. NO. 101-485, pt.2, at 52 (1990), reprinted in 1990 U.S.C.A.N. 267, 334.

37. *Id.* at pt. 3, at 28-29. See also S. REP. NO. 101-116, at 23 (1989).

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

39. 29 C.F.R. § 1630.2(j)(ii) (1999).

40. *Id.* § 1630.2(j)(2)(i)-(iii).

41. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 558 (1999).

with an impairment is, or is regarded as being, substantially limited in that major life activity of working. The EEOC defines the term "major life activity" as "mean[ing] functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."⁴² When the claim is that an individual with an impairment is, or is regarded as being, substantially limited in the major life activity of working, the EEOC's regulations provide that:

The 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.⁴³

The EEOC's regulations further provide that the following factors may be considered in making that determination:

- (A) The geographical area to which the individual has reasonable access;
- (B) The 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) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not 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).⁴⁴

III. THE TRILOGY OF CASES

A. Sutton v. United Air Lines, Inc.⁴⁵

Twin sisters who met United Air Lines ("United") qualifications for

42. 29 C.F.R. § 1630.2(i) (1999). See EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ADA TITLE I TECHNICAL ASSISTANCE MANUAL § I-2.2(a)(ii) (1992); COLKER & TUCKER, *supra* note 26, at 47. See also EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, INTERIM ENFORCEMENT GUIDANCE: DEFINITION OF THE TERM "DISABILITY" § 902.3 (1999); COLKER & TUCKER, *supra* note 26, at 120. The DOJ regulations contain the same definition. See, e.g., 28 C.F.R. § 35.102 (1999) (Title II); 28 C.F.R. § 36.104 (1999) (Title III).

43. 29 C.F.R. § 1630.2(j)(3)(i) (1999).

44. *Id.* § 1630.2(j)(3)(ii).

45. 527 U.S. 471 (1999).

pilots with respect to age, education, experience, and Federal Aviation Administration ("FAA") certification applied for jobs as commercial pilots with United.⁴⁶ United refused to hire them because they each had uncorrected vision of 20/200 in their right eye and 20/400 in their left eye, although their corrected vision (via glasses or contact lenses) was 20/20.⁴⁷ The sisters filed suit under ADA Title I, alleging that United discriminated against them because of their actual disabilities (their uncorrected vision) or because United regarded them as being disabled.⁴⁸ The Tenth Circuit affirmed the district court's dismissal of the action for failure to state a claim under the ADA, on the ground that the sisters were not disabled.⁴⁹ The Supreme Court affirmed.⁵⁰

The Court first rejected the EEOC's interpretation of the mitigating measures issue, and held that when determining whether an individual with an impairment is substantially limited in a major life activity, the effects of mitigating measures, both positive and negative, must be considered.⁵¹ This ruling was premised on several factors.

First, the Court defined the term "individual with a disability" as set forth in the "Findings and Purposes" section of the ADA,⁵² and opined that no agency was given authority to promulgate regulations implementing those introductory provisions.⁵³ Recognizing that the EEOC and DOJ have promulgated regulations and interpretive statements to provide guidance on the interpretation of the definition, however, the majority stated that because both parties accepted the validity of the EEOC's regulations and because a determination of their validity was not necessary to resolution of the case, the Court would not consider the question of "what deference they are due, if any."⁵⁴

46. *Sutton*, 527 U.S. at 475.

47. *Id.* at 475-76.

48. *Id.* at 476.

49. *Id.* at 477.

50. *Id.*

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

52. *Id.* at 478.

53. *Id.* at 479.

54. *Id.* at 472. The Court's reasoning with respect to the agency regulations defining the term "individual with a disability" seems to directly conflict with its treatment of those regulations in *Bragdon v. Abbott*, 524 U.S. 624 (1998). In *Bragdon*, which involved the question of whether an individual with HIV was disabled for purposes of ADA Title III, the Court said it was appropriate to rely on the DOJ's Title III regulations defining that term; the Court also sought guidance from the EEOC's Title I regulations addressing the same definition. *Bragdon*, 524 U.S. at 647. The Court did not question the authority of the DOJ and EEOC to draft regulations dealing with that definition. *Id.* The Court's conflicting opinions are bewildering. What effect does the Court's recent ruling that the EEOC and DOJ had no authority to enact regulations defining an "individual with a disability" have on the Court's finding that *Bragdon* was disabled, since that finding was premised on the DOJ's now purportedly "invalid" regulations? For a discussion of a possible motive for the differing opinions and results, see *infra* text accompanying notes 85-96.

Justice Breyer, dissenting in *Sutton*, strongly disagreed with the majority's holding that the EEOC and DOJ had no authority to draft regulations interpreting the definition of an "individual with a disability" simply because that definition was contained in the introductory section of the ADA.

Second, the majority held that the regulations promulgated by the EEOC and the DOJ with respect to the mitigating measures issue constituted an "impermissible interpretation of the ADA[.]"⁵⁵ for three reasons. First, the requirement that an impairment substantially limit a major life activity means that a person must be "presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability."⁵⁶ The Court held that a person whose impairment is ameliorated by mitigating measures is not presently substantially limited in a major life activity.⁵⁷ Second, the individualized inquiry required under the ADA (and Section 504) to determine whether an individual is disabled does not permit generalizations about "how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition."⁵⁸ Further, if mitigating measures could not be considered, "courts and employers could not consider any negative side effects suffered by an individual resulting from the use of mitigating measures . . ."⁵⁹ Third, Congress' finding that 43 million Americans have physical and mental disabilities warranting protection of the ADA⁶⁰ indicates that people whose impairments are "largely corrected by medication or other devices" are not intended to be protected by the Act;⁶¹ if Congress had intended to include all persons with corrected impairments the number of covered individuals would have been significantly greater than 43 million.⁶² Although the Court was aware that the legislative history of

Sutton, 527 U.S. at 513-15. Justice Breyer stated:

There is no reason to believe that Congress would have wanted to deny the EEOC the power to issue such a regulation, at least if the regulation is consistent with the earlier statutory definition [under Section 504] and with the relevant interpretations by other enforcement agencies. The physical location of the definitional section seems to reflect only drafting or stylistic, not substantive, objectives. And to pick and choose among which of "this subchapter['s]" words the EEOC has the power to explain would inhibit the development of law that coherently interprets this important statute.

Id. at 514-16.

55. *Sutton*, 527 U.S. at 473.

56. *Id.*

57. Justice Stevens, whose dissenting opinion was joined by Justice Breyer, strongly disagreed with this reasoning. *Sutton*, 527 U.S. at 496-503 (Stevens, J., dissenting). Justice Stevens noted that the ADA's three-pronged definition of the term "individual with a disability" evidences that the ADA is not just concerned with the present ability or inability of individuals with impairments to participate in society. *Id.* at 497. Justice Stevens gave an example of individuals who have lost one or more limbs, but with the aid of prostheses, courage, determination, and physical therapy are able to perform their major life activities. *Id.* Justice Stevens stated that if the ADA were solely concerned with present capabilities none of these individuals would fall within the ADA's definition. *Id.* at 498.

58. *Id.* at 484.

59. *Sutton*, 527 U.S. at 483.

60. 42 U.S.C. § 12101(a)(1) (1994).

61. *Sutton*, 527 U.S. at 486.

62. Justices Stevens and Breyer again disagreed with the majority's decision. *Id.* at 495. The dissenting opinion authored by Justice Stevens cites the "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes," *Id.* at 504 (citations omitted), and further notes that using the 43 million figure to interpret the definition of disability narrowly is not necessary to avoid the danger that the ADA might be construed as requiring United to hire pilots whose vision renders them unsafe to fly commercial planes. *Id.* at 503. Determining

the ADA indicates otherwise, the Court refused to consider the legislative history of the Act on the ground that the EEOC's regulations did not accord with the wording of the Act itself.⁶³

The Court then considered whether United had regarded the sisters as disabled, even though they were not actually disabled. Plaintiffs argued that United regarded them as being substantially limited in the major life activity of working. The Court assumed, without deciding, that "working" constitutes a major life activity under the ADA. The Court expressed some dissatisfaction with that assumption, however, stating that:

[T]here may be some conceptual difficulty in defining "major life activities" to include work, for it 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."⁶⁴

The Court also noted that the EEOC's guidance provides that working is only to be addressed as the major life activity that is substantially limited if the individual is not substantially limited in any other major life activity.⁶⁵

Assuming *arguendo* that working is a major life activity, the Court then discussed the "regarded as" issue and held that United did not regard plaintiffs as being substantially limited in the ability to work. The

whether plaintiffs are disabled is only the threshold issue in an ADA action. It must then be determined whether the disabled plaintiffs are qualified for the job at issue. If plaintiffs would pose a safety risk due to their vision problems they will not be qualified for the job of commercial airline pilot. *Id.* at 513.

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

64. *Id.* at 492 (brackets in original) (citing Transcript of Oral Argument at 15, *School Bd. of Nassau Co. v. Arline*, 481 U.S. 1024 (1987) (No. 85-1277)).

Subsequent to the Court's ruling in *Sutton*, the Fifth Circuit entered a decision in *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645 (5th Cir. 1999). When holding that working constitutes a major life activity the Fifth Circuit stated:

Working falls well within the phrase "major life activity." For many, working is necessary for self-sustenance or to support an entire family. The choice of an occupation often provides the opportunity for self-expression and for contribution to productive society. Importantly, most jobs involve some degree of social interaction, both with coworkers and with the public at large, providing opportunities for collegial collaboration and friendship. For those of us who are able to work and choose to work, our jobs are an important element of how we define ourselves and how we are perceived by others. The inability to access the many opportunities afforded by working constitutes exclusion from many of the significant experiences of life. Without doubt, then, working is a major life activity.

EEOC v. R.J. Gallagher Co., 181 F.3d at 654-55.

In reaching this conclusion, however, the Fifth Circuit did not refer to the Supreme Court's statement in *Sutton*, although the circuit court relied on *Sutton* in other parts of its decision. Thus it is not clear whether, when reaching its decision, the Fifth Circuit considered the Supreme Court's concern about whether working constitutes a major life activity.

65. *Sutton*, 527 U.S. at 492.

majority noted that plaintiffs had only alleged that United regarded their poor uncorrected vision as preventing them from holding positions as "global airline pilots."⁶⁶ The Court followed the EEOC's regulatory framework in holding that the position of global airline pilot is only a single job, and that by regarding plaintiffs as unable to perform a single job, United did not regard plaintiffs as substantially limited in their ability to work.⁶⁷ To show that United regarded plaintiffs as substantially limited in the ability to work, plaintiffs had to show that United regarded them as unable to perform a class of jobs or a broad range of jobs in various classes.⁶⁸ Because plaintiffs did not allege that United viewed them as unable to perform other jobs, such as those of regional pilot or pilot instructor, the "regarded as" test was not satisfied.⁶⁹

The effect of the majority's ruling was to permit United to refuse to hire plaintiffs because of their poor vision in an uncorrected state, without making any determination as to whether, after their vision difficulties were ameliorated via mitigating measures or accommodations, plaintiffs would be capable of performing as global airline pilots.⁷⁰ The Court permitted United to treat plaintiffs' vision as sufficiently disabling to cause plaintiffs to be denied the positions they sought, but not sufficiently disabling to allow plaintiffs to seek redress under the ADA for conduct that was allegedly irrational and discriminatory.⁷¹

B. *Murphy v. United Parcel Service, Inc.*⁷²

Murphy had hypertension, commonly known as high blood pressure. Without medication Murphy's blood pressure was extremely high. With medication, however, Murphy's "hypertension [did] not significantly restrict his activities and . . . in general he [could] function normally and [could] engage in activities that other persons normally [did]"⁷³ save for a restriction on heavy lifting. United Parcel Service ("UPS") dismissed Murphy from his job as a mechanic because of his hypertension after discovering that his blood pressure exceeded limits set forth in Department of Transportation ("DOT") guidelines for drivers of commercial

66. *Id.* at 474.

67. *Id.* at 478-94.

68. *Id.* at 493.

69. *Id.* at 494.

70. *Sutton*, 527 U.S. at 494.

71. In a strongly worded dissent, Justice Stevens, joined by Justice Breyer, explained the fallacy of such reasoning, by offering the following example: "when an employer refuses to hire [an] individual 'because of' his prosthesis [to replace a missing limb], and the prosthesis in no way affects his ability to do the job, that employer has unquestionably discriminated against the individual in violation of the Act." *Sutton*, 527 U.S. at 498.

72. 527 U.S. 516 (1999).

73. *Murphy*, 527 U.S. at 519 (citing *Murphy v. United Parcel Serv., Inc.*, 946 F. Supp. 872, 875 (D. Kan. 1996) (discussing the testimony of Murphy's doctor)).

vehicles,⁷⁴ and that Murphy had thus been improperly granted DOT certification.⁷⁵ Although Murphy may have qualified for temporary DOT certification, UPS did not permit him to seek such certification.⁷⁶

Murphy alleged that UPS violated the ADA by either firing him on the basis of his actual disability or regarding him as having a disability.⁷⁷ The Tenth Circuit affirmed the district court's dismissal of Murphy's action on the ground that he was not an individual with a disability covered by the ADA.⁷⁸

Following *Sutton*, the Supreme Court ruled that whether Murphy was actually disabled must be determined in light of the medication Murphy took to mitigate the ramifications of his hypertension.⁷⁹ Since Murphy did not allege that, when medicated, his high blood pressure substantially limited any major life activity, the majority held that Murphy did not have an actual disability under the ADA.⁸⁰

The Court then turned to the issue of whether UPS regarded Murphy as substantially limited in the major life activity of working when, in fact, while taking medication for his hypertension he was not so limited.⁸¹ The Court again followed its ruling in *Sutton* in holding that, at most, Murphy had merely shown that UPS regarded him as unable to perform a single job—that of a mechanic only when the job requires driving a commercial motor vehicle.⁸² The Court held that Murphy did not show that UPS regarded him as unable to perform any mechanic (or other) job that does not require driving a commercial vehicle and thus does not require DOT certification.⁸³ Like the plaintiffs in *Sutton*, Murphy did not show that UPS regarded him as unable to perform a class of jobs or a broad range of jobs in various classes.

With respect to the refusal of UPS to permit Murphy to apply for temporary DOT certification, the majority ruled that any factual dispute over whether Murphy could have qualified for such certification was not relevant to the question of whether Murphy was disabled, but was only relevant to the question of whether Murphy was qualified for the job as a mechanic.⁸⁴ Since Murphy's suit had been dismissed at the threshold issue of whether he was disabled, however, the case never reached the next issue to be resolved—whether Murphy was qualified for the job.⁸⁵

74. *Id.* at 520.

75. *Id.* at 522.

76. *Id.*

77. *Id.* at 520.

78. *Murphy*, 527 U.S. at 520.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 524.

83. *Murphy*, 527 U.S. at 524.

84. *Id.*

85. *Id.* at 525.

Thus, the issue of Murphy's qualifications was not before the Court.⁸⁶

The result of the Court's ruling was that UPS was permitted to terminate Murphy from his position because of his hypertension, without determining whether Murphy was qualified for the job while taking medications for that hypertension.⁸⁷ The Supreme Court permitted UPS to treat Murphy as too disabled for the job, but not sufficiently disabled to warrant protection under the ADA.

C. *Albertson's, Inc. v. Kirkingburg*⁸⁸

Kirkingburg had monocular vision (usable vision in only one eye).⁸⁹ His brain compensated for this impairment, however, and he was thus able to see almost normally for most purposes with his monocular vision.⁹⁰ Albertson's fired Kirkingburg from his job as a truck driver after learning that he did not satisfy the DOT's requirement that truck drivers have adequate visual acuity in each eye and adequate binocular vision.⁹¹ Kirkingburg obtained a waiver of those requirements from the DOT, but Albertson's refused to rehire him.⁹² Kirkingburg filed suit under the ADA.⁹³

Following the EEOC's regulations,⁹⁴ the Ninth Circuit held that Kirkingburg's monocular vision substantially limited his major life activity of seeing, and thus constituted a disability, because his impairment was permanent and because "the manner in which [Kirkingburg] sees differs significantly from the manner in which most people see."⁹⁵ The Supreme Court reversed.⁹⁶

The Supreme Court noted that when determining that the manner in which Kirkingburg sees differs from the manner in which other individuals see, the Ninth Circuit relied on *Doane v. Omaha*⁹⁷ in stating that an individual is disabled when he can see out of only one eye, because "the manner in which he performed the major life activity of seeing was

86. This is the usual scenario when a plaintiff's claim is dismissed on the ground that plaintiff is not disabled. An overwhelming number of ADA cases are decided on this threshold issue of whether the definition of a "person with a disability" is satisfied, and thus the parties and the courts are not able to pursue the substantive issues of whether the plaintiff is qualified or whether the defendant's conduct was discriminatory.

87. *Murphy*, 527 U.S. at 524.

88. 527 U.S. 555 (1999).

89. *Albertson's*, 527 U.S. at 559.

90. *Id.*

91. *Id.* at 560.

92. *Id.*

93. *Id.*

94. See *supra* text accompanying notes 39-40.

95. *Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228, 1232 (9th Cir. 1998).

96. *Albertson's*, 527 U.S. at 578.

97. 115 F.3d 624, 627-29 (8th Cir. 1997).

different."⁹⁸ The Supreme Court held that the Ninth Circuit impermissibly transformed the requirement of a "significant restriction" into mere "difference," and ruled that the fact that Kirkingburg saw differently than others (i.e., out of one eye rather than two eyes) did not constitute a substantial limitation of his ability to see.⁹⁹

Further, the Court ruled that the Ninth Circuit had failed to comply with the "mitigating measures" rule set forth in *Sutton*.¹⁰⁰ The Court held that the Ninth Circuit had improperly failed to consider whether Kirkingburg was disabled in light of his brain's ability to compensate for his monocular vision—a type of mitigating measure.¹⁰¹ The Court stated that "[w]e see no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems."¹⁰²

Third, the Court ruled that the Ninth Circuit had failed to apply the requisite individualized approach to determining whether Kirkingburg was disabled.¹⁰³ The Court stated that the Ninth Circuit did not identify the degree or extent of visual loss or restrictions suffered by Kirkingburg.¹⁰⁴

Finally, the Court ruled as a matter of law that Albertson's was not required to consider the fact that Kirkingburg had been granted a waiver from the DOT with respect to the DOT's requirements for truck drivers.¹⁰⁵ The Court ruled that Albertson's was free to establish standards for its own truck drivers, and that since the waiver program constituted an "experiment with safety," and that the hypotheses upon which the experiment was based were not supported by independent findings, Albertson's was not obligated to participate in that program.¹⁰⁶

The result of the Court's decision was that Albertson's was permitted to fire Kirkingburg because of his monocular vision, without determining whether Kirkingburg was qualified for the job despite his vision problem.¹⁰⁷ The Court held that Albertson's, like the employers in *Sutton* and *Murphy*, could treat Kirkingburg as too disabled for the job but not sufficiently disabled to warrant protection under the ADA.¹⁰⁸

98. *Kirkingburg*, 143 F.3d at 1232 (citing *Doane*, 15 F.3d at 627-28).

99. *Albertson's*, 527 U.S. at 564.

100. *Id.* at 565.

101. *Id.*

102. *Id.* at 565-66.

103. *Id.*

104. *Albertson's*, 527 U.S. at 566.

105. *Id.* at 577-78.

106. *Id.* at 576-77.

107. *Id.* at 577-78.

108. *Id.*

IV. A HYPOTHETICAL CASE

Amy and Betty are identical twin sisters. When they were in their early twenties they began losing their ability to hear due to a heretofore unknown genetic disorder. By the age of 25 both sisters were deaf. The sisters made very different decisions with respect to the manner in which they would cope with their deafness.

Amy decided to have a cochlear implant—a surgically implanted device that is capable of permitting some people who are deaf to hear via electrically stimulated electrodes placed inside the cochlea.¹⁰⁹ Because Amy heard normally for twenty years, and because she had only been hearing-impaired for a few years and deaf for approximately a year, her implant was very successful (much more successful than it would have been had Amy been deaf all her life).¹¹⁰ With the assistance of specialized auditory training, Amy learned to train her brain to adapt to the new form of sound she heard via her implant, a process that took considerable time and effort.¹¹¹ As a result of this training and hard work, Amy was able to understand speech and communicate normally with others, she could hear on the telephone, and she could understand movies, plays, and lectures without assistance. For the most part, when Amy used her implant she could function as if she were hearing, but the manner in which she heard was different from the way normally hearing people hear.

Betty, to the contrary, declined to have a cochlear implant. She did not want to have surgery, and she did not want to spend the necessary time and energy retraining her brain to adapt to a new type of sound. Betty learned sign language and made new deaf friends who signed. She purchased a Telecommunications Device for the Deaf ("TDD"),¹¹² and

109. A cochlear implant is an electronic prosthesis implanted into the inner ear that partially performs the functions of the cochlea—that part "of the inner ear that transduces sound waves into coded electrochemical signals." Thomas Balkany, *A Brief Perspective on Cochlear Implants*, 328 N. ENG. J. MED. 281 (1993). The cochlear implant is intended to remedy many of the effects of nerve deafness, the most common form of deafness. *Id.* From two to twenty-two electrodes are implanted into the inner ear and are attached via a magnet and wires to an external processor. Noel L. Cohen et al., *A Prospective, Randomized Study of Cochlear Implants*, 328 NEW ENG. J. MED. 233, 234 (1993). In addition to the processor, the implanted person wears a microphone to pick up sound. *Id.* at 233. The external processor sends coded information to the prosthesis in the inner ear, which is a receiver-stimulator. *Id.* The receiver-stimulator converts the coded information into electrical signals, which are passed to the electrodes. *Id.* The electrodes stimulate hearing nerve fibers, and artificial "sound" is transmitted directly to the brain, bypassing the nonfunctioning portion of the ear. *Id.* See also Michael F. Dorman, *An Overview of Cochlear Implants*, in BONNIE P. TUCKER, COCHLEAR IMPLANTS: A HANDBOOK 5-28 (1998) [hereinafter COCHLEAR IMPLANTS: A HANDBOOK].

110. See generally TUCKER, *supra* note 109.

111. TUCKER, *supra* note 109.

112. A TDD is a typewriter telephone. When using a TDD, the telephone receiver is placed into two headset cups (similar to a modem) on a machine that resembles a small typewriter with a video screen and/or paper printout. The TDD user types a message on a keyboard, which is relayed to a party on the other end of the line with a similar device. The receiver returns his or her message by

used the telephone only with other people who had TDDs or via a relay service (pursuant to which an operator acts as a live conduit between deaf and hearing telephone user—typing words for the deaf person and speaking words for the hearing person).¹¹³ Betty relied on the services of sign language interpreters when she wanted or was required to speak with people who do not know sign language.

Amy and Betty are both trained chemists. They applied for jobs as chemists with Small-Chem, a company with about fifty employees engaged in innovative cancer research in a laboratory setting. Small-Chem's president, Sam Samuels, interviewed them individually.

When interviewing Amy, Samuels asked about her visible cochlear implant (Samuels had never seen an implant before and did not know what it was). Amy explained that she was deaf and the device was a cochlear implant that allowed her to hear very well. Amy told Samuels that she would not require any job accommodations for her deafness except a special adaptor for the telephone,¹¹⁴ because with her implant she could hear all environmental sounds, and could communicate easily on the telephone (with the adaptor), as well as everyone at the workplace.

Betty was accompanied at her interview by a sign language interpreter, who interpreted everything Samuels said. Betty told Samuels that she would require some job accommodations for her deafness. Betty requested that Small-Chem: (i) buy a TDD so that she could make work-related phone calls using a relay service provided by the state; (ii) provide her with a sign language interpreter during weekly staff meetings and all other meetings and situations in which she had to confer with supervisors or co-workers; and (iii) provide her with written copies of all instructions given orally to the chemists. Betty said that during casual, unofficial communications with her supervisors and co-workers, people could write notes to her.

Samuels refused to hire either Amy or Betty, expressly because of their deafness. Samuels told Amy that Small-Chem was a small company and its employees were an unusually close-knit group—the employees were all friends and the atmosphere in the laboratory was very congenial. Samuels said that he was “put-off” by Amy’s visible implant and her deafness, and he thought his chemists would be equally put-off. Samuels informed Amy that even though he realized (intellectually) that

typing it to the sender and the conversation proceeds via typewriter and video screen or printout.

113. Because most hearing people do not have TDDs, a relay service is required to allow TDD users to communicate with non-TDD users. Thus, the TDD user calls a relay service, and a relay operator answers via TDD and places the call to the non-TDD user (or vice versa). The operator then relays messages back and forth between the TDD and non-TDD users, typing messages for the TDD user and speaking messages for the non-TDD user. Title IV of the ADA requires all telephone services to provide 24 hour, seven day a week relay services for individuals who have hearing and/or speech impairments. See *supra* text accompanying note 19.

114. See *infra* note 131 and accompanying text.

Amy heard well with her implant and thus would probably not miss any more of what was said in the workplace than any other chemist would miss, the very words "deaf" and "implant" carried negative connotations and fears, however irrational. Samuels explained that Amy's "very different" presence amongst this small group of tightly knit employees would cause a jarring impact and affect the cohesiveness, and hence the productivity, of the group. Samuels recommended that Amy seek a job at either: (a) a larger company, where so many chemists were employed that the presence of one who was different would not be so intrusive, or (b) a different small company where the employees did not comprise such a uniquely close group.

Samuels expressed similar concerns to Betty, stating that Betty's presence in the workplace would be even more "off-putting" and disruptive due to the necessity of having interpreters present and the need to write notes. Further, Samuels said that it was not reasonable to expect the company to pay for interpreters at all meetings between Betty and her supervisors or co-workers. Samuels explained that meetings were often called on the spur of the moment, and that in order to have an interpreter available for on-the-spot meetings the company would have to hire a full time interpreter at an exorbitant cost. Samuels also suggested that Betty apply for jobs at larger companies. Amy and Betty both feel that Small-Chem's refusal to hire them because of their deafness constitutes discrimination prohibited by ADA Title I.

Amy believes that Samuels' unwillingness or inability to disregard irrational concerns about her corrected deafness perpetuate the very stereotypes or myths about deafness the ADA was intended to alleviate. Amy contends that Samuels was obligated to focus solely on her actual, individual ability to hear with her implant. Further, Amy believes that the refusal to hire her because other employees might find her implant and deafness "off-putting" constitutes a clear violation of the ADA.

Betty has similar objections. In addition, Betty believes that the provision of interpreters for all meetings is a reasonable accommodation that the ADA requires Small-Chem to provide.

Amy and Betty seek legal advice as to whether they may pursue claims against Small-Chem for violating the ADA. The significant issue is, of course, whether Betty and Amy satisfy the threshold test of being individuals with disabilities within the meaning of the ADA, as construed by the Supreme Court.

A. Amy

It is questionable whether Amy can satisfy the threshold test of be-

ing an individual with a disability, for the following reasons:

1. Having an Actual Disability

Amy is not likely to be found to have an actual disability. The Supreme Court has ruled that Amy's ability to hear must be examined with, rather than without, her cochlear implant to determine whether her ability to hear is substantially limited.

Amy contends that with her implant she is limited in her ability to hear in two respects: First, she has some difficulty understanding conversations in very noisy settings, such as in very loud bars or restaurants. However, with concentration and occasional repetition she is able to follow and participate. Second, the external components of a cochlear implant cannot be submerged in water. Thus, Amy cannot wear her implant when she is in the water, and she is unable to hear in those situations. Amy, however, does not like water sports or activities that take place in water (such as boating), and she does not know how to swim. Moreover, she spends only a minimal amount of time each day taking a shower, and, in any event, most people do not use their hearing to any significant extent while showering.

Since we must analyze Amy's impairment in the context of her individual situation, it is unlikely that her limited difficulty hearing in very noisy settings and her inability to hear while submerged in water would be held to constitute a substantial limitation of the major life activity of hearing. Although Amy remains "impaired" in her ability to hear, that impairment does not necessarily rise to the level of an actual disability, as that term is defined by the Supreme Court.

If Amy were an avid swimmer or boater or other water sport enthusiast, however, arguably the result would be different. Courts have held that the ability to participate in sports activities is not a major life activity, when employment in the field of sports is not at issue but the individual engages in sports activities simply for enjoyment.¹¹⁵ Amy, however, is not contending that she is substantially limited in her ability to play sports but that she is substantially limited in her ability to hear. If Amy were unable to hear while participating in an activity that she spent considerable time performing, she could be found to be substantially limited in the ability to hear. (Note that swimming, boating, and other water activities, unlike showering, often involve interaction with others during a lengthy period of time.) It seems preposterous to premise the determination of whether Amy is disabled on the question of whether

115. See, e.g., *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 642 (2d Cir. 1998) (noting that sports activities are not major life activities); *accord Piascyk v. City of New Haven*, 64 F. Supp. 2d 19 (D. Conn. 1999), *aff'd*, No. 99-7960, 2000 U.S. App. LEXIS 9969 (2d Cir. May 11, 2000).

she likes water or water sports, but that is a possible outcome of the Court's rulings.¹¹⁶

To prevail on her claim that she remains actually disabled despite her implant, Amy could contend that she cannot comfortably wear her implant while sleeping, because to prevent the rather large device she wears behind her right ear (similar to a large hearing aid) from becoming dislodged, she must lie immobile so that her head does not move while she is sleeping. Thus, Amy could make one of two arguments.

Amy could argue that because she is unable to wear her implant processor while sleeping she is substantially limited in the ability to hear—she cannot hear for the seven or eight hours each night that she spends sleeping, and she could not hear if an emergency arose during that period. Amy could further argue that her difficulty hearing in very noisy settings, coupled with her inability to hear while in water and while sleeping, render her substantially limited in the ability to hear.¹¹⁷

Alternatively, Amy could argue that she must wear her implant processor while sleeping (so that she could hear if an emergency arose) and her sleep is thus fitful and frequently interrupted. The EEOC takes the position that the ability to sleep is a major life activity, and opines, for example, that the combined effects of two medications an individual takes to reduce the ramifications of an impairment might substantially limit that individual's major life activity of sleeping.¹¹⁸ In a few decisions entered since the Supreme Court's trio of cases, courts have found that material issues of fact precluded summary judgment on the issue of whether plaintiffs were disabled, notwithstanding their use of mitigating measures to reduce the ramifications of their physical impairments.¹¹⁹ At

116. On the other hand, it could be argued that Amy should give up water sports as a mitigating measure to accommodate her deafness, and that her failure to employ such reasonable mitigating measures renders her unable to claim the protection of the ADA. See *infra* Part IV.A.4.

117. See EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC GUIDANCE TO FIELD OFFICERS ON AMERICANS WITH DISABILITIES ACT CHARGES: ANALYZING ADA CHARGES AFTER SUPREME COURT DECISIONS ADDRESSING "DISABILITY" AND "QUALIFIED" § IV(B) (1999) [hereinafter "EEOC's October 1999 Guidance"] (noting that the combined effects of mitigating measures, such as the combined effects of two different medications, may produce side effects that in combination serve to substantially limit a major life activity).

118. *Supra* note 117. See also *McAlindin v. County of San Diego*, 192 F.3d 1226 (9th Cir. 1999) (finding that sleep is a major life activity), *amended by*, 201 F.3d 1211 (9th Cir. 2000); *Franklin v. Consolidated Edison Co. of New York*, 16 Nat'l Dis. L. Rep. (LRP) ¶ 181, No. 98-C-2286, 1999 U.S. Dist. LEXIS 15582 (S.D.N.Y. Sept. 30, 1999).

119. See, e.g., *Ivy v. Jones*, 192 F.3d 514, 515 (5th Cir. 1999); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 320 (3d Cir. 1999). In at least one case the court held that the plaintiff was actually disabled despite the use of mitigating measures to reduce the ramifications of a physical disability. See *Belk v. Southwestern Bell Tel. Co.*, 194 F.3d 946 (8th Cir. 1999). In that case the Eighth Circuit held that an individual who suffered from the residual effects of polio but was able to walk and engage in physical activities while wearing a leg brace remained actually disabled under the ADA. *Belk*, 194 F.3d at 950. In so ruling, the court relied on the facts that while wearing the brace the plaintiff did not have full range of motion in his leg, that plaintiff's gait was hampered by a pronounced limp, and that plaintiff's brace did not permit him to "function the same as someone who never had polio." *Id.* at 950.

least two of those cases involved claims that one or more mitigating measures taken to reduce the ramifications of a physical impairment caused the plaintiffs to be substantially limited in the ability to perform a major life activity, including the ability to sleep.¹²⁰

Whether a court would agree that Amy's major life activities of either hearing or sleeping are substantially limited under the above scenarios is problematic. Most courts are likely to conclude that Amy does not have an actual disability. Most people do not use their hearing to any significant extent while sleeping, and there are measures that Amy could take to allow her to be aware of emergencies while asleep. She could, for example, acquire a hearing dog,¹²¹ install smoke alarms with flashing lights instead of audible signals, or install vibrating and strobe light alarm clocks to wake sleepers who do not hear audible alarm clocks.¹²² These facts, particularly the fact that hearing is not often used while sleeping, in conjunction with the fact that courts seem to generally disfavor ADA claims, do not bode well for Amy's ability to show that she remains actually disabled despite her implant. In the vast majority of cases in which courts have considered the effects of mitigating measures following the Supreme Court's trilogy of cases, the courts have ruled that the plaintiffs were not actually disabled.¹²³

120. See, e.g., *McAlindin*, 192 F.3d at 1238 (finding that material issue of fact existed regarding whether a plaintiff who took medications for anxiety, panic and somatoform disorders was disabled because the medications interfered with his major life activities of sleeping, interacting with others and engaging in sexual relations); *Franklin*, 1999 U.S. Dist. LEXIS 15582 (finding a material issue of fact existed regarding whether an attorney who claimed that medication she took to reduce the effects of her epilepsy rendered her substantially limited in the major life activities of sleeping and working).

121. Many people who are deaf have specially trained hearing dogs (analogous to seeing eye dogs for people who are blind) to alert them to sound in emergency situations as well as to alert them to ordinary sounds such as the ringing of a doorbell or telephone.

122. These factors do not mitigate Amy's hearing loss, in that they do not enhance Amy's ability to hear, but are merely measures that permit Amy to compensate for her loss of hearing. See *infra* note 127 and accompanying text.

123. See, e.g., *Hill v. Kansas City Area Transp. Auth.*, 181 F.3d 891, 894 (8th Cir. 1999) (holding that a bus driver who took medication for hypertension was not actually disabled within the meaning of the ADA; although evidence showed that the medication plaintiff took for her hypertension, in combination with the pain killers she took for a work related injury, caused drowsiness, the court held that the evidence did not show that plaintiff's physical condition *compelled* her to take that combination of medications) (summary judgment granted in favor of defendant); *Spades v. City of Walnut Ridge*, 186 F.3d 897, 900 (8th Cir. 1999) (holding that a police officer whose depression was alleviated by medication and counseling was not actually disabled within the meaning of the ADA) (summary judgment granted in favor of defendant); *Matlock v. City of Dallas*, 17 Nat'l Dis. L. Rep. (LRP) ¶ 7, No. 3:97-CV-2735-D, 1999 U.S. Dist. LEXIS 17953 (N.D. Tex. Nov. 12, 1999) (holding that individual with 160 decibel loss in right ear and 180 decibel loss in left ear was not disabled since with hearing aids he was not substantially limited in the ability to hear) (summary judgment granted in favor of defendant); *Lajaunie v. Hibernia Corp.*, 17 Nat'l Dis. L. Rep. (LRP) ¶ 180, No. 99-0285, 2000 U.S. Dist. LEXIS 1209 (E.D. La. Feb. 7, 2000) (holding that individual whose vision impairment, despite mitigating measures, prevented her from working in the garden, riding a bicycle, or doing crossword puzzles was not substantially limited in the ability to see since she could drive, work, read, and substantially see most things) (summary judgment granted in favor of defendant); *Blackston v. Warner-Lambert Co.*, 17 Nat'l Dis. L. Rep. ¶ 179, No. CV-98-P-2974-S, 2000 U.S. Dist. LEXIS 1114 (N.D. Ala. Jan. 25, 2000) (holding that plaintiff with Attention Deficit Disorder

Finally, it is unlikely that Amy will be found to be substantially limited in her ability to hear, because the manner in which she hears via her cochlear implant differs from the manner in which hearing people hear.¹²⁴ The Supreme Court explained in *Albertson's* that the manner in which Kirkingburg sees with only one eye does not constitute a substantial difference from the manner in which most people see with two eyes.¹²⁵ If Amy were "hearing" via lip-reading or sign language, presumably such a drastically different means of "hearing" would constitute a substantial difference from the manner in which others hear.¹²⁶ It is

("ADD") was not substantially limited in any major life activities since "the symptoms of ADD can be alleviated by different types of treatment: medication, practical management strategies, and psychotherapy," and when plaintiff was medicated he could function normally) (summary judgment granted in favor of defendant); *Haiman v. Village of Fox Lake*, 55 F. Supp. 2d 886, 893 (N.D. Ill. 1999) (holding that an employee who took cardiac medications for a heart condition was not actually disabled within the meaning of the ADA despite the fact that her heart condition caused her to be placed on medical leaves of absence for a total of three and a half months even while taking the medications) (summary judgment on that issue granted in favor of defendant); *Pacella v. Tufts Univ. Sch. of Dental Med.*, 66 F. Supp. 2d 234, 238 (D. Mass. 1999) (holding that a plaintiff who had essentially monocular vision and also had severe myopia in his good eye, but who utilized contact lenses, diopter eyeglasses, and occupational bifocals to assist his vision and also used visual clues to compensate for his deficiencies in depth perception, was not actually disabled within the meaning of the ADA; although plaintiff's corrected vision may have "var[ie]d from that of the general population" those differences did not rise to the level of a substantially limiting disability) (summary judgment on that issue granted in favor of defendant); *Todd v. Academy Corp.*, 57 F. Supp. 2d 448, 454 (S.D. Tex. 1999) (finding that while taking anti-epileptic medication plaintiff experienced only light seizures once a week and was thus not substantially limited in a major life activity; although anti-epileptic medication may have adverse side effects on the user's intellectual capacity, it was not clear whether those side effects were actually or hypothetically substantial) (summary judgment granted for the defendant/employer on the ground that the plaintiff was not disabled); *Taylor v. Blue Cross and Blue Shield of Tex., Inc.*, 55 F. Supp. 2d 604, 611 (N.D. Tex. 1999) (holding that a sales instructor whose sleep apnea was relieved by the use of a Constant Positive Air Pressure machine ("CPAP") was not actually disabled within the meaning of the ADA) (summary judgment granted in favor of defendant); *Spradley v. Custom Campers, Inc.*, 68 F. Supp. 2d 1225, 1233 (D. Kan. 1999) (holding that a plaintiff with a seizure disorder whose doctor prescribed medication which would make it less likely that plaintiff would have seizures but would not prevent all seizures was not actually disabled within the meaning of the ADA) (summary judgment granted in favor of defendant); *Robb v. Horizon Credit Union*, 66 F. Supp. 2d 913, 919-20 (C.D. Ill. 1999) (holding that individual with severe depression who was capable of working while taking anti-depressant medication was not actually disabled within the meaning of the ADA) (summary judgment granted in favor of defendant).

In a few cases courts have held that a material issue of fact precluded summary judgment in favor of defendant on the issue of whether an individual with an impairment was actually disabled despite the employment of mitigating measures. *See, e.g., Ivy v. Jones*, 192 F.3d 514, 515 (5th Cir. 1999) (remanding the case to the district court to determine whether a plaintiff with a hearing loss was substantially limited in the ability to hear despite her use of a hearing aid); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 309 (3d Cir. 1999) (remanding the case to the district court to determine whether a plaintiff with bipolar disorder was disabled despite her use of lithium to reduce the ramifications of her impairment); *Finical v. Collections Unlimited, Inc.*, 65 F. Supp. 2d 1032, 1051 (D. Ariz. 1999) (holding that material issues of fact precluded summary judgment in favor of employer on the issue of whether an individual with a hearing impairment was substantially limited in the ability to hear).

124. *See supra* text accompanying notes 39-40.

125. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565-67 (1999).

126. *See, e.g., Finical v. Collections Unlimited, Inc.*, 65 F. Supp. 2d 1032, 1041 (D. Ariz. 1999) (stating that lip-readers obtain information visually rather than orally and that as a consequence lip-reading to mitigate the effects of a hearing loss does not alter the status of the individual's hearing impairment; the court opined that an individual "may be able to obtain information from a speaker

necessary, however, to distinguish between mitigating measures that actually improve plaintiff's hearing and those that simply aid plaintiff in compensating for her hearing loss.¹²⁷ Since Amy, with her implant, hears *actual* sound, albeit sound that is transmitted via artificial electronic means rather than via the means by which sound is transmitted to the cochlea of hearing individuals, her implant actually improves her ability to hear. This "difference" is likely to be found no more substantial than the difference between seeing out of one eye versus two eyes.

The effect of the Court's "mitigating measures" rule is to place Amy in a "Catch-22" position. To meet the threshold test and proceed to the merits of her ADA claim, Amy must show that she is sufficiently impaired, despite mitigating measures taken to alleviate the ramifications of her deafness, and that she remains disabled under the Act.¹²⁸ However, the Court has raised the standard of a "disability" to such extremes that in order to satisfy that standard Amy must show that she is virtually unqualified to perform the job she seeks. The effects of mitigating measures taken to alleviate a serious physical or mental impairment should be examined when determining whether Amy is *qualified* for the job, not when determining whether Amy is disabled. Under the Court's rulings, Amy is precluded from showing that mitigating measures alleviate her deafness to such extent that she is fully capable of performing the job, with or without reasonable accommodations.¹²⁹ The more Amy focuses on the effects of mitigating measures taken for her deafness, the less likely she is to satisfy the test of being actually disabled.

The Court's "mitigating measures" rule would also permit Small-Chem to hire Amy yet refuse to provide any reasonable accommodations Amy might require for her hearing loss.¹³⁰ Amy can converse normally on the telephone only if she utilizes a special telephone adaptor.¹³¹ Amy

via lip-reading while remaining substantially limited in [the] ability to hear").

127. See *Finical*, 65 F. Supp. 2d at 1041. In *Finical*, the court noted that the means utilized by the plaintiff, Kirkingburg, in *Albertson's* to mitigate the ramifications of his monocular vision had actually improved his ability to see despite his monocular vision. *Id.* The court held that that type of mitigating measure is distinguishable from mitigating measures that may have merely permitted Kirkingburg to compensate for his monocular vision, such as the development of more acute hearing. *Id.*

128. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

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

130. See *id.* at 500.

131. Many people with cochlear implants can only hear on the telephone with use of a special adaptor. The adaptor has two cords, one on each end, and a receptacle opening. One cord, attached to one end of the adaptor, plugs into an opening in the implant processor. The cord attached to the other end of the adaptor plugs into the jack on the telephone receiver where normally the cord from the body of the telephone to the receiver is plugged into. The cord that normally goes from the body of the telephone to the receiver is then plugged into the receptacle opening on the adaptor. By this means the sound from the telephone receiver goes directly into the implant processor. In many office telephone systems, however, the cords that run from the body of the telephones to the telephone receivers are not removable. In that situation an individual with a cochlear implant cannot utilize the telephone. Thus a different phone, having a removable cord between telephone body and receiver,

has adaptors that allow her to communicate easily via her home and car phones, and thus she is not substantially limited in her ability to hear on the telephone. Since Amy is not actually disabled under the Court's trilogy of rulings (we have already concluded that she is not likely to be found substantially limited in the ability to hear for any other reason), she is not covered by the ADA, and Small-Chem can ignore the ADA's reasonable accommodation requirement with impunity.¹³² Small-Chem may thus refuse to provide Amy with a telephone adaptor at work, and thereby effectively *cause* Amy to be actually disabled, even if she is not viewed as such under the Supreme Court's definition of that term, and render her unable to perform the functions of her job.

However, this raises another issue. It is arguable that if Amy were employed at Small-Chem and asserted an ADA Title I claim against Small-Chem due to its refusal to provide her with a telephone adaptor, Amy would fall within the definition of an individual with a disability under the ADA because she was substantially limited in the ability to work. Amy's argument would be that without being able to use the telephone she is precluded from working in a class of jobs or a broad number of jobs in various classes, and because she is denied a telephone adaptor she is unable to use the telephone. In that case, since Amy does not have the benefit of the "mitigating measure" of an adaptor at work, use of that mitigating measure cannot be considered when deciding whether she is substantially limited in a major life activity and thus disabled.¹³³

In *Finical v. Collections Unlimited, Inc.*,¹³⁴ the court expressly rejected the defendant employer's assertion that the accommodation (a telephone adaptor) plaintiff sought from the employer to accommodate her impairment (a hearing loss) should be considered a mitigating measure that reduced the effects of plaintiff's impairment.¹³⁵ The court cited *Sutton* and *Murphy* in holding that "the mitigating measures or devices that must be considered are those employed by the individual claimant, such as hearing aids or blood pressure medication, not those provided by, and within the control of, the employer."¹³⁶ Under the court's reasoning in *Finical*, the employer's conduct may cause Amy to fall within the definition of an "individual with a disability," even if, by using the simple accommodation of a telephone adaptor outside the workplace, Amy is not disabled, under the Supreme Court's "mitigating measures" rule, in any other major life activity but the activity of working. This

must be acquired in addition to the adaptor.

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

133. *Id.*

134. 65 F. Supp. 2d 1032 (D. Ariz. 1999).

135. *Finical*, 65 F. Supp. 2d at 1038.

136. *Id.*

example serves to illustrate the incongruity of the Court's "mitigating measures" rule and the resulting circular manner one must use to determine whether an individual is disabled under the ADA.¹³⁷ For, if the facts in our hypothetical were different, and Amy had been hired by Small-Chem and filed suit against Small-Chem due to its failure to provide her with the necessary telephone amplifier, Amy might succeed on her claim of disability within the meaning of the ADA.¹³⁸

The Court's "mitigating measures" rule has an unfortunate tangential effect. Since the Court's trilogy of cases, courts have held that a plaintiff who has been denied employment of her choice but obtains other employment in other fields, pending resolution of an ADA Title I claim against the allegedly discriminating employer, cannot show that she is substantially limited in the ability to work.¹³⁹ In *Mondzelewski v. Pathmark Stores*,¹⁴⁰ which was decided prior to the Supreme Court's rulings in *Sutton*, *Murphy*, and *Albertson's*, the Third Circuit followed

137. While the court's reasoning in *Finical* seems logical, that reasoning could lead to absurd results. For example, suppose an individual cannot stand for long periods due to a back impairment. His employer provides him with the reasonable accommodation (i.e., a mitigating measure) of a chair to sit on during working hours. The individual may be held to be actually disabled (i.e., substantially limited in the ability to work) because we do not consider the effects of mitigating measures supplied by and within the control of the employer. If the individual provides his own chair to sit on at work, however, he may be found *not* disabled, because we must consider the effects of mitigating measures taken by that individual when determining whether he is substantially limited in a major life activity.

138. In one case decided after this Article was written, the court applied different reasoning and expressed outright frustration with the circularity of reasoning it felt was compelled under the Supreme Court's rulings. In *Nawrot v. CPC Int'l*, 18 Nat'l Dis. L. Rep. (LRP) ¶ 167, No. 99-C-630, 2000 WL 816787 (N.D. Ill. June 22, 2000), a plaintiff with diabetes claimed that the defendant employer violated ADA Title I by refusing his requests for reasonable accommodations and by terminating his employment. Following *Sutton*, the court concluded that the plaintiff was not disabled, since medication alleviated the ramifications of his diabetes. The court further ruled that the plaintiff had not shown that the employer regarded him as disabled. Thus the court granted summary judgment in favor of the employer on the plaintiff's complaint. The court expressed its frustration with its ruling, however, noting that the result was "distorted." The plaintiff maintained that the employer failed to accommodate his diabetes. The court determined that factual issues existed as to whether the defendant employer prevented the plaintiff from controlling his diabetes. The court was frustrated that under *Sutton* the court could *not* consider that issue, because the plaintiff was not disabled in his mitigated state. Thus, the court stated that under such circumstances, "the employer strips the [employee] of all ameliorative measures, but in court, the judge pretends that the [employee] is always clothed with those measures." *Nawrot*, 2000 WL at *7.

139. See, e.g., *Hurley v. Modern Continental Constr. Co., Inc.*, 54 F. Supp. 2d 85, 95 (D. Mass. 1999) (holding that the plaintiff's contention that he was "substantially limited" in the ability to work was "undercut" by the fact that plaintiff held other jobs between the time he was denied employment by the defendant and the time the court entered a decision in plaintiff's ADA action); *Williams v. Heathreach Network*, 18 Nat'l Dis. L. Rep. (LRP) ¶ 197, No. 99-0030-B, 2000 U.S. Dist. LEXIS 9695 (D. Me. Feb. 22, 2000) (holding that the fact that a nurse was able to secure other employment after she was terminated from her position by the defendant illustrated that she was not substantially limited in the ability to work); *Nugent v. Rogosin Institute*, 105 F. Supp. 2d 106 (E.D.N.Y. 2000) (holding that a nurse who was able to obtain a comparable job at another facility after being terminated from his position with the defendant was not substantially limited in the ability to work). See also *Shipley v. City of Univ. City*, 195 F.3d 1020 (8th Cir. 1999), discussed *infra* in note 212.

140. 162 F.3d 778 (3d Cir. 1998).

the EEOC's regulations in holding that the determination of whether an individual is disabled should be made *without* considering the effects of mitigating measures taken to alleviate the ramifications of an impairment.¹⁴¹ The Third Circuit held that the provision of reasonable accommodations for an employee's disability constitutes a form of mitigating measure, and rejected the defendant's argument that the plaintiff could not be "substantially limited in the major life activity of working because he is now working."¹⁴² The Third Circuit's reasoning may no longer be valid in light of the Supreme Court's rejection of the EEOC's mitigating measures rule.¹⁴³ To the contrary, courts such as *Hurley* have held that it is now permissible to evaluate the effects of mitigating measures, such as reasonable accommodations provided to allow a person with an impairment to work, when determining whether the individual is disabled.¹⁴⁴ These courts take a different approach than that taken by the court in *Finical*, as discussed above. Such reasoning serves to encourage people with physical and mental impairments to remain out of the workforce in some, albeit limited, circumstances, an effect which flies in the face of the ADA's purposes.

It is difficult to reconcile the Court's "mitigating measures" rule with its ruling in *Bragdon v. Abbott*.¹⁴⁵ In *Bragdon*, the Court considered the question of whether a plaintiff with HIV was disabled under the ADA.¹⁴⁶ The Court noted that HIV is a "physiological disorder with a constant and detrimental effect on the infected person's hemic and lymphatic systems from the moment of infection,"¹⁴⁷ and held that the plaintiff's impairment of HIV substantially limited her major life activity of reproduction.¹⁴⁸ Although the Court did not rule that HIV constitutes a *per se* disability,¹⁴⁹ it took an expansive view of the ADA's definition of the term "individual with a disability."¹⁵⁰ The Court implied that most individuals with HIV would be disabled within the meaning of the ADA, due to the inherent substantial limitations posed by that impairment.¹⁵¹

Other impairments, such as diabetes, have somewhat similar inherent substantial limitations on the daily activities of a person having such impairments. A person with diabetes must constantly watch such factors

141. *Mondzelewski*, 162 F.3d at 786.

142. *Id.*

143. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482-84 (1999).

144. *Hurley*, 54 F. Supp. 2d at 94 n.9.

145. 524 U.S. 624 (1998).

146. *Bragdon*, 524 U.S. at 628.

147. *Id.* at 637.

148. *Id.* at 639-41.

149. *Id.* at 642.

150. *Id.* at 632-41.

151. See *Bragdon*, 524 U.S. at 637. For a discussion of another issue on which the Court's opinion in *Bragdon* differs from its rulings in this trilogy of cases, see *supra* note 54 and accompanying text.

as her weight, what and when she eats and drinks, how much she exercises, the extent of stress to which she is subjected,¹⁵² and how many hours a day she sleeps.¹⁵³ While medication such as insulin may help in regulating the effects of diabetes, every aspect of the daily life of a person with diabetes remains affected by the impairment.¹⁵⁴ Moreover, that person must carefully monitor the amount of insulin to be taken, as well as the time and manner in which the insulin should be given.¹⁵⁵

An individual whose diabetes is regulated by insulin may appear in perfect health and may, in fact, be able to function normally in most activities if care is taken to eat and sleep properly, engage in exercise, monitor medication, and the like.¹⁵⁶ Under the Court's trilogy of cases, therefore, many individuals with insulin-regulated diabetes might not satisfy the test of being actually disabled.¹⁵⁷ The individual could argue that her major life activity of "caring for herself"¹⁵⁸ was substantially limited by her diabetes, as so many aspects of life are affected by the impairment of diabetes.¹⁵⁹ While the Court indicated that it might have agreed with such reasoning in *Bragdon* if the plaintiff had alleged that her major life activity of caring for herself was impacted by her HIV,¹⁶⁰

152. National Institute of Diabetes and Digestive and Kidney Diseases, *How Does a Person Live with Diabetes?* (Feb. 20, 1998) <http://my.webmd.com/printing/dmk/dmk_article_56354>.

153. University of Chicago Medical Center, *Lack of Sleep Alters Hormones, Metabolism* (Oct. 22, 1999) <<http://www.crystalinks.com/sleepdisorders.html>>.

154. National Institute of Diabetes and Digestive and Kidney Diseases, *supra* note 152.

155. *Id.*

156. *Id.*

157. This result contravenes the intent of Congress as expressed in the legislative history of the Act. Congress recognized that people with "controlled diabetes . . . are often denied jobs for which they are qualified" as a "result of negative attitudes and misinformation." S. REP. NO. 101-116, at 24 (1989). Congress intended for people with diabetes to be considered actually disabled under the ADA "even if the effects of . . . [their diabetes] are controlled by medication." H.R. REP. NO. 101-485, pt. 2, at 52 (1990).

158. The EEOC and DOJ regulations both include "caring for oneself" as a major life activity. 29 C.F.R. § 1630.2(i) (1991) (EEOC's ADA Title I regulations); 28 C.F.R. § 35.104 (1999) (DOJ's ADA Title II regulations); 28 C.F.R. § 36.104 (1999) (DOJ's ADA Title III regulations).

159. See Brief of the AIDS Action Council et al., at 25-26, *Bragdon v. Abbott*, 524 U.S. 624 (1998) (No. 97-156). In *Bragdon*, an amicus brief filed with the Supreme Court by a coalition of AIDS organizations stated:

Virtually everything involved in caring for oneself day to day, from the profound to the trivial, is altered forever by an HIV diagnosis . . . A soda at lunch filled with ice cubes made from tap water becomes a deadly threat. A person with HIV must be attentive to diet or stress that might trigger immune suppression. A person with HIV must be wary about changing careers for fear that a new health plan may leave him or her destitute in a few years. Life involves a series of decisions, including those that are large for everyone—what career to choose, what schooling to pursue, where to live, and whether to start a family—and those that, although small for the average person, have a greater impact for the person with HIV—what and when to eat, or which gynecologist or primary care physician to choose. The prospect of a series of debilitating illnesses and an untimely death means that people with HIV will make every one of these decisions, and a host of others, under a different set of conditions from those experienced by the average person.

Id. at 25-26.

160. The Court stated, for example, that "it may seem legalistic to circumscribe our discussion to

the extent to which an individual with diabetes is limited in the ability to care for herself is somewhat less than that of an individual with HIV.¹⁶¹ The same reasoning does not apply in the case of individuals with diabetes. Moreover, the Court's rulings in *Sutton*, *Murphy*, and *Albertson*'s evidence an unwillingness to interpret the "substantial limitation of a major life activity" prong of the definition in such an expansive manner.¹⁶²

Moreover, prior to the Supreme Court's recent trio of decisions, rulings of lower courts, holding that the effects of medication on individuals with diabetes must be considered when determining whether such individuals were disabled, did not suggest that such an argument would prevail.¹⁶³ Thus, it is unlikely that an individual with diabetes controlled by insulin would succeed on a claim that she was disabled.¹⁶⁴ Accordingly, an employer could permissibly refuse to hire that person because

the activity of reproduction. We have little doubt that had different parties brought the suit they would have maintained that an HIV infection imposes substantial limitations on other major life activities." *Braddon*, 524 U.S. at 637.

161. The brief filed by the coalition of AIDS organizations in *Braddon* also stated:

As if transforming the most mundane aspects of daily living into potential threats to life itself were not enough, people who are HIV infected must adjust their lives to cope with the fear, stigma and prejudice of those around them An HIV diagnosis carries with it the certain knowledge that no one will look at you quite the same way again, that you may be in danger of losing your friends and your family, and that the attitudes of many will pose serious threats to your ability to survive with the disease—to keep your job and your insurance and to get essential medical care (whether or not related to HIV). That knowledge profoundly affects the way people with HIV interact with others, making them circumspect about sharing what is now a central part of their lives, hypersensitive to the collection and handling of medical information, and justly wary about how even casual remarks might shatter their lives.

Brief of the AIDS Action Council, *supra* note 159, at 26-28.

162. See, e.g., *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). The Court observed that applying the EEOC's rule that mitigating measures not be considered when determining whether an individual is substantially limited in a major life activity:

[C]ourts would almost certainly find all diabetics to be disabled, because if they failed to monitor their blood sugar levels and administer insulin, they would almost certainly be substantially limited in one or more major life activities. A diabetic whose illness does not impair his or her daily activities would therefore be considered disabled simply because he or she has diabetes.

Sutton, 527 U.S. at 483. Justice Stevens, in dissent, noted that the majority indicated that "diabetes that is controlled only with insulin treatments is not a 'disability.'" *Id.* at 508.

163. See, e.g., *Coghlan v. H.J. Heinz Co.*, 851 F. Supp. 808 (N.D. Tex. 1994); *Schluter v. Indus. Coils, Inc.*, 928 F. Supp. 1437 (W.D. Wis. 1996).

164. See, e.g., *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645 (5th Cir. 1999). An individual who was allegedly discriminated against had a fatal form of blood cancer which, without treatment, "would have resulted in 'severe anemia, systemic infection, internal bleeding' and would 'infiltrate other organs or body systems,'" and "would affect the full panorama of life activities, and indeed would likely result in an untimely death," and which eventually did cause his death (the plaintiff died before the case was decided), was held not to have an impairment that substantially limited his ability to work under the Supreme Court's "mitigating measures" rule. *R.J. Gallagher Co.*, 181 F.3d at 655. The EEOC did not allege that the individual was substantially limited in the major life activity of caring for himself, but it is doubtful that the court would have accepted that reasoning. The court found, however, that the EEOC had raised material issues of fact with respect to the question of whether the individual was regarded as disabled. See *id.* at 657.

she was a diabetic,¹⁶⁵ or could hire that person but refuse to provide the reasonable accommodations necessary to permit the employee to keep her job (such as providing necessary breaks to allow the employee to take medication or eat at required intervals).

One rationale for the Court's more expansive reading of the term "individual with a disability" in *Bragdon* is that the Court was troubled that people with HIV suffer social stigma and prejudice in significantly greater degrees than persons with other impairments. The Court appeared willing and ready to protect people with HIV from discriminatory conduct, while it currently appears substantially less willing to protect people with other physical and mental impairments.

The Court's interpretation of the ADA in a manner that provides greater protection for those whom it views as particularly worthy or needful of such protection is troubling. While the extensive social stigma suffered by persons with HIV may give particular reason to protect such persons from discrimination, Congress determined that discrimination against other persons with physical and mental impairments, including diabetes, remains a pervasive social problem.¹⁶⁶ Interpreting the ADA in a manner that permits an employer to refuse to hire someone simply because he has diabetes, or that permits an employer to engage in conduct that precludes an individual with diabetes from working, contravenes congressional intent in enacting the ADA.

The Court's reasoning does not bode well for the future of other individuals whom the ADA is intended to protect. By way of example, the ADA expressly provides that rehabilitated drug abusers are individuals with disabilities under Title I of the Act.¹⁶⁷ How can a rehabilitated drug addict have an actual disability (i.e., have a physical or mental impairment that substantially limits a major life activity) under the Court's interpretation of that term, if mitigating measures such as rehabilitation treatment have alleviated the effects of an individual's drug addiction? The individual still has the impairment of being addicted to drugs, but because she is not currently manifesting many of the effects of that impairment, she is not actually disabled.¹⁶⁸ Similarly, many individuals with learning disabilities may not qualify as actually disabled under the ADA because they have employed mitigating measures that allow them to learn without substantial limitation.¹⁶⁹ And how will courts deal with

165. Justice Stevens' dissenting opinion in *Sutton*, noting that the majority's "approach would seem to allow an employer to refuse to hire every person who has epilepsy or diabetes that is controlled by medication, or every person who functions efficiently with a prosthetic limb." *Sutton*, 572 U.S. at 509.

166. See *supra* Part II of this Article.

167. 42 U.S.C. § 12114 (1994).

168. It is also questionable whether such an individual could show that he fell within the "record of" prong of the definition of a person with a disability. See *infra* Part IV.A.2.

169. Following its decisions in its June 1999 trilogy of cases, the Supreme Court vacated and re-

individuals whose physical or mental impairments fluctuate? Conceivably, an individual with diabetes could be held not to be disabled when her diabetes is controllable with medication, but that same individual could be held to be disabled when extenuating factors such as stress render medication ineffective to control her diabetes.

In promulgating its "mitigating measures" rule, the Court seems more concerned with requiring people with disabilities to pull themselves up by their bootstraps and take all possible steps to change or rehabilitate themselves than with enforcing the ADA's goal of preventing discrimination based on irrational stereotypes, prejudice or benevolent paternalism. The Court is focusing on the old "medical model" of disability¹⁷⁰ rejected by Congress when enacting the ADA, rather than on the concept of civil rights for persons with disabilities, the core of the Act.¹⁷¹

The Court established its "mitigating measures" rule in the *Sutton* case.¹⁷² The Court's ruling in *Sutton* appears premised on the convic-

manded the Second Circuit's opinion in *Bartlett v. New York State Bd. of Law Exam'rs*, 156 F.3d 321 (2d Cir. 1998), vacated, remanded for further consideration by, 527 U.S. 1031 (1999), for a determination of whether Bartlett was disabled in light of those cases. *Bartlett*, 527 U.S. at 1031. *Bartlett* involved the question of whether the New York State Board of Law Examiners violated the ADA by refusing to provide Ms. Bartlett with accommodations while she took the bar examination. *Bartlett*, 156 F.3d at 324. Ms. Bartlett had learning disabilities that seriously impaired her ability to learn. *Id.* She had developed numerous compensating measures for her learning disabilities which enabled her to learn sufficiently well to graduate from college and law school. *Id.* It was this author's opinion that when Bartlett's learning disabilities are examined in light of the mitigating measures employed to reduce the ramifications of her impairment, she would be viewed as not substantially limited in the ability to learn. This author further opined, however, that despite the mitigating measures employed, Bartlett should be able to succeed on a claim that she remains substantially limited in the separate major life activity of reading, since she remains severely limited in her ability to read and process the information she reads in a timely fashion. Other individuals with learning disabilities, however, may not be viewed as substantially limited in any major life activity due to the effectiveness of mitigating measures employed to reduce the ramifications of their impairments.

On August 30, 2000, the Second Circuit issued its opinion on remand in *Bartlett*. *Bartlett v. New York State Bd. of Law Exam'rs*, 226 F.3d 69 (2d Cir. 2000). The Second Circuit held, *inter alia*, that despite the mitigating measures employed by Bartlett, she may be disabled under the ADA if her impairment substantially limits her ability to read. The Second Circuit remanded the case to the district court to determine "whether Bartlett is substantially limited in the major life activity of reading by her slow reading speed, or by any other 'conditions, manner or duration' that limits her reading 'in comparison to most people.'" *Bartlett*, 226 F. 3d at 75 (citation omitted). The Second Circuit also noted that Bartlett's slow reading rate may be viewed as a negative side effect of the mitigating measures she employed. *Id.*

170. The medical model of disability focuses on "rehabilitating" or changing the person with a disability rather than on changing society. See, e.g., Linda Hamilton Krieger, *Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1 (2000); Richard Scotch, *Models of Disability and the Response of the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213 (2000); Jonathan C. Drimmer, Comment, *Cripples, Overcomers and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341 (1993).

171. For articles discussing the civil rights premise on which the ADA was based, see, e.g., Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 61 OHIO ST. L.J. (forthcoming Fall 2000); Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19 (2000).

172. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

tions that the ADA should not protect, and Congress did not contemplate that the ADA would protect, every person who has serious difficulty seeing without corrective lenses. Congress, however, did not make an exception in its definition of an "individual with a disability" covered under the Act for persons with correctable vision problems, although it could have done so had it thought about the matter and felt or envisioned the necessity for such an exception.¹⁷³ The Disability Discrimination Act of 1995 ("DDA") enacted in the United Kingdom, for example, expressly provides that the DDA

does not however extend to those with impaired sight where the impairment is correctable by spectacles or contact lenses or by some other prescribed method, whether or not those aids are in fact used. This exception reflects the fact that the correction of impaired sight by spectacles and contact lenses is usually so effective that "people who wear spectacles or contact lenses would not generally think of themselves as disabled."¹⁷⁴

It might have been wise for Congress to place a similar provision in the ADA, and Congress may, indeed, have erred in failing to do so. The Court, of course, cannot rewrite the ADA for Congress to correct that real or perceived error. It is equally inappropriate for the Court to "correct" a real or perceived omission on the part of Congress by interpreting the ADA in a manner that expressly contravenes Congress's intent in enacting the ADA. While Congress' use of the 43 million figure to describe the number of Americans with disabilities in the introductory section of the Act¹⁷⁵ may pose some ambiguities, such ambiguities should have been resolved in a manner that is in accord with the Act's purposes rather than in a manner that defeats those purposes. The Court erred in refusing to look to the legislative history of the ADA for aid in interpreting that ambiguity.¹⁷⁶

173. It is possible that Congress did not think sufficiently about this issue in conjunction with its definition of an "individual with a disability" under the Act.

174. Disability Discrimination Act, 1995, ch. 50 (Eng.), available in 4 SWEET & MAXWELL, CURRENT LAW STATUTES 50-8 (1996) (citing Minister for Social Security and Disabled People). The DDA further provides that the Secretary of State may issue regulations making other exceptions. *Id.* The DDA's annotations offer an illustration of further exceptions that might be made, as follows:

For example, at the moment, people wearing hearing aids will be covered by the definition because hearing aids usually provide only a partial correction of a disability. Those people are still usually, and should be, seen as disabled. But if at some future date, as a result of improved technology, hearing aids become as completely effective as spectacles or contact lenses are today, it might be appropriate to exclude people in that situation from the general definition of disability.

Id. at 50-8 - 50-9.

175. See *supra* text accompanying note 6.

176. See *supra* text accompanying note 63. This is particularly true since the Court was aware of the legislative history expressly contradicting the reasoning behind its "mitigating measures" rule. The Court also erred in placing reliance on the large number of Americans who have correctable

2. *Having a Record of a Disability*

The next question is whether Amy can satisfy the second prong of the definition of an "individual with a disability." Can Amy invoke the protections of the ADA because she has a record of a disability—in that she was deaf for a year prior to receiving her implant and no mitigating measures alleviated the ramifications of her deafness during that year?

Under the Supreme Court's reasoning in its June 1999 trilogy of cases, Amy would clearly satisfy the "record of" prong of the definition if her deafness had been totally cured. Suppose that surgery was available to replace the nonfunctioning nerves in Amy's ear, that Amy had undergone such surgery, and that Amy's deafness was thereby completely eradicated. If Samuels refused to hire Amy because she was once deaf and he was afraid she would again become deaf, or because he harbored stereotypical beliefs about people who were once deaf, Samuels' discriminatory conduct would be prohibited under the ADA, as Amy has a "record of" a disability. Here, however, Amy's deafness was not cured—she still has the physical impairment of deafness. Is the "record of" prong of the definition triggered in this situation?

To fall within the "record of" prong of the definition of an "individual with a disability" under the ADA, an individual must have once had an impairment that substantially limited a major life activity.¹⁷⁷ Presumably, if Amy falls within this prong, some, if not all, of the plaintiffs in *Sutton*, *Murphy*, and *Albertson's* would also have fallen within that prong. Like Amy, at least some of those plaintiffs: (i) once had a physical impairment that substantially limited one or more of their major life

impairments. The Court noted, for example, that more than 100 million Americans wear corrective lenses and that Congress could not have meant to include all such individuals within the class of individuals with disabilities to be protected under the ADA. *Sutton*, 527 U.S. at 487. Congress, of course, did not intend for the ADA to cover all such individuals; rather, Congress only intended the ADA to protect individuals whose impairments are so severe that they substantially limit a major life activity—as expressly stated in the ADA's definition of an "individual with a disability." 42 U.S.C. § 12102(2) (1994). Only a small percentage of people who wear corrective lenses have vision impairments that rise to that substantially limiting level. The *Sutton* sisters, for example, each had visual acuity of 20/400 in one eye (prior to using corrective lenses). *Sutton*, 527 U.S. at 476. While this author has been unable to locate any statistics evidencing the number of Americans with correctable vision of 20/400 in an uncorrected state (all statistics on record address corrected vision levels), the author has been informed by her ophthalmologist that only a small percentage of people who wear glasses have such severe vision impairments prior to correction.

177. § 12102(2)(B). That section provides that to fall within the "record of" prong, an individual must have "a record of . . . an impairment . . . that substantially limits one or more of the major life activities of such individual." *Id.* § 12102(A)-(B). It has been contended that this definition is somewhat confusing, because it provides that the individual must have a record of, a past history of, a substantially limiting impairment which is defined in the present tense. *Id.* § 12102(2) (stating that "a physical . . . impairment that substantially limits . . .", "a record of such an impairment.") The only logical interpretation of this somewhat confusing phrasing is to say that to satisfy the "record of" prong, an individual must have once had a physical or mental impairment that (at that time) substantially limited one or more of his or her major life activities.

activities,¹⁷⁸ (ii) were unable to cure their impairments, but (iii) employed mitigating measures to alleviate the ramifications of those impairments. Arguably, because the plaintiffs in those cases did not satisfy the definition, Amy could not satisfy either.¹⁷⁹ It is important to recognize, however, that the Supreme Court did not decide whether the plaintiffs in *Sutton*, *Murphy*, and *Albertson's* satisfied the "record of" prong of the definition, as the plaintiffs in each of those cases did not raise that issue.

It can be argued, of course, that if the "record of" prong were to apply to situations involving individuals who were able to take mitigating measures for their impairments that would enable them to perform all major life activities without substantial limitation, there would be no need for the "mitigating measures" rule enunciated by the Court. For in almost every case, the allegedly discriminatory conduct at issue would be based on the disability the plaintiff once had (i.e., has a record of having) but no longer has, leaving the "mitigating measures" rule with no practical effect.

Many individuals who employ mitigating measures, however, do so to alleviate the ramifications of a physical or mental impairment that never constituted an actual disability under the ADA, because that impairment does not "substantially limit a major life activity" within the meaning of the Act. Such individuals would not fall within the "record of" prong of the definition.

For example, it is unclear whether the visual impairments of the sisters in *Sutton* (before the use of mitigating measures) "substantially limited" their major life activity of seeing. No court has yet determined what constitutes a "substantial limitation" of the ability to see under the ADA. The EEOC opines that to make such a determination we would have to compare the sisters' uncorrected vision to the uncorrected vision of the average person in the population to see how well the sisters could see in comparison to the ability of other people to see.¹⁸⁰ The sisters both

178. Murphy's severe hypertension since the age of ten clearly substantially limited one or more of his major life activities until medication was able to assist in alleviating the symptoms of that hypertension. See discussion *supra* Part III.(B). It is arguably less clear whether the vision impairments of the plaintiffs in *Sutton* and *Albertson's* substantially limited one or more of their major life activities before mitigating measures were taken to alleviate the symptoms of their impairments. Factual evidence would be required to resolve that issue.

179. Justice Stevens noted in his dissenting opinion in *Sutton* that the majority's opinion "holds that one who continues to wear a hearing aid that she has worn all her life might not be covered [under the "record of" prong]—fully cured impairments are covered, but merely treatable ones are not." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 499 (1999) (Stevens, J., dissenting).

180. The EEOC defines the term "substantially limited" as meaning, *inter alia*, "[s]ignificantly 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." 29 C.F.R. § 1630.2(j)(ii) (1999) (EEOC's Title I regulations). See *supra* text accompanying note 39.

had uncorrected vision of 20/200 in one eye and 20/400 in the other eye.¹⁸¹ How does that compare with the vision of the average person in our society?¹⁸²

Questions dealing with the EEOC's "test" may be irrelevant because it is questionable whether the Supreme Court would follow the "comparison to the average person" standard applied by the EEOC.¹⁸³ In *Albertson's*, the Court implied that a rather high standard should be imposed for showing that an individual was substantially limited in the ability to see.¹⁸⁴ Thus, perhaps a more stringent standard must be employed to determine whether the sisters were substantially limited in the ability to see prior to utilizing mitigating measures to correct their vision. Such a standard might be analogous to the standard applied by some states or school districts when determining whether a pre-school age child has a disability—usually a disability other than one involving a loss of vision or hearing—within the meaning of the Individuals with Disabilities Education Act ("IDEA").¹⁸⁵ Under those standards, a child's impairment must be two standard deviations below the norm for the child to be considered disabled within the meaning of the IDEA.¹⁸⁶

It is not the number of people affected, of course, that renders an impairment substantially limiting, but the extent to which a person with that impairment is unable to perform a major life activity when compared to the ability of others to perform that activity. "Numerical tests," however, are intended to reflect the individual's inability to perform an activity, such as seeing, in comparison to the extent to which others are able to perform that activity. If an individual can see only slightly less than the average person can see, that individual is presumably not substantially limited in the ability to see. An individual whose ability to see

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

182. Is a difference "significant" if it is shared by less than half the population of the United States, for that would mean that the average person can see better than the plaintiffs? If so, do more than half the people in the United States have uncorrected vision better than 20/200 and 20/400? Or are similar vision difficulties shared by approximately half the population? And if approximately half the people in our society have vision slightly better than 20/200 and 20/400, can it still be said that the sisters were substantially limited in their ability to see before wearing glasses or contact lenses and thus have a record of a disability?

183. *Supra* Part III.C (discussing Supreme Court's *Albertson* opinion).

184. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 564 (1999).

185. 20 U.S.C. §§ 1400-1485 (1994).

186. DIVISION OF EARLY CHILDHOOD EDUCATION AND DIVISION OF SPECIAL EDUCATION, THE OHIO DEPARTMENT OF EDUCATION, MODEL POLICIES AND PROCEDURES FOR THE EDUCATION OF CHILDREN WITH DISABILITIES 32 (1995). This promulgation provides that a preschool age child is considered to be disabled in areas other than those involving hearing or vision if the child's test scores are "two standard deviations below the mean in one [area], or . . . one and one-half standard deviations below the mean in two or more areas . . ." *Id.*

The Department of Human Development Services regulations with respect to Head Start Program Performance Standards on Services for Children with Disabilities provide several standards for determining whether a child is visually disabled, including, *inter alia*, whether the child's central acuity with corrective lenses is between 20/70 and 20/200 in either eye. 45 C.F.R. §§ 1308.13 (1999).

is two standard deviations below the average, however, presumably *is* substantially limited in the ability to see. But it is important to remember that the ADA requires an individualized assessment of whether a person is substantially limited in a major life activity.¹⁸⁷ Thus, any standard established with respect to a particular impairment, such as vision, must serve purely as a guideline, rather than as a dispositive test, to aid in determining whether a specific individual is substantially limited in the ability to see.

To determine whether the sisters satisfy the "record of" prong of the definition of an "individual with a disability" under the ADA, an appropriate guideline would have to be devised for defining a "substantial limitation" of the ability to see, and it would have to be determined whether the sisters' uncorrected vision once fell within that general guideline. No such logistical questions are present in Amy's case, however. Amy clearly has a record of a physical impairment that substantially limited her major life activity of hearing, because she was unable to hear at *all* before her cochlear implant.¹⁸⁸ Amy, therefore, should be held to have a "record of" a disability within the meaning of the ADA, albeit not on the basis of anything decided in the Court's trilogy of cases.

The dissenting opinion in *Sutton* suggests that, under the majority's reasoning, because Amy's deafness is only ameliorated or partially corrected by mitigating measures (her implant), Amy is not protected by the ADA, and Small-Chem is permitted to discriminate against her because of her *current* deafness.¹⁸⁹ But if Amy's deafness has been completely cured, she would be protected by the ADA, and Small Chem in turn would not be permitted to discriminate against her because of her *past* deafness. If this is indeed the result of the Court's reasoning in its trilogy of cases, such a preposterous result would turn the ADA on its head. Congress added the "record of" prong to the definition of a person with a disability to expand the circumstances under which the laws would protect individuals with physical or mental impairments; Congress never intended to give preference to people with past impairments over people with current impairments.¹⁹⁰

187. 42 U.S.C. § 12102(2)(A) (1994).

188. *Supra* Part IV.

189. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 507-08 (1999).

190. As previously noted, the ADA's definition of an individual with a disability is the same definition utilized in the Rehabilitation Act. *See supra* text accompanying note 22. When the Rehabilitation Act was enacted in 1973, the definition only included people with actual disabilities. Pub. L. No. 93-112, § 7(6), 87 Stat. 355, 361 (1973). The Rehabilitation Act was amended in 1974 to protect a broader group, *inter alia*, and incorporated the three-pronged definition. Pub. L. No. 93-516, tit. I, § 111(a); 88 Stat. 1612 (1974). Congress adopted that three-pronged definition in the ADA with the intent of protecting the same broad group of persons. Rehabilitation Act Amendments, Pub. L. No. 93-516 (1974).

Because the majority did not address the "record of" prong of the definition of an "individual with a disability" in its June 1999 trio of cases, the Court should hold, in a later case, that the "record of" prong does apply to a case such as Amy's.¹⁹¹ To hold otherwise would defeat the objectives of one prong of the express definition of an "individual with a disability" in the ADA. The problem, of course, is that in determining whether an individual has a disability under the "record of" prong of the definition, the Court is required to look at the effects of the individual's impairment without considering mitigating measures taken to alleviate those effects (because it is the impairment before mitigating measures that constitutes the "record"). This, in turn, allows a plaintiff to defeat the Court's "mitigating measures" rule simply by claiming to be disabled under prong two of the ADA's definition of an "individual with a disability" rather than prong one.

The Court seems to have created a circular maze with no real way out short of deciding the issue based on superficial pretensions. We are left with two unsatisfactory choices: to circumvent the Court's "mitigating measures" rule by application of the "record of" prong of the definition, or to effectively demolish the "record of" prong established by Congress. Rules of statutory construction require the Court to choose the first option, but whether the Court will do so is another question, as since such a choice renders the Court's decisions in its June 1999 trio of cases mere exercises in semantics with little practical effect.

3. *Being Regarded as Having a Disability*

If Amy is not found to fall within the "record of" prong of the definition of an "individual with a disability," we must next ask whether Amy can show that Small-Chem regarded her as being disabled under the third prong of that definition. Samuels expressly told Amy that she was not being given a job at Small-Chem because she was deaf and because she used a cochlear implant to hear.¹⁹² Samuels said that he would not hire Amy because he feared that her presence would interfere with employee dynamics.¹⁹³ Did Samuels regard Amy as disabled?

To see if the "regarded as" test is satisfied, we must determine whether Samuels regarded Amy as substantially limited in a major life activity.¹⁹⁴ The first question to be answered, therefore, is which, if any,

191. Note that the EEOC has expressly stated that the "record of" prong of the definition of an "individual with a disability" covers people with a history of a substantially limiting impairment that has been controlled by mitigating measures. See, e.g., EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ADA TITLE I TECHNICAL ASSISTANCE MANUAL § 1-2.2(b) (1992).

192. *Supra* p. 335.

193. *Supra* p. 335.

194. 42 U.S.C. § 12102(c) (1994).

major life activity Samuels viewed Amy as substantially limited in the ability to perform.

Samuels did not regard Amy as substantially limited in the ability to hear.¹⁹⁵ To the contrary, he expressly recognized that Amy could hear well and that any concerns that Amy might miss something in the workplace were intellectually irrational.¹⁹⁶ He made it clear that he refused to hire Amy because her cochlear implant was "off putting"¹⁹⁷ and he feared his employees would not react well to Amy's presence.¹⁹⁸ While Amy can argue that Samuels *really* did not believe that Amy could hear well, she has no evidence to support that contention. Given the courts' generally disfavored treatment of ADA claims,¹⁹⁹ it is highly unlikely that a court would give credence to Amy's vague contention.

Moreover, even if courts continue to accept the validity of the EEOC's conclusion that working constitutes a major life activity (despite the Supreme Court's apparent disfavor with that conclusion),²⁰⁰ Amy cannot show that Samuels regarded her as substantially limited in the ability to work. Samuels regarded Amy only as being substantially limited in her ability to work as a chemist with one company—Small-Chem, a very small company with a uniquely close-knit group of employees whose unusual cohesiveness would allegedly be threatened by the jarring disruption of a chemist who is "different."²⁰¹ Samuels expressly told Amy that she was capable of working as a chemist in a large company or at another small company where employee cohesiveness and dynamics are not crucial.²⁰² Under the EEOC's regulations, followed by the Supreme Court with respect to this issue, an employer does not regard a person as significantly limited in the ability to work by simply regarding that person as being unable to work at one job, or at a small class of jobs.²⁰³

195. *Supra* p. 335.

196. *Supra* p. 335.

197. *Supra* p. 335.

198. Note that the EEOC takes the position that the failure to employ an individual with a disability because of employee reaction to that individual, or because employee morale might be detrimentally affected, is discriminatory in violation of the ADA. See, e.g., EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ADA TITLE I TECHNICAL ASSISTANCE MANUAL § 1-3.9(5) (1992). Because Amy is not likely to meet the threshold test of being disabled and thus subject to the ADA's protections, the parties and the court will never address this issue.

199. See, e.g., Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 61 OHIO ST. L.J. (forthcoming Fall 2000); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV., 99 (1999); Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377 (2000); Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19 (2000); Arlene B. Mayerson, *Restoring Regard for the "Regarded as" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587 (1997).

200. See *supra* note 64 and accompanying text.

201. *Supra* p. 335.

202. *Supra* p. 335.

203. Courts have consistently followed the EEOC's regulatory requirements when considering

whether plaintiffs were, or were regarded as, substantially limited in the major life activity of working. *See, e.g.*, TUCKER & GOLDSTEIN, *supra* note 25, chapter 21 § (II)(B)(4). Since the recent trio of Supreme Court decisions, the courts have continued to follow those regulations. *See, e.g.*, Broussard v. University of Cal. at Berkeley, 192 F.3d 1252 (9th Cir. 1999) (holding that the inability to perform the specialized job of a lab technician did not constitute a substantial limitation of the ability to work; plaintiff could not defeat defendant's motion for summary judgment because she failed to present evidence that her carpal tunnel syndrome would prevent her from performing a class of jobs or a broad range of jobs in various classes); Sorenson v. Univ. of Utah Hosp., 194 F.3d 1084 (10th Cir. 1999) (holding that an employer who refused to permit an individual with multiple sclerosis to work as a flight nurse did not regard her as being substantially limited in the ability to work; the position of a flight nurse is a single job and the employer offered the plaintiff other types of nursing jobs) (summary judgment in favor of defendant *aff'd*); Shipley v. City of Univ. City, 195 F.3d 1020 (8th Cir. 1999) (finding that an employer did not regard a firefighter as substantially limited in the ability to work; the employer only regarded plaintiff as unable to work at the single job of a firefighter, and the record showed that plaintiff held jobs as a car wash attendant, salesman, dry cleaner, and dishwasher repairman while seeking reinstatement as a firefighter) (summary judgment in favor of defendant *affirmed*); Whitney v. Apfel, 16 Nat'l Dis. L. Rep. (LRP) ¶ 187, No. C-98-1119, 1999 U.S. Dist. LEXIS 15291 (N.D. Cal. Sept. 28, 1999) (holding that employer who refused to promote an individual with depression to a position as a claims authorizer did not regard him as substantially limited in the ability to work because he did not show that the employer regarded him as unable to perform other jobs) (summary judgment granted in favor of defendant); Tone v. United States Postal Serv., 68 F. Supp. 2d 147 (N.D.N.Y. 1999) (holding that an employee with monocular vision was not substantially limited in the ability to work because his vision problem only prevented him from continuing to work as a truck driver; since plaintiff was capable of working in positions that did not require use of two eyes, and in fact was currently working as a laborer custodian, he was not disabled within the meaning of the Rehabilitation Act) (summary judgment granted in favor of the defendant); Powderly v. John Muir/Mt. Diablo Health Sys., 16 Nat'l Dis. L. Rep. (LRP) ¶ 11 No. C98-1328, 1999 U.S. Dist. LEXIS 9738 (N.D. Cal. June 24, 1999) (holding that the inability to perform one type of nursing job, when the plaintiff was able to perform other jobs in the health care industry, did not constitute a substantial limitation of the ability to work) (summary judgment granted in favor of defendant); Amro v. Boeing Co., 65 F. Supp. 2d 1170 (D. Kan. 1999) (finding that a plaintiff who was precluded from working as a design engineer was not substantially limited in the ability to work; the job of design engineer constituted a narrow job category rather than a broad class of jobs) (summary judgment granted in favor of defendant); Real v. City of Compton, 87 Cal. Rptr. 2d 531 (Cal. Ct. App. 1999) (holding that police officer with permanent knee injury was not regarded as substantially limited in the ability to work by virtue of the fact that he was terminated from a particular law enforcement agency since the record did not show that the employer regarded the officer as unable to work at any position within the city) (judgment in favor of officer reversed).

Moreover, in recent cases courts have imposed almost impossible to satisfy evidentiary standards upon plaintiffs claiming that employers regarded them as disabled to work. *See, e.g.*, Avery v. Omaha Pub. Power Dist., No. 98-1739, 1999 U.S. App. LEXIS 17699 (8th Cir. July 27, 1999) (involving plaintiff who claimed that the defendant employer regarded him as unable to perform safety sensitive positions because the employer considered him a security risk due to its perception that he was an alcoholic; the court held that the "regarded as" test was not satisfied because plaintiff failed to present evidence of the number and type of jobs from which that perception disqualified him) (summary judgment granted in favor of defendant); Heiman v. United Parcel Serv., Inc., 17 Nat'l Dis. L. Rep. (LRP) ¶ 42 No. 98-2253, 1999 U.S. Dist. LEXIS 19145 (D. Kan. Dec. 2, 1999) (holding that report of a vocational expert stating that plaintiff had lost the ability to perform 30 percent of the jobs he would have been able to access prior to his physical impairment was too vague to show that plaintiff was substantially limited in the ability to work) (summary judgment granted in favor of defendant); Baker v. Chicago Park Dist., 16 Nat'l Dis. L. Rep. (LRP) ¶ 45 No. 98-C-4613, 1999 U.S. Dist. LEXIS 11225 (N.D. Ill. July 15, 1999) (holding that an employer did not regard a laborer with a knee injury as substantially limited in the ability to work because plaintiff failed to show what other jobs, in addition to a laborer's job, he was regarded as unable to perform) (summary judgment granted in favor of defendant); Hurley v. Modern Continental Constr. Co., Inc., 54 F. Supp. 2d 85 (D. Mass. 1999) (holding that individual with idiopathic ventricular tachycardia was not substantially limited in the ability to work despite the fact that he was unable to work at "many classes of jobs in the economy . . . , including welder, electrician, electrical engineer, forklift operator, mason, steel erector, construction site excavator, plumber, teamster, warehouseman, ironworker, machinist, machine operator, stock clerk, delivery person, HVAC technician, maintenance engineer, laborer, ditch

The Supreme Court, following the EEOC's regulatory analysis, would require Amy to show that Samuels regarded her as being unable to work either at a class of jobs or a broad range of jobs in various classes as a prerequisite to seeking protection under the ADA for Samuels' intentionally discriminatory conduct.²⁰⁴ This requirement serves to perpetuate the very type of conduct the ADA was intended to prevent. It permits Samuels, or any savvy employer, to avoid the ADA's nondiscrimination mandate and discriminate at will against an applicant or employee with a physical or mental impairment simply by telling that applicant or employee that she should apply to work at other jobs, at other companies, or in other fields.

There are numerous inherent problems with the EEOC's regulatory test under which an individual may show that he or she is substantially limited in the ability to work or that an employer regarded him or her as substantially limited in the ability to work. Although the EEOC's ADA Title I regulations are generally geared toward accomplishing the purposes of the ADA,²⁰⁵ the "regarded as" working regulations are the exception.

The legislative history of the ADA indicates that Congress intended that an employer's rejection of an individual from one particular job on the basis that the employer regarded the individual as disabled would constitute discrimination under ADA Title I. The House Judiciary Report notes that:

[A] person who is rejected from a job because of the myths, fears and stereotypes associated with disabilities would be covered under this [regarded as] test, *whether or not the employer's*

digger, firefighter, law enforcement officer, telephone or utility lineman, carpenter, roofer, and painter," *Hurley*, 54 F. Supp. 2d at 94, the court held that plaintiff failed to place those jobs in context to show whether they represented a class of jobs or broad range of jobs in various classes, and that plaintiff did not show that those jobs are the types of jobs that a person with his education and experience would be likely to perform) (summary judgment granted in favor of defendant).

Only in rare cases was the plaintiff found to have presented sufficient evidence to defeat the defendant's motion for summary judgment on the issue of whether plaintiff was, or was regarded as, substantially limited in the ability to work. *See, e.g., Jones v. Pennsylvania Minority Bus. Dev. Auth.*, 17 Nat'l Dis. L. Rep. (LRP) ¶ 192, No. 97-4486, 1999 U.S. Dist. LEXIS 10413 (E.D. Pa. July 9, 1999), *aff'd*, 2000 U.S. App. LEXIS 20665 (3d Cir. 2000) (holding that a medical doctor's conclusion that a postal worker was not able to work in any structured setting resembling the post office was sufficient to show that plaintiff was "restricted from performing most of the jobs for which he would otherwise be qualified"; *Jones*, 1999 U.S. Dist. LEXIS 10413, at *14) (summary judgment granted in favor of defendant on other grounds); *Stensrud v. Szabo Contracting Co., Inc.*, 16 Nat'l Dis. L. Rep. (LRD) ¶ 73, No. 98-C-878, 1999 U.S. Dist. LEXIS 11974 (N.D. Ill. July 27, 1999) (holding that an employer regarded an individual with psoriatic arthritis as substantially limited in the ability to work by virtue of the fact that it terminated the plaintiff from his position as driver of an eighteen-wheel semi-tractor trailer; the court held that plaintiff presented evidence showing that the employer regarded plaintiff as unable to drive a truck generally, and the Seventh Circuit views truck driving to encompass a class of jobs) (employer's motion for summary judgment denied).

204. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (1999).

205. *See supra* text accompanying notes 6-14.

perception was shared by others in the field and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.²⁰⁶

The Report further states:

In the employment context, if a person is disqualified on the basis of an actual or perceived physical or mental condition, and the employer can articulate no legitimate job-related reason for the rejection, a perceived concern about employing persons with disabilities could be inferred and the plaintiff would qualify for coverage under the "regarded as" test²⁰⁷

Neither the House nor Senate reports indicate that, to be covered under the "regarded as" prong, an individual would have to show that he or she would be rejected from other jobs on the basis of the perceived disability. There seems to be no logical reason for the contrary reasoning applied by the EEOC. Similar reasoning is not applied in situations involving other forms of discrimination. Thus, for example, if an individual is rejected from a job because of his race, the individual need not show that he would be prevented from performing other jobs because of his race in order to establish a violation of the Civil Rights Act of 1964.

Moreover, although the EEOC takes the position that, for the "regarded as" test to be satisfied under ADA Title I, it is "not necessary that the employer's perception of the individual be shared by other employers,"²⁰⁸ the EEOC requires the plaintiff to "identify the work limitations that the employer believes result from the impairment."²⁰⁹ For example, the plaintiff must demonstrate that the employer regards him or her as substantially limited in the ability to perform a class of jobs or a broad range of jobs in various classes.²¹⁰ To satisfy that test, the plaintiff must do exactly what the EEOC says the plaintiff need not do: show that other employers in the plaintiff's geographical location would refuse to hire the plaintiff due to the plaintiff's physical or mental impairment.²¹¹

The reasoning of the EEOC and the Court permits employers in metropolitan areas to engage in conduct that may be held discriminatory when engaged in by employers in less populated areas. Under this reasoning, if identical twins with the same physical impairments live in different areas, one could be held disabled under the ADA while the other could be held not disabled.

206. H.R. REP. NO. 485, pt.3, at 30 (1990) (emphasis added).

207. *Id.* at 30-31.

208. 2 EEOC Compl. Man. (BNA) § 902 at 902-44 (1995).

209. *Id.* at 902-51.

210. *See id.* at 902-50.

211. *Id.*

For example, suppose that identical twins having similar education and skills both have mild seizure disorders that are fully corrected by medication, and thus neither is actually disabled under the Supreme Court's interpretation of the ADA. Suppose further that twin A lives in a large city with a population of one million people, while twin B lives in a small city with a population of fifteen thousand people. Both apply for a job driving a sanitation truck in their respective cities, and each twin is rejected from the job due to the employer's erroneous perception that his mild seizure disorder is not corrected.

Twin A is not likely to succeed on a claim that the employer violated the ADA in refusing to hire him to drive a sanitation truck, because there are a variety of other jobs, besides driving a sanitation or similar truck, that he could perform, given his education and skills, in the large city in which he resides. Twin B, however, is likely to succeed on the same claim, because of the lack of other jobs available for which he is qualified in the geographic location to which he has reasonable access. Thus, the metropolitan area employer is permitted to discriminate against Twin A due to his erroneous perception, but the small city employer is not permitted to engage in the same conduct with respect to Twin B. More importantly, we are deciding whether someone is disabled by looking to the effects that the conduct of others has on that individual. Rather than determining whether an individual has been discriminated against because he is disabled, we are determining whether an individual is disabled because he has been discriminated against. This was surely not Congress' intent when enacting the ADA.

In addition, the reasoning followed by the EEOC and the Supreme Court may serve, in some situations, to discourage people with physical impairments who have been rejected from jobs from applying for jobs with other employers. It has been held that a plaintiff who was rejected from the job of his choice and worked at other jobs while awaiting resolution of his ADA claim against the rejecting employer could not show that he was regarded as substantially limited in the ability to work.²¹² The fact that plaintiff had obtained and worked at other jobs showed that he was not substantially limited in the ability to work, and thus the employer could not have regarded him as being so limited.²¹³ This reasoning virtually nullifies the "regarded as" prong, because it looks to the plaintiff's actual ability, as opposed to the defendant's erroneous perception of the plaintiff's actual ability. The "regarded as" prong of the

212. See *Shipley v. City of Univ. City*, 195 F.3d 1020, 1023 (8th Cir. 1999).

213. See, e.g., *Shipley*, 195 F.3d at 1022-23 (refusing to reinstate him as a fireman, the defendant city did not regard plaintiff as unable to perform a broad class of jobs because plaintiff held jobs as a car wash attendant, salesman, dry cleaner, and dishwasher repairman while seeking reinstatement as a firefighter).

definition of an "individual with a disability" is premised on the theory that the defendant employer has viewed the plaintiff in a stereotypical, erroneous manner. To give credence to that prong we must expect that other employers would view the situation differently (i.e., accurately).

Rather than following the EEOC's regulations with respect to the circumstances under which an employer may be found to have regarded an individual as disabled, the Court should have found those regulations ultra vires, for two reasons. First, the Court has opined that the EEOC lacked authority to draft regulations defining the term "individual with a disability" under the ADA.²¹⁴ Second, those regulatory provisions are contrary to Congress' express purpose in enacting the ADA, as stated in the legislative history of the Act.

4. Removal of Her Implant to Satisfy the Definition

If Amy removes her implant, so that she is again unable to hear, will she then be considered disabled within the meaning of the ADA? May Amy resort to such drastic tactics to obtain the job of her choice at Small-Chem? In cases decided both prior to and after the Supreme Court's trio of cases, several courts have indicated that the answer to that question is probably "no."

In *Spradley v. Custom Campers, Inc.*,²¹⁵ a plaintiff with epilepsy was terminated from his job after he had seizures at work.²¹⁶ Plaintiff filed suit against his employer under ADA Title I.²¹⁷ The plaintiff conceded that on both instances in which he had seizures at work he was not taking the Dilantin prescribed by his doctors to reduce the likelihood that he would have seizures.²¹⁸ When determining whether plaintiff was actually disabled under the ADA, the court cited *Murphy* in stating that "[t]he Supreme Court has recently held that if a disorder *can be* controlled by medication or other corrective measures, it does not substantially limit a major life activity."²¹⁹ The court implied that an individual who intentionally fails to utilize possible mitigating measures, and as a result manifests a substantially limiting disability, cannot qualify as disabled under the ADA.²²⁰

214. See *supra* note 54 and accompanying text. It is discouraging that the Supreme Court was so willing to apply the EEOC's very restrictive "regarded as working" regulations in the trio of cases at issue, while at the same time refusing to apply EEOC regulations permitting people with physical and mental impairments to seek redress under the ADA from allegedly discriminatory conduct. This does not bode well for the ADA's future.

215. 68 F. Supp. 2d 1225 (D. Kan. 1999).

216. *Spradley*, 68 F. Supp. 2d at 1230.

217. *Id.* at 1227.

218. *Id.* at 1230.

219. *Id.* at 1232 (emphasis supplied).

220. *Id.* at 1233.

In *Matuska v. Hinckley Township*,²²¹ an employee who suffered from panic attacks, acute depression and post-traumatic stress disorder alleged that he was impermissibly terminated from his position in violation of ADA Title I.²²² When determining whether the plaintiff was actually disabled, the court stated that it could not "consider (as suggested by Matuska) whether he would be substantially limited in his ability to work if he discontinued his medication."²²³ The court did not discuss its reasoning for so holding.²²⁴

In *Tangires v. Johns Hopkins Hospital*,²²⁵ the plaintiff refused to use the inhaled steroids recommended by her doctors to control her asthma.²²⁶ The court found that plaintiff's refusal to take the prescribed medications "was based on her subjective and unsubstantiated belief that such use would adversely affect her pituitary adenoma,"²²⁷ as the record indicated that plaintiff's doctors "apparently disagreed with her belief that steroids should not be taken by a person who had a pituitary adenoma."²²⁸ In holding that plaintiff's asthma did not constitute a disability under the ADA, the court stated as follows:

[T]his Court concludes that plaintiff's asthma was treatable and that during her employment she intentionally failed to follow her physicians' recommendations that she take steroid medication. Since plaintiff's asthma is correctable by medication and since she voluntarily refused the recommended medication, her asthma did not substantially limit her in any major life activity. A plaintiff who does not avail herself of proper treatment is not a "qualified individual" under the ADA . . . [and is thus not disabled under the Act].²²⁹

The court seemed to confuse the question of whether plaintiff was disabled with the question of whether she was qualified for the job at issue. Nevertheless, the court made it clear that an individual whose refusal to take mitigating measures to alleviate the ramifications of her impairment could not be considered disabled and deserving of the ADA's protections.²³⁰

Cases decided prior to the Supreme Court's trilogy of cases also considered the question of whether a plaintiff who failed to take mitigat-

221. 56 F. Supp. 2d 906 (N.D. Ohio 1999).

222. *Matuska*, 56 F. Supp. 2d at 910.

223. *Id.* at 913.

224. *Id.* at 915.

225. 79 F. Supp. 2d 587 (D. Md. 2000).

226. *Tangires*, 79 F. Supp. 2d at 595.

227. *Id.* at 596.

228. *Id.*

229. *Id.*

230. *Id.*

ing measures to reduce the effects of an impairment could be considered disabled under the ADA. In *Testerman v. Chrysler Corporation*,²³¹ the court held that when determining whether the plaintiff was disabled, it must consider the effects of mitigating measures taken to alleviate the ramifications of the plaintiff's diabetes, alcoholism, depression, and back problems.²³² The court noted that evidence in the record showed that the plaintiff "did not consistently monitor his condition, take his insulin, or otherwise control his diabetes to the greatest degree possible."²³³ The court held that the defendant had raised a genuine issue of fact as to whether the plaintiff's "diabetes would have been substantially limiting if it had been more diligently treated."²³⁴ The court further held, however, that if the plaintiff showed that his depression or other mental condition prevented him from adhering to prescribed medical treatment for his diabetes, the plaintiff could not be "penalized for any related failure to mitigate the diabetes and his condition must be evaluated in the state presented."²³⁵ Taking this language to its logical conclusion, the court implied that if plaintiff's failure to mitigate the ramifications of his diabetes was not the result of a second physical or mental impairment, plaintiff could be "penalized" for that failure. The only logical possible "penalty" would be a finding that plaintiff's diabetes did not constitute a disability (i.e., did not substantially limit a major life activity) in light of mitigating measures the plaintiff should have taken.

In *Bowers v. Multimedia Cablevision, Inc.*,²³⁶ the plaintiff suffered from panic attacks, which substantially limited several major life activities, but which were correctable with medication.²³⁷ Applying the rule that mitigating measures must be considered when determining whether the plaintiff is substantially limited in a major life activity, the court stated that "[t]he plaintiff cannot gain ADA protection by unilaterally deciding, without justification, not to use prescribed medication which corrects or alleviates his condition."²³⁸

In *Haworth v. Proctor & Gamble Manufacturing Co.*,²³⁹ plaintiff alleged that his employer fired him because of his cervical radiculopathy

231. 11 Nat'l Dis. L. Rep. (LRP) ¶ 307, No. 95-240, 1997 U.S. Dist. LEXIS 21392 (D. Del. Dec. 30, 1997).

232. *Testerman*, 1997 U.S. Dist. LEXIS 21392, at *36.

233. *Id.* at *47.

234. *Id.*

235. *Id.*

236. 14 Nat'l Dis. L. Rep. (LRP) ¶ 55, No. 96-1298, 1998 U.S. Dist. LEXIS 19319 (D. Kan. Nov. 3, 1998).

237. *Bowers*, 1998 U.S. Dist. LEXIS 19319, at *7.

238. *Id.* at *11. See also *Burroughs v. City of Springfield*, 163 F.3d 505, 509 (8th Cir. 1998) (holding that when an employee "fails to meet the employer's legitimate job expectations, due to his failure to control a controllable disability, he cannot state a cause of action under the ADA").

239. 12 Nat'l Dis. L. Rep. (LRP) ¶ 249, No. 97-2149, 1998 U.S. Dist. LEXIS 6625 (D. Kan. Apr. 30, 1998).

in violation of ADA Title I.²⁴⁰ Plaintiff claimed that he was disabled because his impairment substantially limited his major life activity of working.²⁴¹ Plaintiff's doctor had prescribed medication and treatments that would significantly limit the effects of that impairment,²⁴² but, due to lack of income and insurance, plaintiff went for months at a time without the necessary medication or treatment.²⁴³ The court made particular note of the fact that plaintiff had failed to utilize mitigating measures that would have enabled him to perform all major life activities without substantial limitation.²⁴⁴ The court held, however, that it could not find as a matter of law that plaintiff did not have a disability for that reason.²⁴⁵ The court did not need to address the issue further, because it found that plaintiff had not shown that his impairment precluded him from a class of jobs or a large number of jobs in various classes.²⁴⁶

In some of the above cases the courts implied that only "unjustified" reasons for declining to take mitigating measures would preclude an individual with an impairment from falling within the ADA's definition of an individual with a disability. In other cases, however, the courts did not seem to make that distinction. In *Testerman v. Chrysler Corp.*,²⁴⁷ for example, the court merely indicated a willingness to determine whether a second impairment precluded the plaintiff from taking mitigating measures to alleviate the ramifications of a first impairment, but did not seem willing to look to other reasons why mitigating measures were not taken.²⁴⁸

In one case decided after the Supreme Court's trilogy of cases, the court declined to rule that the failure to take possibly reasonable mitigating measures might preclude an individual with an impairment from having an actual disability under the ADA.²⁴⁹ In *Finical*, an individual with a hearing impairment alleged that her employer violated ADA Title I by refusing to provide her with the reasonable accommodation of a telephone headset to assist her in using the telephone.²⁵⁰ A doctor had opined that plaintiff would benefit from the use of hearing aids.²⁵¹ Plain-

240. *Haworth*, 1998 U.S. Dist. LEXIS 6625, at *17.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at *17-18.

245. *Haworth*, 1998 U.S. Dist. LEXIS 6625, at *18.

246. *Id.*

247. 11 Nat'l Dis. L. Rep. (LRP) ¶ 307, No. 95-240, 1997 U.S. Dist. LEXIS 21392 (D. Del. Dec. 30, 1997).

248. *Testerman*, 1997 U.S. Dist. LEXIS 21392, at *35-36.

249. See *Finical v. Collections Unlimited, Inc.*, 65 F. Supp. 2d 1032 (D. Ariz. 1999).

250. *Finical*, 65 F. Supp. 2d at 1035.

251. *Id.* at 1037.

tiff chose not to wear hearing aids, however.²⁵² Rather, "[a]t some point in the past, [p]laintiff tried using hearing aids for a month but stopped upon discovering that they picked up background noise she found annoying."²⁵³ The employer argued that, following the Supreme Court's reasoning in *Sutton*, a determination of whether plaintiff's hearing impairment rose to the level of a disability could not be made without evaluating the doctor's opinion that she could benefit from hearing aids.²⁵⁴ The court disagreed. The court noted that *Sutton* "requires a case-by-case analysis of the limitations an individual faces in his or her current state."²⁵⁵ The court held that, in order to determine whether plaintiff was substantially limited in any major life activities, it was necessary to determine what limitations plaintiff actually faced in the present.²⁵⁶ To evaluate plaintiff's impairment in light of a corrective measure that plaintiff did not use would involve speculation about the limitations plaintiff might or might not face if she used that corrective device and would not constitute an evaluation of plaintiff's actual, present limitations.

In *Finical*, the court did not second-guess plaintiff's decision not to utilize a particular mitigating measure, but accepted that decision at face value.²⁵⁷ The court did not consider whether the plaintiff was compelled to take reasonable mitigating measures to fall within the ADA's definition of an individual with a disability.²⁵⁸ As other courts have held or implied, however, it may well violate public policy to permit someone to qualify as disabled by deliberately refusing mitigating measures for the sole purpose of avoiding application of the Supreme Court's "mitigating measures" rule. An individual whose decision to decline mitigating measures is justified by other reasoning, however, should not be held to have somehow "waived" the right to be held disabled and deserving of the protections of the ADA. Such justification might take any number of forms, such as lack of money or insurance, lack of available medical personnel in the individual's geographic location, or a personal determination that the side effects of mitigating measures are more debilitating

252. *Id.*

253. *Id.*

254. *Id.* at 1037-38.

255. *Finical*, 65 F. Supp. 2d at 1038. The *Finical* court's reasoning is in accord with the Court's statement in *Sutton* that "if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999). Note, however, that in *Sutton* the Court was not confronted with a situation in which an individual could have, but chose not to, employ mitigating measures to reduce the ramifications of a physical or mental impairment.

256. *Finical*, 65 F. Supp. 2d at 1042.

257. *Id.* at 1051.

258. *Id.*

or uncomfortable to the particular individual than the ramifications of the unmitigated impairment.²⁵⁹

If the only reason Amy declines to wear her implant is to qualify as disabled under the ADA and thereby subject Small-Chem to the Act's proscriptions, presumably most courts would not sanction that conduct and give effect to Amy's goal. If, to the contrary, Amy could show that there were legitimate reasons for her decision not to wear her implant,²⁶⁰ a court should find that Amy's "justifiable" reasons for refusing mitigating measures warrant a finding that she is disabled and deserving of the protections of the ADA.

This conclusion raises several additional issues. First, how objectively "reasonable" must Amy's reasons for declining to wear her implant be to convince a court that those reasons are justifiable? Would Amy's subjective, honest reasons for refusing to wear her implant constitute justification even if those reasons are not objectively reasonable (in that other individuals with implants would not be likely to feel as Amy does)? And is a judge—who has no personal experience with cochlear implants and probably will not appreciate the nuances involved in wearing such a device and juggling with the external apparatus and numerous inconveniences relating thereto—capable of making the determination of whether Amy's articulated reasons are justifiable? In *Tangires v. Johns Hopkins Hospital*,²⁶¹ the court held that the plaintiff's reasons for refusing to take mitigating measures must be objectively reasonable,²⁶² and determined that plaintiff's subjective reasons did not satisfy that test.²⁶³ A few courts, however, such as the court in *Finical*, may be willing to accept the plaintiff's stated reasons for the refusal of mitigating measures without looking to whether those reasons are objectively reasonable.

Second, if Amy's reasons for declining to wear her implant are held to be reasonable and thus justifiable, could a judge determine that Amy should take some other conceivably mitigating measure to reduce the effects of her deafness? New technology is constantly being developed

259. By way of example, some people with mild or moderate hearing losses choose not to wear hearing aids that could alleviate the ramifications of their hearing losses in some situations but might cause discomfort and confusion due to amplification of background noise. See, e.g., *supra* note 255 and accompanying text.

260. This author, for example, personally knows individuals with lifelong deafness (unlike Amy), who were implanted late in life and who have chosen not to wear their implants for a variety of reasons, including that the noise is too distracting, the sound is too unpleasant, their own voices sound terrible with the implant, the implant causes tinnitus (loud ringing in the head), the difficulties of dealing with the external apparatus do not warrant the relatively limited benefit they receive from the implant, etc. A few people implanted after short-term deafness could possibly have similar concerns.

261. 79 F. Supp. 2d 587 (D. Md. 2000).

262. *Tangires*, 79 F. Supp. 2d at 596.

263. *Id.*

to alleviate the ramifications of deafness. Is a court expected to evaluate the effectiveness of such technology, based on the testimony of expert witnesses for the parties? Will courts now be expected to resolve medical or scientific questions?²⁶⁴

Third, what role will an individual's financial status play in the determination of whether reasonable mitigating measures have been taken? Will we have one set of rules for people who can afford mitigating measures (such as a cochlear implant) and who thus are not considered disabled under the ADA, and another set of rules for people who cannot afford mitigating measures and are thus considered to be disabled under the ADA?

There is no evidence, in the legislative history of the ADA or elsewhere, that Congress intended for courts to have to resolve all of these issues when deciding whether an individual is disabled under the ADA. The Supreme Court has significantly expanded the difficulties inherent in determining whether an individual falls within the ADA's definition of disabled beyond those contemplated by Congress.

B. Betty

Betty's situation is quite different from Amy's. Betty has not had cochlear implant surgery to mitigate the ramifications of her deafness, and thus she has an actual disability, deafness, which substantially limits her ability to hear. The only question is whether Betty could be held not disabled within the meaning of the Act due to her refusal to obtain an implant.

To some extent, the same concerns at issue when determining whether Amy could refuse to utilize the implant she already has for the purpose of falling within the ADA's definition of disability are at issue with respect to Betty's situation. In both situations (assuming Amy does not use her implant), Amy and Betty have refused to take mitigating measures to alleviate the ramifications of their deafness. Betty, of course, could argue that her reasons for refusing to have an implant in the first instance are justifiable, even if Amy's decision to refrain from utilizing an implant she already has that has proven successful is not justifiable. This would require a court to determine whether the refusal to have major surgery and undergo therapy and training to learn to hear via artificial means, in comparison to the probable (but not certain) benefits that would accrue, is justifiable. Such a determination would again depend on whether the justification is premised on objective or

264. For a discussion of this issue, see Isaac S. Greaney, Note, *The Practical Impossibility of Considering the Effect of Mitigating Measures Under the Americans with Disabilities Act of 1990*, 26 FORDHAM URB. L.J. 1267, 1292 (1999).

subjective factors. Betty's claim that her decision is justified is more compelling than Amy's because the mitigating measure at issue involves undergoing major surgery.²⁶⁵

I have previously argued that an individual who is likely to benefit substantially from an implant—that is, an implant would probably enable the individual to hear and understand speech in most situations—should not be able to refuse to be implanted and then insist that an employer or other entity covered by the ADA pay for expensive accommodations, such as the services of a full time interpreter, to allow her to work or participate in an activity despite her (chosen) deafness.²⁶⁶ My argument was premised on the theory that reasonable accommodations are provided to equalize the playing field for an individual with a disability to permit that individual to participate in mainstream society, and that society should not be required to pay for accommodations to level a playing field that could be leveled by correcting the individual's disability.²⁶⁷ At the same time, however, I explained that an individual with a cochlear implant remains deaf and should not be subjected to discrimination premised on either her inherent deafness or on an implant she received to mitigate the ramifications of that deafness. I stated that:

This is not to say, however, that people who are deaf and who have cochlear implants, or other people who have disabilities and who accept mitigating medical intervention, should not be protected in any fashion by laws such as the ADA [S]uch individuals may still be illegally discriminated against. Suppose, for example, that an employer refused to hire a deaf person simply because that person was deaf and had a cochlear implant. Such conduct should be held to violate the ADA. This type of situation is quite different from requiring the provision of costly accommodations that would not be necessary if reasonable medical intervention was accepted. It is crucial that we distinguish between the two types of situations.²⁶⁸

265. By way of analogy, in the tort context it is held that a plaintiff in a personal injury case cannot claim damages for a "permanent injury" if the permanency of the injury could be avoided by reasonable medical treatment. *Zimmerman v. Ausland*, 513 P.2d 1167, 1169 (Or. 1973). Whether submitting to surgery constitutes a "reasonable" mitigating measure involves a determination of several factors, including the risk of the surgery, the pain involved, the cost of the surgery, the amount of effort to be expended by the person having the surgery, and the probability that the surgery will have successful results. Those considerations must then be weighed against the consequences of not having the surgery. See, e.g., *Zimmerman*, 513 P.2d at 1169. In *Hall v. Dumitru, M.D.*, 620 N.E.2d 668 (Ill. App. Ct. 1993), for example, the court held that the plaintiff had no duty to submit to surgery to mitigate damages in her medical malpractice suit where, *inter alia*, the surgery presented risks of enhanced or additional injury or the prospect for the plaintiff's improved health was slight. *Hall*, 620 N.E.2d at 673.

266. BONNIE P. TUCKER, COCHLEAR IMPLANTS: A HANDBOOK 185-93 (1998). This assumes, of course, that the individual has the financial means to obtain an implant.

267. *Id.* at 190.

268. *Id.* at 190-91.

Unfortunately, the Supreme Court's interpretation of the definition of an "individual with a disability" fails to distinguish between these very distinct types of situations. By requiring that mitigating measures be considered when determining whether an individual is disabled, rather than when determining whether the individual is qualified for the job or program at issue, the Court permits entities covered by the ADA to ignore the Act's proscriptions and to discriminate deliberately against an individual because of an impairment such as deafness or the mitigating measures taken to alleviate the ramifications of that impairment.

Whether an individual has or has not taken mitigating measures to alleviate the ramifications of a physical or mental impairment should be held to bear no relevance to the question of whether that individual is actually disabled. Thus, an employer who refuses to hire Amy simply because she is deaf and has a cochlear implant should be held to have violated the ADA by virtue of the fact that the employer discriminated against Amy on the basis of her disability—deafness. Similarly, an employer who refuses to hire Betty simply because she is deaf and does not have a cochlear implant should be held to have violated the ADA because the employer discriminated against Betty on the basis of her disability—deafness.

Whether an individual has or has not taken appropriate mitigating measures to alleviate the ramifications of a physical or mental impairment, however, should be held to bear some relevance to the question of whether the individual is qualified for a job or program, since we must then determine whether the individual can perform the essential functions of the job or program with or without the provision of *reasonable* accommodations. Thus, an employer who refuses to hire Betty and pay for expensive accommodations to permit Betty to perform the job at issue should be able to defend an allegation that he has violated the ADA by showing that Betty is not qualified for the job because she refuses to take mitigating measures that would obviate the need for such accommodations.²⁶⁹

269. Interestingly, in its promulgation on July 15, 1999, the EEOC opines that an employer is not relieved of its obligation to provide reasonable accommodation for an employee who "fails to take medication, to obtain medical treatment, or to use an assistive device (such as a hearing aid)" to mitigate the ramifications of an impairment. Peggy R. Mastroianni, *EEOC Enforcement Guidance on Reasonable Accommodations and Undue Hardship under the Americans with Disabilities Act*, SEO5 ALI-ABA 187, 239 (1999). The EEOC further opines, however, that an employee who fails to take mitigating measures that would enable her to perform the essential functions of a job would not be qualified for that job and thus would not be protected under the ADA. *Id.* To some extent, therefore, the EEOC looks at the individual's failure to take reasonable mitigating measures when determining whether the individual is qualified for a job. The EEOC does not, however, take this analysis so far as to opine that an individual who declines to take mitigating measures that would allow her to perform a job without reasonable accommodations is not qualified for the job. A discussion of the latter issue is, unfortunately, outside the scope of this Article, but is addressed briefly by this author in her

Unfortunately, the Court's trilogy of cases does not recognize the crucial distinction between these two very distinct types of situations. The failure to permit recognition of this distinction constitutes a significant flaw in the Court's reasoning.

V. CONCLUSION

In its June 1999 trilogy of cases interpreting the definition of an "individual with a disability" under the ADA, the Supreme Court incorrectly held that mitigating measures taken to alleviate the ramifications of a physical or mental impairment must be considered when determining whether an individual is disabled, rather than when determining whether the individual is qualified for the job or program at issue. The Court held, further, that among the mitigating measures to be considered are those that are consciously or unconsciously applied by the individual's body systems as well as those that consist of external or artificial measures.²⁷⁰ Finally, the Court held that an individual may be regarded as disabled in the major life activity of working only if the defendant employer regards the individual as unable to perform a class of jobs or a broad number of jobs in a variety of classes.²⁷¹ It is difficult to reconcile the Court's rulings in these cases with its 1998 ruling in *Bragdon v. Abbott*²⁷² and with the legislative history of the ADA.

The Court's rulings seriously undermine the purposes and goals of the ADA, as explained in the legislative history, and permit covered entities to discriminate at will against persons whom Congress clearly intended to be protected under the Act. Such permissible discrimination may involve the deliberate refusal to allow individuals with serious physical or mental impairments entry to programs or jobs, or the refusal to provide reasonable accommodations to permit such individuals to perform in the workplace or to participate in programs. The effect of those rulings is to drastically curtail the number of persons covered by the ADA, and to place many seriously impaired individuals in situations where they will be held too disabled for the job or program they seek but not sufficiently disabled to warrant the protection of the ADA.

First, the Court's rulings with respect to consideration of mitigating measures requires lower courts to examine a host of tangential issues when determining whether an individual is actually disabled within the meaning of the ADA, including: (a) the mitigating measures an individ-

forthcoming article in the OHIO ST. L.J., described *supra* in note 171.

270. See cases cited *supra* notes 2-4.

271. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 473 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 517 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 556 (1999).

272. 524 U.S. 624 (1998).

ual has taken to alleviate the ramifications of a physical or mental impairment;²⁷³ (b) the extent to which those mitigating measures assist or do not assist the individual in performing major life activities;²⁷⁴ which necessitates a determination of (c) the activities engaged in by the individual,²⁷⁵ and (d) the individual's education, abilities and skills;²⁷⁶ (e) the unique nuances of each mitigating measure utilized by the individual, both individually and in combination;²⁷⁷ (f) other mitigating measures that the individual might take, which, in combination with the mitigating measures already taken could allow the individual to perform major life activities;²⁷⁸ (g) whether the mitigating measures taken improve the individual's ability to perform a major life activity or simply compensate for the individual's limitations in performing that major life activity;²⁷⁹ (h) whether an individual's refusal to take mitigating measures that would allow her to perform major life activities constitutes a "waiver" of her right to claim to be disabled under the Act, or (i) whether an individual may permissibly refuse particular mitigating measures and still be considered disabled, which requires a determination of (j) whether subjective or objective standards should be applied to determine the reasonableness of the individual's conduct; (k) whether new technology is available that could mitigate the ramifications of the individual's impairment and allow the individual to substantially perform major life activities;²⁸⁰ and (l) whether the individual is financially capable of utilizing appropriate mitigating measures.²⁸¹ Congress did not intend for courts to have to consider all of these issues when deciding the threshold issue of whether an individual is actually disabled and may, thus, pursue a claim under the ADA.

The Court has made it very difficult for an individual to show that she is actually disabled and, thus, able to pursue a claim under the ADA. An individual who utilizes mitigating measures to reduce the ramifications of her physical or mental impairment may, in some circumstances, satisfy that threshold test by showing that: (a) due to the unique circumstances of her impairment and/or her lifestyle and avocations she remains substantially limited in the ability to perform one or more major life activities despite the mitigating measures employed;²⁸² (b) the side-effects of a mitigating measure or combination of mitigating measures

273. *Sutton*, 527 U.S. at 472; *Murphy*, 527 U.S. at 516; *Albertson's*, 527 U.S. at 556.

274. *Sutton*, 527 U.S. at 482-83.

275. *Murphy*, 527 U.S. at 523.

276. *Id.*

277. *Albertson's*, 527 U.S. at 566.

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

279. *Murphy*, 527 U.S. at 523.

280. *Albertson's*, 527 U.S. at 569.

281. *Sutton*, 527 U.S. at 486-88.

282. *Id.*

employed cause her to be substantially limited in one or more major life activities;²⁸³ (c) the mitigating measures employed do not improve her ability to perform a major life activity but simply aid her in compensating for the inability to perform that activity;²⁸⁴ or (d) the impairment has such inherent effects on almost all aspects of her day-to-day life that she is substantially limited in the major life activity of caring for herself.²⁸⁵ In addition, in some cases an individual who has been refused accommodations in the workplace may be able to show that she is actually disabled because the mitigating measure she needs is not being supplied by the employer, and thus she is substantially limited in her ability to work.

In many instances, however, individuals will not be able to prevail in making such claims. Moreover, an individual who refuses to utilize suggested mitigating measures that would allegedly reduce the ramifications of her impairment will probably have to convince a court that her refusal was objectively reasonable.

Second, when mitigating measures control the effect of an impairment, but do not eliminate the impairment, in many cases the Court *should* find the "record of" prong of the ADA's definition of an "individual with a disability" to be satisfied, but the Court may be unwilling to make such a finding. A logical reading of Congress's express definition, in conjunction with the Court's trio of rulings, indicates that some plaintiffs in that situation should remain able to satisfy the "record of" prong of the definition, while others whom Congress sought to protect should not. Such an interpretation of the "record of" prong, however, would permit plaintiffs to circumvent the Court's "mitigating measures" rule by clever wording of their claims, and might not be accepted by the Court. Nevertheless, the "record of" prong might be the strongest avenue for a plaintiff in that position to pursue.

Third, the Court's rulings with respect to the circumstances under which an employer may be found to have regarded an individual as substantially limited in the ability to work provides employers with an easy means of avoiding the mandates of the ADA. An employer who makes an adverse employment decision based on an irrational belief that the individual in question is impaired in her ability to perform a job can avoid application of the ADA by indicating that the individual would be capable of working at other jobs at other companies or in other fields. This result nullifies the "regarded as" prong of the definition because it focuses on the plaintiff's actual ability as opposed to the employer's erroneous perception of the plaintiff's actual ability. Moreover, these

283. *Id.*

284. *Id.*

285. *Id.*

rulings permit employers in metropolitan areas to engage in conduct that would be held discriminatory when engaged in by employers in less populated areas.

In sum, the Supreme Court has taken many people with disabilities back to the dark ages, by permitting employers and program administrators to discriminate against such individuals at will based on irrational stereotypes or prejudice. The Court's rulings are disheartening at best, and abhorrent at worst.

Congress could, of course, amend the ADA, by, for example: (i) redefining the definition of an "individual with a disability" to exclude people with vision problems that are easily and fully correctable by eyeglasses or contact lenses, as was done under the United Kingdom's DDA²⁸⁶ (perhaps to also exclude other groups of individuals with relatively "common" impairments, such as minor back problems); (2) codifying the definition of the term "major life activities" and stating expressly that "working" constitutes a major life activity; (3) stating expressly that whether an individual is disabled is not dependent upon the location in which that individual lives and the number and type of jobs available in that geographical area; or (4) requiring that the effects of mitigating measures be considered when determining whether an individual with an impairment is qualified for a job or program rather than when the individual is disabled.²⁸⁷ It does not seem advisable at this juncture, however, for Congress to revisit the ADA. Given the current political climate, in which there is great dissatisfaction with civil rights laws in general,²⁸⁸ and specific dissatisfaction with the ADA in particular,²⁸⁹ new congressional discussions about the ADA might well lead to a reduction in the protections granted by the Act rather than an expansion of those protections. At the moment, therefore, it appears that the best—albeit unsatisfactory—approach for individuals with disabilities to take when seeking to meet the ADA's threshold definition is to make the strongest arguments possible on a case-by-case basis, particularly under the "record of" prong of the definition, and wait for a more favorable

286. See *supra* text accompanying note 174.

287. There are many other areas, not discussed in this trilogy of cases and thus not addressed in this Article, in which the ADA would benefit from amendment.

288. See, e.g., Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19 (2000); Linda Hamilton Krieger, *Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1 (2000).

289. See, e.g., Diller, *supra* note 288; Kreiger, *supra* note 288; Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999); Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377 (2000); Arlene B. Mayerson, *Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587 (1997); Robert L. Burgdorf, Jr., "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409 (1997).

political climate in which to seek Congressional amendment of the ADA.