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THE SUPREME COURT REVERSES THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION’S DIRECTIVE THAT DISABILITY DETERMINATIONS SHOULD BE MADE WITHOUT REGARD TO MITIGATING MEASURES: SUTTON V. UNITED AIRLINES

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THE SUPREME COURT REVERSES THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION’S DIRECTIVE THAT DISABILITY DETERMINATIONS SHOULD BE MADE WITHOUT REGARD TO MITIGATING MEASURES: SUTTON V. UNITED AIRLINES

I. INTRODUCTION

In Sutton v. United Airlines, identical twin sisters with severe myopia, filed suit under Title I of the Americans with Disabilities Act (ADA) alleging that United Airlines (United) discriminated against them on the basis of a disability, or because United regarded them as having a disability. This case invited the United States Supreme Court to decide for the first time whether mitigating measures such as glasses, medication or prosthetics should be considered when determining if an impairment is an “actual disability” under the ADA, and what constitutes a proper allegation for being “regarded as” disabled under the ADA. In a seven to two decision, the Court held that mitigating measures used by individuals with impairments should be considered when determining whether such individuals are disabled under the ADA, thereby heightening the standard. The Court also held that the sisters failed to properly allege that they were regarded by United as disabled within the meaning of the ADA.

One of the dissenting opinions, however, argues that the legislative history of the ADA, as well as the regulations issued from the executive agencies charged

2. Myopia is defined as “a condition in which the visual images come to a focus in front of the retina of the eye resulting especially in defective vision of distant objects.” Webster’s New Collegiate Dictionary 755 (8th ed. 1981).
4. See id. at 2144. The Supreme Court’s decision in Sutton v. United Airlines was one of a trio of cases that required the Court to determine whether an individual’s impairment should be viewed in its mitigated or unmitigated state when determining whether an impairment is a disability under the ADA. In Sutton, the sisters were able to mitigate their vision impairment with the use of corrective lenses. See id. at 2141. In Murphy v. United Parcel Service, 119 S. Ct. 2133 (1999), the plaintiff was dismissed from his job as a mechanic because he had high blood pressure. See id. at 2135. The plaintiff’s high blood pressure was controlled, or mitigated, with the use of medication. See id. In Albertsons v. Kirkingburg, 119 S. Ct. 2162 (1999), the respondent lost his job due to his failure to meet the Department of Transportation’s vision standards as a result of his monocular vision caused by amblyopia (respondent was essentially blind in one eye). See id. at 2163. Respondent had learned to compensate for his monocular vision and the Court viewed the body’s ability to compensate for an impairment as a mitigating measure. See id. at 2164. This Note will focus specifically on the Sutton decision as it was the key decision rendered in the above mentioned cases. See Perry Meadows, M.D. & Richard A. Bales, Mitigating Measures to Determine Disability under the Americans with Disabilities Act, 45 S.D. L. REV. (2000) for a discussion involving Sutton, Murphy, and Kirkingburg.
with enforcing the ADA, expressly states that the determination of whether an individual's impairment amounts to a disability under the ADA should be made without reference to mitigating measures. Given the Court's surprisingly narrow reading of the statutory language of the ADA and the dissents' focus on the legislative history of the ADA, the question now becomes: should Congress amend the ADA? If not, what impact will the Sutton decision have on future ADA claims?

Part II of this Note is divided into four parts: (a) the legislative action leading up to the creation and enactment of the ADA; (b) an overview of the ADA; (c) Title I of the ADA and some of the key terms essential to understanding the issues discussed in the Sutton decision; and (d) the case law surrounding the mitigating measure issue prior to the Sutton decision. Part III provides a detailed explanation of the arguments presented by both parties in the Sutton case and the Court's rationale for its decision. Part IV considers whether Congress should amend the ADA to prevent the Sutton decision from limiting the class of individuals who are "actually disabled" under the statute and from creating such a high burden for those seeking to establish that they were "regarded as" having a disability. After considering the positive and negative aspects of Congressional action, this Note advocates for immediate legislative action, despite the inherent risks attached to such action. In order to reinstate those disabled individuals that the Sutton decision has excluded from the ADA's protected class, Congress must amend the ADA to expressly state that mitigating measures should not be referenced in determining whether an impairment is a disability. In conclusion, this Note advises that immediate legislative action is necessary to ensure the ADA's protected class includes those disabled individuals that use mitigating measures.

II. DEVELOPMENT OF THE AMERICANS WITH DISABILITIES ACT

A. Legislative Action Leading up to the Americans with Disabilities Act of 1990

The implementation of federal legislation to provide protection and basic rights to those with disabilities began a little more than fifty years ago. One of the first pieces of federal legislation guaranteeing equal rights for people with disabilities was the Act of June 10, 1948. This Act prohibited the United States Civil Service from discriminating against individuals with physical handicaps within the workplace. The next major legislation passed by Congress guaranteeing equal rights for people with disabilities focused on removing barriers from buildings that were financed, renovated, or constructed by the federal government. It was

9. Justice Breyer joined Justice Stevens's dissent, but he also wrote a separate dissent. See id. at 2161 (Breyer, J., dissenting).
11. See id.
not until 1973, however, that a significantly broader act focusing on disabilities rights was passed. Although the Rehabilitation Act of 1973\textsuperscript{13} was enacted to extend vocational rehabilitation programs, it was significant for its Title V provisions, such as the requirement of federal executive agencies to develop affirmative action plans for the hiring, placement, and advancement of disabled individuals and the creation of a compliance board to ensure compliance with the Architectural Barriers Act.\textsuperscript{14} Title V's provisions, however, were limited to federal executive agencies,\textsuperscript{15} federal government contractors,\textsuperscript{16} and any program or activity that received federal financial assistance.\textsuperscript{17} Because the last provision had the potential to affect any federally funded program, it was the most far-reaching and progressive provision of Title V. In 1978, section 504 of the Rehabilitation Act was expanded even further to reach executive agencies and the United States Postal Service.\textsuperscript{18} In addition to amending section 504, Congress changed Title IV\textsuperscript{19} Title IV created the National Council on the Handicapped (the Council)\textsuperscript{20} in the Department of Health, Education, and Welfare.\textsuperscript{21} Numerous other acts were passed by Congress throughout the 1970s and 1980s that continued to expand the rights of disabled Americans in areas such as public education,\textsuperscript{22} voting rights,\textsuperscript{23} and fair housing.\textsuperscript{24}

In 1986, the Council issued a report to Congress entitled \textit{Towards Independence} that contained various legislative recommendations, one of which conceptualized what was to become the ADA.\textsuperscript{25} Two years later, the Council issued a

\begin{enumerate}
  \item \textsuperscript{15} See 29 U.S.C. § 791.
  \item \textsuperscript{16} See id. § 793.
  \item \textsuperscript{17} See id. § 794.
  \item \textsuperscript{18} See Act of Nov. 6, 1978, Pub. L. No. 95-602, § 119(2), 92 Stat. 2955, 2982 (codified as amended at 29 U.S.C. § 794(a), (b) (1994)).
  \item \textsuperscript{24} See Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601-3602, 3604-3608, 3610-3619, 3631 (1994)). This act included people with disabilities as a protected class under Title VIII of the Civil Rights Act of 1968 and prohibited discriminatory practices such as the construction of inaccessible housing units and the failure to make reasonable accommodations for individuals with disabilities.
  \item \textsuperscript{25} See Lowell P. Weicker, Jr., \textit{Historical Background of the Americans with Disabilities Act}, 64 Temp. L. Rev. 387, 390-91 (1991). The Council's report recommended that "[C]ongress should enact a comprehensive law requiring equal opportunity for individuals with disabilities, with broad coverage and seeing clear, consistent, and enforceable standards prohibiting discrimination on the basis of handicap." \textit{Id.} at 390 (quoting the Council).
second report entitled *On the Threshold of Independence*.26 This report continued to emphasize a need for legislative action.27 The Council's second report also concluded that legislative action was necessary for individuals with disabilities because of the continued discrimination such individuals encountered in employment, public transportation, public accommodations, and telecommunications. The Council's fundamental conclusions were reaffirmed in additional reports by the Civil Rights Commission, the Presidential Commission on the Human Immunodeficiency Virus Epidemic, and the Task Force on the Rights and Empowerment of Americans with Disabilities, as well as two polls taken by Louis Harris and Associates.28

In April of 1988, Senator Weicker, a Republican, introduced the bill proposed by the Council on the floor of the United States Senate.29 The next day, Representative Coelho, a Democrat, introduced the bill on the floor of the United States House of Representatives.30 Although introduced in the 100th Congressional Session, no action was taken until the 101st Congressional Session. Both the Senate and the House of Representatives entertained extended discussions on the ADA, and it was subjected to many modifications and revisions prior to its reintroduction and approval by both Houses of Congress in May of 1989.31 The Americans with Disabilities Act of 1990 was signed into law by then President George Bush on July 26, 1990,32 and became effective on July 27, 1992.33

**B. The Americans with Disabilities Act of 1990**

The reports submitted to Congress by the National Council for the Handicapped as well as the various other interested agencies found that discrimination was strongly entrenched within all aspects of society, and that individuals with disabilities were repeatedly isolated, discriminated against, and prevented from entering mainstream America. Congress enacted the ADA in an attempt to remedy the discrimination that disabled individuals consistently encountered, and to bring such individuals into the social and economic mainstream of American life.34 In

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26. See id. at 391.
27. See id.
31. See Edward E. Potter, Foreword to *Legislative History*, supra note 28.
33. See Legislative History, supra note 28, at 2. The employment provisions of the ADA located in Title I, which is the focus of this Note, were implemented in two phases. Title I became effective as of July 27, 1992, and applied to all business entities with twenty-five or more employees. Two years later, in July of 1994, Title I coverage was extended to employers with fifteen or more employees. See id.
34. See Legislative History, supra note 28, at 51. The report was submitted by Mr. Kennedy from the Committee on Labor and Human Resources and it read, in pertinent part, as follows: The purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life; to provide en-
order to carry out the ADA's mandate to "bring persons with disabilities into the economic and social mainstream," the Americans with Disability Act of 1990 is comprised of five titles, each intended to eliminate discrimination within a particular section of society: employment, public transportation, public accommodation, telecommunications, and miscellaneous provisions such as prohibiting retaliation against those who exercise their rights under the ADA.

The ADA's definition of disability is nearly identical to that of the Rehabilitation Act of 1973. The ADA defines disability "with respect to an individual [as] (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." Although the Rehabilitation Act of 1973 is similar to the ADA in its discrimination provisions, the Rehabilitation Act's protection is limited to discrimination by the federal government or those contractors or institutions that have a nexus to the federal government. The ADA makes the critical leap forward: extending the prohibition against discrimination on the basis of disabilities to private employers, private educational institutions, and private businesses and service providers. In this sense, "[t]he ADA is a comprehensive piece of civil rights legislation, providing uniform, federal protection to persons with disabilities" or to those who associate with them.

forceable standards addressing discrimination against individuals with disabilities, and to ensure that the Federal government plays a central role in enforcing these standards on behalf of individuals with disabilities.

Id. The language expressing the ADA's purpose evolved during the legislative process but the focus remains unchanged:

It is the purpose of this Act
(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and
(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

35. LEGISLATIVE HISTORY, supra note 28, at 51.
37. See id. §§ 12111-12165.
38. See id. §§ 12182-12189.
41. See BARBARA LINDERMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 274-75 (Paul W. Crane, Jr. et al. eds., 3d ed. 1996). The original version of the Rehabilitation Act provided for an "individual with handicaps" but was later changed to "individuals with a disability." With this change, the ADA and the Rehabilitation Act's disability definitions are identical. See id. at 275.
42. 42 U.S.C. § 12102(2). Although this definition applies to all five titles of the ADA, this Note limits it discussion to Title I and the regulations and interpretive guidelines issued by the Equal Employment Opportunity Commission (EEOC).
43. See LINDERMANN & GROSSMAN, supra note 41, at 261.
45. Id.
C. Title I of the Americans with Disabilities Act of 1990

Title I of the ADA prohibits employment discrimination on the basis of disability.\[46\] The ADA required the Equal Employment Opportunity Commission (EEOC) to issue substantive regulations implementing Title I within one year from its enactment.\[47\] In order to fulfill the congressional mandate that the ADA be clear, the EEOC, in addition to the regulations, issued interpretative guidelines for the terms used in Title I, as well as for the terms used in the ADA's definition of disability.\[48\]

The issues presented by the Sutton\[49\] case require examining the EEOC regulations and interpretive guidelines to fully understand four particular terms within the disability definition. The first three terms "physical or mental impairment," "major life activity," and "substantially limits" are all found within subsection (A) of the disability definition.\[50\] The fourth term, "regarded as having such an impairment," comprises subsection (C) of the disability definition.\[51\] The EEOC regulations define physical or mental impairment as "[a]ny psychological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of several body systems" or "[a]ny mental or psychological disorder."\[52\] The interpretative guidelines expressly state that "[t]he existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices."\[53\]

Once an impairment is determined, the disability definition requires that the impairment substantially limit a major life activity. The regulations define "major

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46. The ADA's general rule is that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

47. See 42 U.S.C. § 12116. The EEOC's regulations reflect congressional intent that the employment provisions of the ADA be modeled on the regulations implementing section 504 of the Rehabilitation Act of 1973. Due to the close similarities between the two statutes, the case law developed under section 504 of the Rehabilitation Act is generally applicable to the ADA. See also U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and the U.S. DEPARTMENT OF JUSTICE, AMERICANS WITH DISABILITIES ACT HANDBOOK at I-3 (1992) [hereinafter ADA HANDBOOK]; LINDERMANN & GROSSMAN, supra note 41, at 273.


50. 42 U.S.C. § 12102(2).

51. Id.

52. 29 C.F.R. § 1630.2(h)(1), (2).

53. 29 C.F.R., app., § 1630.2(h). "For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by medicine. Similarly, an individual with hearing loss would be considered to have an impairment even if the condition were correctable through the use of a hearing aid." Id.

The interpretive guidelines exclude the following from the definition of physical or mental impairments: (1) common physical characteristics such as height, weight, eye color; (2) common personality traits such as poor judgment or a quick temper; (3) predisposition to illness or disease; (4) other conditions such as pregnancy; (5) environmental, cultural, or economic disadvantages such as poverty, lack of education or a prison record; and (6) advanced age in and of itself. See id.
life activities” as “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”\textsuperscript{54} Emphasizing that the laundry list of major life activities within the regulations is not exhaustive, the interpretive guidelines define “major life activity” as “basic activities that the average person in the general population can perform with little or no difficulty.”\textsuperscript{55}

An impairment is not a disability under the ADA unless the impairment “substantially limits” a major life activity.\textsuperscript{56} An individual is substantially limited if he or she is either significantly restricted or unable to perform a major life activity that an average person can perform.\textsuperscript{57} Accordingly, an individual is not substantially limited in the major life activity of lifting if he or she could not lift 100 pounds on a repetitive basis, because neither can the average person in the general population. Also, impairments with no long term or permanent impact such as broken bones, sprained joints, concussions, appendicitis, and influenza do not sub-

\begin{itemize}
  \item \textsuperscript{54} 29 C.F.R. § 1630.2(i).
  \item \textsuperscript{55} 29 C.F.R., app. § 1630.2(i). The guidelines expand the major life activities listed in the regulations to include other activities such as sitting, standing, lifting, and reaching. The guidelines stress that even this list is not exhaustive. \textit{See id.}
  \item \textsuperscript{56} 42 U.S.C. § 12102(2).
  \item \textsuperscript{57} \textit{See 29 C.F.R. § 1630.2(j). The regulation reads as follows:}
    \begin{enumerate}
      \item \textit{Substantially limits}—(1) The term \textit{substantially limits} means:
        \begin{enumerate}
          \item Unable to perform a major life activity that the average person in the general population can perform; or
          \item Significantly restricts the duration, manner or condition under which an individual can perform a 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.
        \end{enumerate}
      \item The following factors should be considered in determining whether an individual is substantially limited in a major life activity:
        \begin{enumerate}
          \item The nature and severity of the impairment;
          \item The duration or expected duration of the impairment; and
          \item The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.
        \end{enumerate}
      \item With respect to the major life activity of \textit{working}—
        \begin{enumerate}
          \item The term \textit{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 \textit{working}.
          \item In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of “working”:
            \begin{enumerate}
              \item The geographical area to which the individual has reasonable access;
              \item 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
              \item 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).
            \end{enumerate}
        \end{enumerate}
    \end{enumerate}
\end{itemize}

\textit{Id.}
stantially limit a major life activity.58 Interestingly, the regulations provide a separate definition of "substantially limits" when the major life activity is that of working.59 The separate definition seems to go hand in hand with the interpretive guidelines' cautionary statement that only when an impairment does not substantially limit any other major life activity should the major life activity of working be considered.60

Neither the regulations nor the interpretive guidelines provide a laundry list of what constitutes an impairment that substantially limits because not all impairments affect individuals in the same way—two individuals may have the same impairment but only one may be disabled due to the advanced nature of that individual's impairment.61 As a result, "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures."62

Significant to the second argument presented by the petitioners is the term "regarded as having such an impairment,"63 which encompasses three separate scenarios.64 First, a situation in which an individual has an impairment that does not substantially limit but is treated as such. Second, a situation in which an individual has an impairment that substantially limits only as a result of how society views such impairment. Third, a situation in which an individual has no impairment but is treated as having a substantially limiting impairment.65 The interpre-

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58. See 29 C.F.R. app. § 1630.2(j). Impairments that would rise to the level of disabilities are those such as (1) an individual whose legs are paralyzed or an individual who uses an artificial leg because either person would be substantially limited in the major life activity of walking; and (2) a diabetic who without insulin would lapse into a coma or an epileptic who without medication would have seizures because neither individual can perform major life activities without the aid of their respective medications. See id.

59. 29 C.F.R. § 1630.2(j)(3).

60. See id. See also 29 C.F.R. app. § 1630.2(j).

61. See 29 C.F.R. app. § 1630.2(j); 29 C.F.R. § 1630.2(j).

62. 29 C.F.R. app. § 1630.2(j). This is the second reference within the EEOC interpretative guidelines that requires that the determination of whether an impairment is a disability be made without regard to mitigating measures. See supra text accompanying note 50.


64. 29 C.F.R. § 1630.2(l).

65. See Sutton v. United Airlines, Inc., 119 S. Ct. 2139, 2141 (1999). See also 29 C.F.R. § 1630.2(l). The regulation reads as follows:

(1) Is regarded as having such an impairment means:

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

(2) 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

(3) Has none of the impairments defined in paragraph (h)(1) or (2) of this section but is treated by a covered entity [employer] as having a substantially limiting impairment.

Id.

The interpretive guidelines provide illustrations for each part of the "regarded as" definition. The first part of the "regarded as" definition would be satisfied if an employee with "controlled high blood pressure that is not substantially limiting" is, nevertheless, reassigned "to less strenuous work because of [the employer's] unsubstantiated fears that the [employee] will suffer a heart attack" if the strenuous work continues. 29 C.F.R. app. § 1630.2(l).
tive guidelines explain that the underlying rationale of the "regarded as" part of the disability definition was articulated by the Supreme Court in School Board of Nassau County v. Arline in the context of the Rehabilitation Act of 1973. In essence, the Court in Arline concluded that the "regarded as" provision was included by Congress because it acknowledged that "society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment." 67

D. ADA Case Law Prior to the Sutton Decision

Prior to the Tenth Circuit's decision in the Sutton case, seven of the nine U.S. Courts of Appeals to consider the issue concluded that in determining whether an individual's impairment amounts to a disability, the impairment should be viewed without regard to the mitigating measures that an individual may have taken such as eyeglasses, medication, or prosthetic devices. 68 These seven decisions were guided by and are in agreement with the interpretive guidelines issued by the EEOC. The Fifth Circuit, rather than choosing between viewing an impairment with or without regard to the mitigating measure, created an intermediate approach. In Washington v. HCA Health Services of Texas, 69 the court held "that courts should not consider a corrective measure unless it is a 'permanent correction,' such as a transplanted organ or an artificial joint." 70

The second part of the "regarded as" definition would be met if an employer discriminated against an individual with a "prominent facial scar or disfigurement"—that did not substantially "limit the individual's major life activities"—because of the negative reactions of customers. Id. The facial scar or disfigurement would be substantially limiting only as a result of the attitudes of others. See id.

The third part of the "regarded as" definition would be satisfied if an employee was discharged by the employer "in response to a rumor that the employee is infected with Human Immunodeficiency Virus (HIV)." Id. The individual would be considered an individual with a disability even though the rumor was totally unfounded and the individual had no impairment at all because the employer treated this individual as being disabled. See id.


67. Id. at 284. Due to the similarities between the ADA and the Rehabilitation Act of 1973, the case law interpreting section 504 of the Rehabilitation Act is generally applicable to the ADA. See Landemann & Grossman, supra note 41, at 273.


70. Id. at 470-71. Prior to the Washington case, the Fifth Circuit in dictum suggested that it would depart from the majority rule. See Ellison v. Software Spectrum, Inc., 85 F.3d 187, 191-92 n.3 (5th Cir. 1996). The court expressly disapproved this dictum in Washington. See Washington v. HCA Health Services of Texas, 152 F.3d at 469 n.5.
Besides the Tenth Circuit, the Sixth Circuit is the only other Circuit to hold contrary to the EEOC’s interpretive guidelines. In *Gilday v. Mecosta County*, Judge Kennedy viewed the EEOC’s requirement that a determination be made without regard to mitigating measures as, “in effect, eliminat[ing] the statutory requirement that an impairment ‘substantially limit[ ]’ a major life activity in order to constitute a disability.” Determining that the EEOC’s interpretive guidelines were in conflict with the text of the ADA, Judge Kennedy concluded that the guidelines were not a “permissive construction” of the ADA.

Therefore, when the Supreme Court granted the *Sutton* case certiorari there was a split among the circuits with the clear majority of the circuit courts deferring to the EEOC’s interpretive guidelines. In addition, the case law developed under the Rehabilitation Act prior to 1990 consistently protected substantially impaired persons whose impairments were partially or wholly correctable.

### III. The *Sutton* Decision

In *Sutton v. United Airlines*, the petitioners were identical twin sisters with severe myopia. Due to their severe myopia, the sisters have uncorrected vision of 20/200 in their right eyes and 20/400 in their left eyes. With the aid of corrective lenses, however, each sister has 20/20 vision. The sisters were regional airline pilots when they sought employment as global airline pilots with United. United invited the sisters to interview for the pilot positions and although they met United’s basic qualifications, as well as those required by the FAA, United informed them that they were disqualified from consideration because they did not meet United’s minimum uncorrected vision requirement of 20/100.

The sisters filed a charge of disability discrimination under the ADA with the EEOC and after receiving a right to sue letter, they filed suit against United in the United States District Court for the District of Colorado alleging that United discriminated against them because of their severe myopia, which they purported was a substantially limiting impairment. The sisters asserted that United vio-

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71. 124 F.3d 760 (6th Cir. 1997). A majority of the Sixth Circuit originally accepted the EEOC's interpretive guidelines that require disability determinations be made without regard to mitigating measures. See id. at 762-64. Judge Kennedy, in his dissent, found that the interpretive guidelines were in conflict with the text of the ADA. See id. at 766-68 (Kennedy, J., concurring in part and dissenting in part). The Sixth Circuit modified the original opinion to make Judge Kennedy's dissent the opinion of the court. See id. at 761.

72. Id. at 767.

73. Id. at 766.

74. See *Reynolds v. Brock*, 815 F.2d 571, 573-74 (9th Cir. 1987) (holding that epilepsy is a handicap, "even though medication controls her seizures"); *Strathie v. Department of Transportation*, 716 F.2d 227, 228-29 (3d Cir. 1983) (reinstating a claim in favor of a bus driver who was suspended due to his poor uncorrected hearing, even though his hearing could be corrected with a hearing aid).

75. 119 S. Ct. 2139 (1999).

76. See id. at 2143.

77. See id.

78. See *Sutton v. United Airlines*, 119 S. Ct. at 2143.

79. See id.

80. See id.

81. See id.

lated the ADA because it discriminated against them because of their disability or, in the alternative, because United discriminated against them because it regarded them as having a disability. After reviewing the statutory language of the ADA and the regulations prepared by the EEOC, the District Court concluded "the plaintiffs cannot state a claim that United regarded them as impaired in a way that substantially limits a major life activity and, therefore, cannot state a claim that they are disabled under the ADA." In addition, the court held that the petitioners had not made sufficient allegations to support their claim that United regarded them as disabled because the petitioners failed to claim that United regarded their impairment as restricting their ability to perform a class of jobs. The Court of Appeals for the Tenth Circuit affirmed the district court's judgment. The sisters appealed to the Supreme Court and were granted a writ of certiorari.

The petitioners requested the Supreme Court to address two issues under the ADA: (1) whether the petitioners have successfully alleged that they possess a physical impairment that substantially limits them in the major life activity of seeing; and (2) whether the petitioners have illustrated that United regarded their impairment as substantially limiting their major life activity of working. Because the petitioners, with the use of corrective lenses, have corrected vision of 20/20, the first issue turns on whether mitigating measures should be considered when a disability determination is made under the ADA.

On appeal, the sisters alleged that they are actually disabled under the ADA because they have a "physical or mental impairment that substantially limits one or more . . . major life activities." Asserting that their vision impairment in its uncorrected state substantially limits them in the major life activity of seeing, the sisters explained that without their corrective lenses they cannot "conduct basic activities such as driving an automobile, watching television, or shopping in a public store." They asserted that the determination of whether an impairment is substantially limiting should be made without regard to mitigating measures.

The petitioners contended that because the ADA does not directly address the is-

85. See id. at *11. The sisters contended that United regarded them as "substantially limited" in the major life activity of working. See id. at *8. The district court found that "the [petitioners] complaint [is] based on their inability to obtain a single, particular job of passenger airline pilot with United." Id. at *13. In order to claim that United regarded them as "substantially limited" in the major life activity of working, the sisters had to prove that United regarded them as "substantially limited" from a "class of jobs" or a "broad range of jobs." 29 C.F.R. § 1630.2(j)(3)(i) (1999).
86. See Sutton v. United Airlines, Inc., 130 F.3d 893, 906 (10th Cir. 1997).
88. See Brief of the Petitioners at 19, 34. Issue one is based on subsection (A) of the definition of disability and issue two is based on subsection (C) of the definition of disability. See also 42 U.S.C. § 12101(2)(A), (C).
90. 42 U.S.C. § 12112(a).
91. Brief of the Petitioners at 2.
92. See id. at 8.
sue of whether mitigating measures should be considered when determining whether an impairment substantially limits a major life activity, the Court should defer to the executive agencies that are responsible for implementing and issuing regulations for the ADA.\textsuperscript{93} The EEOC and the Department of Justice (DOJ) issued the same basic guidelines which state that: “The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices.”\textsuperscript{94} Moreover, the sisters pointed out that contained within the ADA’s legislative history are Senate and House of Representative reports that clearly state that a disability determination should be assessed without regard to mitigating measures.\textsuperscript{95} In summary, the petitioners asserted that the lower courts’ determination that an impairment should be evaluated in light of corrective measures negates the purpose of the ADA as it was intended by Congress.

The sisters argued, in the alternative, that if their vision impairment is not an actual disability under the ADA, United nevertheless violated the ADA because United regarded their impairment as a disability when it denied them the opportunity to work as pilots for United.\textsuperscript{96} Alleging that United’s uncorrected vision requirement of 20/100 is not based on safety requirements but rather on an unsubstantiated fear that individuals requiring corrective lenses are unable to perform as well as individuals with uncorrected vision of 20/100, the sisters asserted that United regarded them as disabled.\textsuperscript{97} Furthermore, they claimed that when United eliminated them from consideration for employment as airline pilots, United substantially limited them in the major life activity of working. According to the EEOC’s guideline, “[a]n individual rejected from a job because of the ‘myths, fears and stereotypes’ associated with disabilities would be covered under this part of the definition of disability [subsection (C)], whether or not the employer’s . . . perception w[as] shared by others.”\textsuperscript{98}

United, on appeal, maintained that the petitioners’ vision impairment is not a disability under the ADA because, if corrected, it does not substantially limit the

\textsuperscript{93} There are three Executive agencies responsible for implementing the various titles of the ADA. The EEOC is responsible for implementing Title I pursuant to 42 U.S.C. § 12116; the Department of Justice (DOJ) is responsible for implementing Title II pursuant to 42 U.S.C. § 12134; and the Department of Transportation is responsible for implementing Titles II and III pursuant to 42 U.S.C § 12149(a).

\textsuperscript{94} 29 C.F.R. app. § 1630.2(j) (1999). The Department of Justice’s guidelines provides that “[t]he question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids and services.” 28 C.F.R. pt.35, app. A, § 35.104 (1999) and pt.36, app. B, § 36.104 (1999).

\textsuperscript{95} See LEGISLATIVE HISTORY, supra note 28, at 62, 313, 385. See also Brief of the Petitioners at 15.

\textsuperscript{96} See Brief of the Petitioners at 39-41. See also 42 U.S.C. § 12102(2)(C) (the “regarded as” prong of the disability definition); 29 C.F.R. app. § 1630.2(l) (interpretive guidelines for the “regarded as” prong established by the EEOC).

\textsuperscript{97} See Brief of the Petitioners at 7 n.7 (citing 59 Fed. Reg. 53226, 53231-32 (1994)). The EEOC’s guidelines provide “that if an individual can show that an employer . . . made an employment decision because of a perception of disability based on ‘myth, fear or stereotype,’ the individual will satisfy the ‘regarded as’ part of the definition of disability.” 29 C.F.R. app. § 1630.2(l).

\textsuperscript{98} 29 C.F.R. app. § 1630.2(l); see also supra notes 57 and 65.
major life activity of seeing. United argued that the Supreme Court should not defer to the EEOC's interpretive guidelines because they conflict with the plain language of the ADA in three ways. First, the ADA's reference that "43,000,000 Americans have one or more physical or mental disabilities" is proof that Congress did not consider individuals with correctable vision impairments disabled under the ADA. United asserted that if individuals with correctable vision impairments were included the number of Americans with disabilities would be much higher because over 100 million Americans wear corrective lenses.

Second, the respondent pointed out that the EEOC's guideline that requires a disability determination to be made without regard to mitigating measures is in contradiction with the plain language of the ADA's disability definition. The disability definition utilizes the words "substantially limits . . ." in the present indicative form. United theorized that Congress's use of the words "substantially limits" indicated that Congress: (a) did not intend for minor, trivial impairments that could be corrected to come within the statute's protected class; and (b) intended to convey that the "substantial limitations actually and presently exist." Furthermore, the respondent asserted that if mitigating measures were taken and such measures corrected the impairment, the impairment would not actually and presently exist and consequently would not substantially limit a major life activity.

Third, United contended that the EEOC's guideline defies the statutory command located within the ADA's disability definition to analyze functionally the

100. See id. at 21-22. See also General Electric Co. v. Gilbert, 429 U.S. 125, 141 (1976) (advising that "courts may accord less weight to such guidance than to administrative regulations which Congress has declared to have the force of law").
101. 42 U.S.C. § 12101(a)(1) (1994). Although the ADA states that some 43,000,000 Americans are disabled, the first ADA bill submitted to Congress listed the number of disabled Americans at 36,000,000. See Legislative History, supra note 28, at 17. Admitting that the "exact source of [this finding] is not clear," the majority in Sutton stated that the 36,000,000 finding evolved from the National Council on Disability's report, Toward Independence. Sutton v. United Airlines, Inc., 119 S. Ct. 2139, 2147-2148 (1999) (citing Robert L. Burgdorf Jr., The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute, 26 Harv. C.R.-C.L. L. Rev. 413, 434 n.117 (1991)). According to the majority, the National Council on Disability's second report, On the Threshold of Independence, increased the finding to 37.3 million when the Council determined that the disability definition should reflect a functional analysis. See id. at 2148. Furthermore, the majority suggested that the 5.7 million gap between the finding in the Council's second report and the finding stated in the ADA, as enacted, is probably due to Congress's attempt to include institutionalized individuals with disabilities in the ADA's findings. See id. (citing National Institute on Disability and Rehabilitation Research, Data on Disability from the National Health Interview Survey 1983-1985 61-62 (1988)).
102. See Brief of the Respondent at 9.
103. See id. at 27.
104. See id. at 26.
106. See Brief of the Respondent at 27.
affect of the impairment on the major life activity of an individual. The statutory command to analyze the impairment's affect on the individual's ability to perform major life activities is the only applicable reading that does not "read the limiting phrase of the disability definition out of the statute."

In response to the petitioners' second argument, United argued that it did not regard the petitioners as disabled when it rejected them from employment as global airline pilots because it did not substantially restrict their major life activity of working. Relying on the EEOC's regulations, the respondent argued that for an individual to be substantially limited in the major life activity of working the individual must be "significantly restricted in [his or her] ability to perform either a class of jobs or a broad range of jobs in various classes [rather than the inability to perform a single, particular job] as compared to the average person having comparable training, skills, and abilities." United maintained that it rejected the petitioners from a particular job—that of global airline pilot—and not from a class of jobs that would include all pilot positions as well as non-pilot positions that "utiliz[ed] similar training, knowledge, skills, or abilities." Furthermore, the respondent claimed that its vision requirement does not limit the petitioners from obtaining jobs with other airlines that do not maintain such hiring requirements.

Indicative of the Court's holding in the Sutton case, the majority opined that no agency had been given the authority to issue either regulations or interpretive guidelines for the generally applicable terms of the ADA, including the disability definition, because of their structural location prior to Titles I-V. Even though it implied that the EEOC's regulations and interpretive guidelines construing the disability definition may not require deference, they had "no need" and "no occasion" to consider the issue in this case. The Court determined that the approach adopted by the agency guidelines resulted in an impermissible interpretation of the ADA. Viewing the ADA in its entirety, the majority concluded that "it is apparent 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."

The Court reached this conclusion by reading in concert three separate provisions of the ADA. First, by focusing on the words "substantially limits" in the

107. See id. at 16.
108. Id.
109. Id. at 44 (citing 29 C.F.R. § 1630.2(j)(3)(i)(1999).
110. Global airline pilot is just one of several types of pilot positions available. The respondent suggested that as a class of jobs, pilot positions included those with "global airlines, national airlines, commuter/regional airlines, and cargo/courier airlines." Id. at 46.
111. Non-pilot positions listed by the respondents include "pilot ground trainer, flight simulator trainer, flight instructor, aeronautical school instructor, as well as executive, management, and administrative positions in flight operations for airlines, and being a consultant for an aircraft manufacturer." Id. at 48.
113. See also Brief of the Respondent at 46.
115. Id.
116. See id. at 2146.
117. Id.
118. See id. at 2146-47.
disability definition, it reasoned that "[b]ecause the phrase [was] in the present indicative verb form,... the language is properly read as requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability."119 Following this reasoning, the majority determined that if an individual with an impairment takes medication or other measures to correct the impairment, then that individual does not have an impairment that "presently 'substantially limits' a major life activity."120 The Court clarified this point by stating that, "The use or nonuse of a corrective device does not determine whether an individual is disabled . . . ."121 The determining factor is whether the impairment presently substantially limits a major life activity.122 Finding further support for its conclusion in the plain language of the disability definition, the majority emphasized that the definition requires that "disabilities be evaluated 'with respect to an individual' and be determined based on whether an impairment substantially limits the 'major life activities of such individual.'"123 The plain language thereby mandated that whether an individual has a disability must be determined on a case by case or individualized inquiry.124

Second, after reviewing the interpretive guidelines, the Court opined that the guidelines stressed the impairment and disregarded whether the impairment substantially limited a major life activity.125 It believed that as a result of this approach, if a person had an impairment such as diabetes, the person would be categorized as disabled whether or not the diabetes substantially limited a major life activity.126 Finding that the agency's guidelines viewed individuals as members of a group with a certain impairment rather than as individuals, the majority stated that "this [approach] is contrary to the letter and the spirit of the ADA."127

The third provision that the Court relied upon for its conclusion can be found in the findings and purposes section of the ADA which states in part that "43,000,000 Americans have one or more physical or mental disabilities."128 The Court theorized that "the 43 million figure reflects an understanding that those whose impairments are largely corrected by medication or other devices are not 'disabled' within the meaning of the ADA."129 Determining that Congress would have made the number of disabled Americans significantly higher if correctable impairments were included under the ADA, the majority reasoned that the interpretive guidelines were contrary to the statutory command.

119. Id. at 2146.
120. Id. at 2147.
121. Id. at 2149.
122. See id. The majority provided the following example: "[I]ndividuals who use prothetic limbs or wheelchairs may be mobile and capable of functioning in society but still be disabled because of a substantial limitation on their ability to walk or run." Id.
123. Id. at 2147.
124. See id. The majority also cites to its most recent ADA decision, Bragdon v. Abbott, 524 U.S. 624 (1998), in which the Court emphasized that the ADA required an individualized inquiry by declining to consider whether HIV infection is a per se disability under the ADA.
126. See id.
127. Id.
Evaluating the petitioners' "regarded as" disabled claim, the Court held that the petitioners failed to adequately allege that United regarded their myopia as an impairment that substantially limited them in the major life activity of working. Determining that the petitioners were denied a single, particular job—that of global airline pilot—and not a class of jobs as required by the EEOC's regulations, the majority held that the petitioners had not adequately alleged that United regarded them as disabled.

Justice Stevens, in dissent, joined by Justice Breyer, applied the customary tools of statutory construction and concluded that "[the ADA] focuses on [the individual's] past or present physical condition without regard to mitigation that has resulted from rehabilitation, self-improvement, prosthetic devices, or medication." Justice Stevens's rationale for this conclusion can be found in the ADA's disability definition, the legislative history, and the regulations and bulletins of the executive agencies responsible for implementing the ADA. Explaining that the three subsections of the disability definition must be read as three overlapping requirements, Justice Stevens opined that it became apparent that Congress intended the ADA to provide protection to those individuals who now have, or once had, an impairment that was substantially limiting. Referencing the majority's opinion, he pointed out that if Congress had intended the ADA to cover only those individuals whose impairments were presently and substantially limiting, Congress would not have provided that an individual could be disabled if he or she had a record of an impairment. Therefore, Justice Stevens found that reading the three prongs of the disability definition in concert permits individuals to take corrective measures to become more employable without losing the protections afforded by the ADA.

Justice Stevens next turned to the legislative history of the ADA to determine whether Congress intended an impairment to be evaluated in its corrected or uncorrected state. He pointed out that the various committee reports from both houses...
of Congress "make it abundantly clear that Congress intended the ADA to cover individuals who could perform all of their major life activities only with the help of ameliorative measures." Lastly, the Justice relied upon the interpretive guidelines issued by the EEOC that require the determination of whether an impairment substantially limits a major life activity to be made on a case by case basis without regard to mitigating measures.

Having determined that the ADA protects those individuals with "correctable" substantially limiting impairments from employment discrimination, Justice Stevens proceeded to examine whether individuals with "minor, trivial impairments" should be excluded from the protections afforded by the ADA. Alluding to the fact that the Court has in the past construed "remedial legislation . . . broadly to effectuate its purposes," Justice Stevens reasoned that even though the petitioners' impairment may fall outside the statute's intended protected class of individuals, there was no reason that the statute could not be construed to allow the petitioners access to the ADA's protection. Finding little difference between extending the ADA to cover the petitioners' impairment and the Court's extension of Title VII of the Civil Rights Act to include same-sex sexual harassment as it did in *Oncale v. Sundown Offshore Services, Inc.*, Justice Stevens pointed out that under the *Oncale* approach there was no basis for treating visual impairments differently than any other "medically controllable condition." Furthermore, the Justice concluded that the 43,000,000 figure was not a cap and that Congress intended the ADA to provide protection to more than that figure by including within the definition of disability those individuals with a "record of" impairment as well as those "regarded as" disabled.

Justice Breyer, in his dissent, maintained that a remedy existed if the dissents' more generous reading of the ADA resulted in an increased number of frivolous lawsuits that adversely affect those whom Congress clearly intended to protect. He proposed that the EEOC, "through regulation, might draw finer definitional

139. *Id.* at 2154-55. Justice Stevens relied upon reports presented by the Senate Committee on Labor and Human Resources, the House of Representatives Committees on Education and Labor, and the Committee on the Judiciary. See *Legislative History, supra* note 28, at 62, 313, 385.

140. See *Sutton v. United Airlines, Inc.*, 119 S. Ct. at 2156.

141. *Id.* at 2153 (quoting *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 866 n.10 (1st Cir. 1998)). Justice Stevens was referencing impairments such as plaintiffs' nearsightedness. See *id.*

142. See *id.* at 2156.

143. *Id.* at 2157 (quoting *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967)). The focus of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and as such is legislation of a remedial nature. 42 U.S.C. § 12101(b)(1) (1994).

144. See *Sutton v. United Airlines, Inc.*, 119 S. Ct. at 2157.

145. 523 U.S. 75 (1998). *Oncale* is an example of the Court extending the coverage of Title VII of the Civil Rights Act to cover a class of individuals not originally contemplated by Congress at the time of the statute's enactment.


lines” in order to prevent the statute from an overly broad extension. Noting that the majority seemed hesitant to accept the EEOC’s authority because it is limited to “this [Title I] subchapter,” which does not include the disability definition, Justice Breyer argued that the ADA’s structure did not deny the EEOC the power to issue a regulation concerning a term defined outside of Title I, if such a regulation was required to carry out the substantive provisions of Title I.

IV. THE ADA’S FUTURE DEPENDS ON LEGISLATIVE ACTION

The majority’s decision in Sutton v. United Airlines, Inc. undermines the broad remedial mandate of the ADA by denying ADA protection to an individual who uses mitigating measures to control an impairment while at the same time providing ADA protection to another individual who has the same impairment but does not use mitigating measures. Additionally, the majority’s reasoning is flawed because it confused the underlying impairment with the mitigating measures. The underlying condition that requires an individual to seek mitigating measures is not cured by the use of those mitigating measures. The condition is chronic and there is sometimes a risk that at some point the mitigating measure may fail to work. For example, in Matczak v. Frankford Candy and Chocolate Co., the plaintiff suffered an epileptic seizure even though he had been mitigating his epilepsy with the use of medication for almost thirty years. Under Sutton, the plaintiff in Matczak, prior to his epileptic seizure, would have been denied ADA protection because of his successful use of mitigating measures for thirty years. The fact that the plaintiff suffered an epileptic seizure while using medication, however, proves that mitigating measures do not cure the underlying impairment. The majority erred when it viewed mitigating measures as a cure. The symptoms are masked or lessened, but the underlying condition, that in its unmitigated state significantly limits a major life activity, remains.

The result of the Sutton decision leaves an impaired individual in a “Catch-22” situation. On one hand, an individual can use a mitigating measure and be eliminated from the protections provided by the ADA. On the other hand, an individual who for whatever reason does not use a mitigating measure is protected by the ADA but, due to his or her unmitigated condition, may not be a qualified individual for employment in general. Additionally, an individual who by use of mitigating measures is not substantially limited in a major life activity may still require some type of reasonable accommodation at work. For example, a diabetic individual may require additional breaks throughout the work day for insulin injections. An employer could deny an employee reasonable accommodations and not fear liability for discrimination because the employee would be excluded from the protection provided by the ADA according to Sutton.

149. Id. at 2161 (Breyer, J., dissenting).
150. Id. (quoting 42 U.S.C. § 12116 (1994)).
151. See id. at 2161-62.
152. 119 S. Ct. 2139 (1999).
153. An individual with an impairment that could be mitigated by the use of medication or a prosthetic may, for economic reasons, not seek such treatment, or the mitigating measures may create side effects that outweigh the benefits for some individuals.
154. 136 F.3d 933 (3d Cir. 1997).
155. See id. at 935.
The majority did underscore its decision's potential effect, however, by acknowledging that corrective measures do not by themselves automatically eliminate an individual from claiming a disability. The majority maintained that an individual can have a disability notwithstanding the use of corrective measures if the impairment still "substantially limits" a major life activity. The majority emphasized that this determination must be done on an individualized or case by case basis. Somewhat illogically, the Court stressed that an individualized inquiry was only possible if disability determinations were made with regard to mitigating measures. Justice Stevens recognized this flawed reasoning and stated that "[v]iewing a person in her 'unmitigated' state simply requires examining that individual's abilities in a different state, not the abilities of every person who shares a similar condition." It would appear then that there is no apparent reason why the statutory mandate for an individualized inquiry cannot be made without reference to mitigating measures. Accordingly, the majority's opinion that the ADA's mandate viewing mitigating measures is unfounded.

The other two rationales that the majority proffered seem equally flawed in light of the dissenting opinion. First, if a disability must be presently and actually substantially limiting, why did Congress include within the disability definition that a person could be disabled if there was a record of an impairment or if an individual was regarded as disabled? The existence of these definitions of disability seems to negate the significance of the fact that "substantially limits" is in the present indicative form.

Additionally, the "record of" and "regarded as" categories undermine the majority's reliance on the 43,000,000 figure to substantiate its conclusion that individuals with impairments that can be corrected with mitigating measures are not part of the ADA's protected class. The 43,000,000 figure is limited to those Americans with a physical or mental impairment and does not take into consideration those found to be disabled under the "record of" or "regarded as" categories. Although the actual number is not larger, the mere fact the disability definition includes the "record of" and "regarded as" categories illustrates that Congress intended to protect far more than those included within the 43,000,000 figure.

Whether or not the Supreme Court's rationale seems transparent is irrelevant because the Sutton decision is now the law of the land. For this to change, the Supreme Court would have to revisit the issue and reverse its decision or Congress would have to amend the ADA. The likelihood of the Supreme Court revisiting the issue anytime in the near future is realistically quite slim given the large number of diverse cases seeking writ of certiorari and the fact that the Court decided three employment discrimination cases under Title I of the ADA last Term. Congressional action, however, is a viable option.

Although some disability rights advocates support a wait-and-see approach, this Note takes the position that immediate legislative action is necessary. The

157. See id. at 2147.
158. Id. at 2159 (Stevens, J., dissenting).
159. The "record of" and "regarded as" categories are subsections (B) and (C) of the disability definition, respectively. 42 U.S.C. § 12102(2)(B)-(C) (1994).
160. See id. § 12101(a)(1).
wait-and-see approach entails waiting to see how the lower courts handle mitigating measures cases. Supporters of this approach view legislative action as a viable option only if the courts repeatedly allow flagrant acts of discrimination. The underlying rationale for not taking a proactive stance is that legislative action is inherently risky. Supporters of the wait-and-see approach fear that legislative action will undermine the protections of the ADA by incorporating employer-friendly provisions while simultaneously excluding plaintiff-friendly provisions. The problem with the wait-and-see approach is that it fails to provide a remedy that will both prohibit further discrimination and reincorporate those disabled individuals excluded from the ADA's protected class as a result of the Sutton decision.

Although courts have proven to be employer-friendly, Congress has generally been receptive over the last fifty years to the needs of the disabled. Additionally, the ADA as a whole received overwhelming bipartisan support and both Houses of Congress in their respective committee reports specifically recommended that disability determinations be made without regard to mitigating measures. It follows then that disabled individuals excluded from the ADA's protected class due to the Sutton decision are more likely to be readmitted through legislative action than through the judicial system.

Legislative action would enable Congress to amend the ADA to include express instructions that disability determinations should be made without regard to mitigating measures. At the same time, Congress should provide stronger guidance on precisely what impairments may constitute a disability under the ADA. Although Congress in the past has rejected providing a laundry list of impairments that "substantially limit" a major life activity, such action may be necessary to ensure those disabled individuals Congress intended the ADA to protect are afforded its protections.

In addition, legislative action would provide Congress with an opportunity to clarify the controversial issues raised by Sutton such as: (a) whether the EEOC had the authority to issue regulations for the disability definition; (b) the degree of deference that should be given to the interpretive guidelines issued by the EEOC; and (c) whether an individual can be "substantially limited" in the major life activity of working. Congress need only include a provision that the EEOC has the authority to issue regulations concerning terms defined outside of Title I if such terms are essential to carry out the substantive provisions of Title I. Although Congress is not likely to make the interpretive guidelines issued by the EEOC mandatory, it should acknowledge the need for such a comprehensive guide and, in doing so, legitimize its existence. Finally, Congress must determine that work is a legitimate major life activity. If work is eliminated from the definition of major life activity, the ADA's mandate to "bring persons with disabilities into the

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163. See id.
164. Plaintiffs prevail in only seven percent of reported ADA employment discrimination cases decided on the merits at the trial court level. See Ruth Colker, The Americans with Disabilities Act: A Windfall for Defendants, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999). Furthermore, "[o]f those cases that are appealed, defendants prevail in eighty-four percent of reported cases." Id.
165. See supra Part II.A.
166. See supra note 139 and accompanying text.
economic and social mainstream" will be hindered because employers would be able to circumvent the reasonable accommodations provision of the ADA.

Without legislative action, the Sutton decision will circumvent Congress's intended purpose of the ADA. The ADA's protection will be limited to those disabled individuals who, even with the use of mitigating measures, are substantially limited in a major life activity; ADA claimants will need to provide detailed factual records of how their impairment with the applicable mitigating measures substantially limits a major life activity. Additionally, in light of the majority's skepticism that an individual can be substantially limited in the major life activity of working, ADA plaintiffs should avoid making such allegations. Moreover, the majority's skepticism regarding the major life activity of working carried over to the "regarded as" allegation, thus limiting the evidence an ADA claimant can use to prove a "regarded as" claim.

V. CONCLUSION

The majority's decision in Sutton v. United Airlines, Inc. is in direct contradiction to the legislative history of the ADA and to the interpretive guidelines issued by the EEOC. In order to resolve these contradictions and ensure that the ADA continues to prohibit discrimination based upon an individual's disability, immediate legislative action is not only appropriate, but necessary. Given Congress's continuous support of disability legislation, the risk involved with seeking legislative action at this time seems minor, especially when compared to the impact of the Sutton decision on ADA claims and the employer-friendly stance of the judicial system.

Sara Gagne Holmes

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167. THE LEGISLATIVE HISTORY, supra note 28, at 51. See also supra note 34 and accompanying text.
168. The majority implied that viewing work as a major life activity was problematic:
Because the parties accept that the term "major life activities" includes working, we do not determine the validity of the cited regulations. We note, however, that there 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."