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THE AMERICANS WITH DISABILITIES ACT: THE NEW DEFINITION OF DISABILITY POST—
SUTTON V. UNITED AIR LINES, INC.

I. INTRODUCTION

Congress passed the Americans with Disabilities Act of 1990 ("ADA") "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." However, the vague language of the ADA has been a formidable obstacle for courts attempting to interpret the meaning of the term "disability." The ADA defines disability 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." The ADA does not define the key terms "substantially limits," "major life activity" and "physical or mental impairment" within the statutory definition of disability, and as a result, courts have struggled with the definition of disability.

Prior to the United States Supreme Court decision in Sutton v. United Air Lines, Inc., the circuits were divided over whether to consider the ameliorative effects of any implemented mitigating measures in determining whether a person is substantially limited in a major life activity. Authority for considering one's unmitigated condition stems from the position taken by the Equal Employment Opportunity Commission ("EEOC"). The EEOC is the administrative agency authorized by Congress to promulgate regulations for implementing Title I of the ADA. The EEOC implemented regulations explaining Title I and defining "substantially limits," "major

4. See id.
6. See Walsh, supra note 2, at 922; see also, 42 U.S.C. § 12116 (1994). The Attorney General issued regulations to implement Title II and the Secretary of Transportation issued regulations to implement the transportation portions in Title II and III. See 42 U.S.C. §§ 12134, 12149 (1994); see also Sutton, 527 U.S. at 478.
life activity" and "physical or mental impairment." Additionally, the EEOC promulgated an appendix to the regulations that contained interpretive guidelines, including the guideline that a person should be evaluated in one's unmitigated state. However, the definition of disability is located in the general provisions of the ADA. Congress did not authorize the EEOC to interpret any provisions that fall outside Title I or to provide interpretive guidance further explaining Title I.

The disagreement among the circuits over whether to consider mitigating measures ended when the United States Supreme Court ruled in Sutton. The Court held that a determination of disability takes into account any mitigating measures a person uses to ameliorate the condition. Reaction to this decision prompted criticism from advocates for the disabled. John Hockenberry, an MSNBC anchor, in a scathing column, wrote:

"The Supreme Court last week further refined an answer to the academic question, 'What is a disability?' The Court said that if a disability can be corrected or mitigated, employers can conclude that an impairment does not amount to a substantial limitation.

This is something of a revelation. I have a job. I have a family. I travel all over the world. By this definition the fact that I use a wheelchair to mitigate my paraplegia suggests that I am not disabled. Someone should tell the doctors working on a cure for spinal cord injury they are wasting their time. The Supreme Court just beat them to it."

8. See 29 C.F.R. § 1630.2(h)-(j) (1994); see also, Walsh, supra note 2, at 926.
10. See 527 U.S. at 471. On the same day, the Supreme Court also decided two other cases involving the ADA. The decisions in the other cases were based on the holding in Sutton. Therefore, Sutton is the only opinion that will be analyzed. In Murphy v. United Parcel Service, Inc. the Supreme Court held that under Sutton a United Parcel Service mechanic was not substantially limited in a major life activity because his high blood pressure was corrected with medication. 527 U.S. 516 (1999). The mechanic was dismissed because his blood pressure exceeded the Department of Transportation's guidelines. See id. at 522. His job required him to drive UPS vehicles. See id. at 519. In Albertson's, Inc. v. Kirkingburg, a truck driver was dismissed because he failed to meet the Department of Transportation's vision requirements due to monocular vision. 527 U.S. 555 (1999). The Supreme Court held that under the principle in Sutton an individual with monocular vision is not per se disabled. See id. at 521.
However, consideration of mitigating measures is the only reasonable interpretation of the ADA, and the plain meaning of the ADA supports this conclusion. Otherwise, every person who has a condition which is fully controlled with medication would be disabled under the ADA. Sutton creates an important distinction for employers because the consideration of mitigating measures significantly limits the breadth of the ADA.

Sutton answered the question of whether to consider mitigating measures. However, the case left open important questions about the deference that courts should afford to the EEOC regulations and interpretive guidelines and whether employers can require an employee to mitigate an easily correctable condition or illness. This Comment provides an interpretation of the decision reached in Sutton and proposes solutions to the questions that the Court did not answer. Part II discusses the historical development of rights for the disabled. Part III outlines the relevant provisions of the ADA and the EEOC regulations and guidelines interpreting the ADA. Part IV briefly reviews the conflict among the circuits over the EEOC guidelines. Part V discusses the decision in Sutton, particularly, the rejection of the EEOC guidelines and the new definition of "disability." Part VI analyzes whether the EEOC regulations and interpretive guidelines are entitled to deference based on case law interpreting the amount of deference agency regulations and interpretations should receive. Part VII reviews recent cases, post-Sutton, that have addressed the issue of whether to follow the EEOC regulations and interpretive guidelines.

Part VIII proposes that employers should challenge the EEOC definitions of "substantially limits" and "major life activity." Specifically, employers should challenge the EEOC's conclusion that "working" is a "major life activity." Also, this part proposes that employees should be required to mitigate their conditions and warns employers to carefully consider the negative effects of mitigating measures. Most importantly, this part emphasizes that employers should continue to follow the EEOC guidelines in order to ensure protection from liability; however, courts in the future probably will grant greater leeway to employers' actions given the Supreme Court's opinion in Sutton.

12. 527 U.S. at 482.
II. PRE-ADA HISTORY: THE DEVELOPMENT OF RIGHTS FOR THE DISABLED

The Civil Rights Movement for the disabled began long before the ADA was implemented. Section 504 of the Rehabilitation Act of 1973 was the first major attempt by Congress to protect the disabled from discrimination. Section 504 provides that "[n]o otherwise qualified handicapped individual in the United States... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." The protection of the disabled under Section 504 applies only to federally funded activities or programs. Because of this, the National Council on Disability ("NCD") lobbied for a "comprehensive law requiring equal opportunity for individuals with disabilities with broad coverage and setting clear, consistent and enforceable standards prohibiting discrimination on the basis of handicap." Ultimately, the proposed legislation evolved into what is now the ADA.

Congressional authority to enact the ADA emanates from the Fourteenth Amendment Commerce Clause and Equal Protection Clause. Much of the testimony before Congress about the plight of the disabled highlighted the segregation, isolation and lack of equal opportunity that disabled persons faced, particularly in trying to gain employment. The ADA applies to all employers with fifteen or more employees. The protection of disabled under the ADA far exceeds in scope and applicability the protection that Section 504 provides.

III. OVERVIEW OF THE ADA AND EEOC REGULATIONS AND INTERPRETIVE GUIDELINES

16. See id.
17. See id. at 19-20.
18. See id.
Congress passed the ADA "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."  

Under Title I of the ADA, which applies solely to employment, the 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." The term disability is defined in the general provisions of the ADA as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 

After passage of the ADA, this vague language quickly became an obstacle to its enforcement, and, in response, Congress authorized the EEOC to establish regulations further explaining Title I of the ADA. Subsequently, the EEOC promulgated regulations in the Code of Federal Regulations to further interpret terms not defined in the ADA. The EEOC regulations define "substantially limits" as follows:

[U]nable to perform a major life activity that the average person in the general population can perform; or (ii) significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

The regulations, further, define "major life activity" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." The regulations define "physical or mental impairment" as:

(1) Any physiological disorder, or condition, cosmetic

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23. See Walsh, supra note 2, at 922; see also, 42 U.S.C. § 12116 (1994).
25. 29 C.F.R. § 1630.2(j) (1994).
disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 27

The EEOC extracted the definition of physical or mental impairment and major life activity directly from its regulations implementing Section 504 of the Rehabilitation Act. 28

All of these definitions are employed in determining whether a person is disabled under the ADA, and each definition is a critical element in the disability analysis.

Congress mandated that the EEOC establish regulations interpreting Title I of the ADA, but in doing so, Congress did not give the EEOC authority to interpret the general provisions of the ADA, which include the definition of disability. 29 In addition, the EEOC also promulgated interpretive guidelines in an appendix to the Code of Federal Regulations to help interpret the ADA, which Congress did not mandate. 30 In the appendix of interpretive guidelines, the EEOC further explained the term "substantially limits." The guidelines state that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 31

The Court rejected this controversial guideline in Sutton. 32 Mitigating measures are the steps a person takes to help remedy one's condition whether it is, for example, in the form of medicine or prosthetics. Therefore, under the EEOC interpretive guidelines, a person with diabetes who functions normally with medication, but who without medication would die is disabled under the ADA because the

27. 29 C.F.R. § 1630.2(h) (1994).
30. See Walsh, supra note 2, at 922. See also Erica Worth Harris, Controlled Impairments Under the Americans with Disabilities Act: A Search for the Meaning of "Disability," 73 WASH. L. REV. 575, 579 (1999); see also, 42 U.S.C. § 12116 (1994).
32. See Walsh, supra note 2, at 922; see also, 42 U.S.C. § 12116 (1994).
beneficial effects of the medication are not considered. If the mitigating effects of the medication are considered in the disability analysis, then this person is not substantially limited in a major life activity because the medication allows that person to function normally. Another example is a person who without glasses is legally blind, but with glasses has normal vision. If the mitigating effect of the glasses is not considered, then this person is disabled under the EEOC analysis.

IV. HISTORY OF THE DEBATE OVER CONSIDERING MITIGATING MEASURES

Prior to Sutton, the circuits were divided over whether mitigating measures should be considered. Some circuits held that the EEOC guidelines were entitled to deference unless the guidelines were in opposition to the plain language of the statute.33 The circuits upholding the EEOC approach determined that the EEOC approach did not violate the plain language of the ADA because "the agency's interpretation simply 'places "substantially limits" in proper relation to the impairment, that is, it relates "substantially limits" to the untreated impairment.""34 In contrast, other circuits favored the approach that mitigating measures should be considered on the basis that EEOC guidelines are not entitled to any deference because the EEOC analysis was in direct opposition to the plain language of the ADA.35 The Supreme Court in Sutton adopted this point of view.

V. THE DECISION: SUTTON V. UNITED AIR LINES, INC.

This section discusses the facts and analyzes the elements of Sutton that compels lower courts to consider mitigating measures. This Comment does not address the plaintiffs' argument that the defendants regarded them as disabled except to discuss the issue of whether working is a major life activity. Rather, this Comment focuses solely on the argument that the plaintiffs were disabled under section 12102(2)(a) of the ADA.36

34. Id.
35. See id.
36. Under § 12101(c) of the ADA persons who are "regarded as disabled" are covered under the ADA. Sutton, 527 U.S. at 478. To establish a claim under this section, one must show either that "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity
A. The Factual Scenario

In 1992, Karen Sutton and Kimberly Hinton, twin sisters, applied for the position of commercial pilot with United Airlines. The sisters qualified for jobs as pilots, except that their uncorrected vision did not meet the airline's requirements. With "corrective lenses, each ... had vision that [was] 20/20 or better." However, the airline required that all applicants have uncorrected vision of 20/100 or better. The airline made an error and did not recognize that the sisters' uncorrected vision did not satisfy the standard. During the interviews, the airline informed the sisters of the mistake and neither of them obtained a job as a commercial pilot.

The sisters brought suit alleging that the airline discriminated against them in violation of the Americans with Disabilities Act. The Supreme Court granted certiorari from the Tenth Circuit after the Tenth Circuit affirmed the District Court of Colorado's dismissal of the sisters' complaint. According to the District Court, because their vision was fully corrected, the sisters did not have an impairment that substantially limited a major life activity. In addition, the District Court dismissed the sisters' argument that if they were not disabled in fact, then they were regarded as disabled. The Supreme Court affirmed the decision of the Tenth Circuit in all respects.

mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities." The employer must have misperceptions about the individual's condition. See id.

38. See id.
39. Id.
40. See id. at 476.
41. See id.
42. See id.
44. See id. at 495.
45. See id.
46. See id. In Sutton, the twin sisters argued that the airline "mistakenly believes their physical impairments substantially limit them in the major life activity of working." Id. They supported this allegation by arguing that the vision requirement was based on "myth and stereotype" and that they were precluded from an entire class of employment. Id. at 490. The Court concluded that the sisters had not established a claim that the airline regarded the twin sisters as disabled. See id. First, a vision requirement by itself is insufficient to show that the airline regarded the sisters as disabled. See id. Employers can "decide that physical characteristics or medical conditions that do not rise to the level of an impairment—...—are preferable to others, just as it is free to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job." Id.
47. See id.
B. The Textualist Approach and Deference to the EEOC Guidelines

In *Sutton*, the sisters first argued that the EEOC interpretive guideline is entitled to deference on the grounds that the ADA does not specifically address whether mitigating measures should be considered. Without corrective lenses the sisters are substantially limited in the major life activity of seeing. The Court held that the plain language of the ADA requires the consideration of mitigating measures. The Court refused to address the issue of deference to agency guidelines because the Court did not have to look beyond the text of the ADA.

In this case, the Court found that the plain language of the ADA does support the consideration of mitigating measures. If a statute is unambiguous, then the Court should not refer to agency regulations or legislative history for instruction. Otherwise, the Court is "essentially delegat[ing] the duty of interpreting the law to legislative actors." Therefore, by reaching the conclusion that the plain language of the statute required that mitigating measures be considered, the Court did not have to address whether EEOC regulations are entitled to deference.

Justice O'Connor, writing for the majority, made the general statement that "[n]o agency, however, has been given authority to issue regulations implementing the generally applicable provisions of the ADA, . . . , which fall outside Titles I-V. Most notably, no agency has been delegated authority to interpret the term 'disability.'" In addition, Justice O'Connor specifically cast doubt on whether working is a major life activity as part of the discussion that the twin sisters were "regarded as disabled." Justice O'Connor found that

[b]ecause 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

48. *See id.* at 481.
49. *See id.*
50. *See id.*
51. *See id.* at 475.
52. *See id.*
54. Puma, supra note 33, at 142.
56. *See id.* at 492; *see also* 29 C.F.R. § 1630.2(i) (1994).
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." 57

Therefore, the deference that the EEOC regulations and guidelines should receive remains an open question. Possible answers to this question are offered in parts VII and VIII of this Comment.

The Court based its conclusion that the text of the ADA was unambiguous after examining three separate provisions of the ADA in context. 58 First, the Court examined the language used in the definition of disability, defined as "a physical or mental impairment that substantially limits one or more... major life activities." 59 The Court held that "[b]ecause the phrase 'substantially limits' appears in the Act in the present indicative verb form, we think the language is properly read as requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability." 60 The Court continued by explaining that "[a] disability exists only where an impairment 'substantially limits' a major life activity, not where it 'might,' 'could' or 'would' be substantially limiting if mitigating measures were not taken." 61 Therefore, the Court concluded that an individual whose condition is completely corrected with mitigating measures is not presently disabled because that person is not substantially limited in a major life activity. 62

The second argument the Court espoused for considering mitigating measures was that the determination of "whether a person has a disability under the ADA is an individualized inquiry," and evaluating a person in his unmitigated state would make a case-by-case analysis difficult if not impossible. 63 The Court rejected the EEOC's guideline because considering a person in his or her unmitigated state "runs directly counter to the individualized inquiry mandated by the ADA." 64 The Court found that "[t]he agency approach would often require courts

58. See id. at 481.
59. *Id.* (emphasis added) (quoting § 12102(2)(A) (1994)).
60. *Id.* at 475.
61. *Id.*
62. See *id.* at 483.
63. See *id.*
64. *Id.*
and employers to speculate about a person's condition and would, in many cases, force them to make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition. In other words, the EEOC's hypothetical approach would achieve the exact opposite result that the text of the ADA requires because a hypothetical approach is not an individualized inquiry.

The third and final provision of the ADA that the Court examined was Congress' finding that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older." The Court critically examined this number and found that if mitigating measures are not considered, then the number of disabled will greatly exceed 43 million. The Court looked beyond the text of the ADA in analyzing this number and considered the basis for this number.

Specifically, the Court looked at a report prepared by the National Council on Disability. The report addressed the difficulty in estimating the number of disabled people in the United States because of the different definitions of disability. Each definition yields varying numbers of disabled. The report stated that the most common estimate is around 35 or 36 million. This number was determined based on a functional definition of disability, which considers the mitigating effects of "'special aids,' such as glasses or hearing aids ...." After reviewing the findings in the report, the Court concluded that the number of persons estimated to be disabled under a functional approach was akin to the number Congress cited within the text of the ADA.

In contrast, a non-functional approach to determining disability, referred to as a "health conditions approach," yields an estimate of 160 million people. The Court accounted for the discrepancy between 36 million and 43 million that the ADA cites on the basis that the report figure only included non-institutionalized individuals, and the Court determined that institutionalized individuals would account for the

65. Id.
67. See Sutton, 527 U.S. at 483.
68. See id.
69. See id. at 485.
70. Id.
71. See id.
72. Id.
difference. This argument is further strengthened by evidence that the number of people with vision impairments are estimated in the range of 100 million, which is far beyond the 43 million cited within the provisions of the ADA. The Court concluded:

Because it is included in the ADA's text, the finding that 43 million individuals are disabled gives content to the ADA's terms, specifically the term "disability." Had Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings. That it did not is evidence that the ADA's coverage is restricted to only those whose impairments are not mitigated by corrective measures.

Therefore, the plain language of the ADA requires that mitigating measures be considered. As a result, the court deemed that the twin sisters are not actually disabled.

VI. IN LIGHT OF SUTTON, SHOULD COURTS DEFER TO THE EEOC REGULATIONS AND GUIDELINES?

Since Sutton did not address the issue of deference, the question remains as to what deference if any courts should give the EEOC regulations and interpretive guidelines. The Chairman of the ABA's commission on mental and physical disability law, James Carr, reported "that the Supreme Court's snub of the EEOC is highly significant and predicted that 'if lower courts do not want to rely on EEOC rules and guidance, they would be given a lot of leeway.'" The EEOC is the "agency directed by Congress to issue implementing regulations to render technical assistance explaining the responsibilities of covered individuals and institutions" under Title I.

The appropriate deference to agency regulations implemented pursuant to a Congressional grant of authority was outlined in Chevron v. Natural Resources Defense Council. In Chevron, the Supreme Court

73. See id. at 475.
74. See id. at 487.
75. Id.
78. 467 U.S. 837 (1984); see also Echazabel v. Chevron, USA, 2000 U.S. App. LEXIS
found that a two step test was appropriate. The first question that must be addressed is whether the intent of Congress is clear because "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." However, if the statute is ambiguous the agency regulation should be given effect if it is "based on a permissible construction of the statute."

Under the ADA, Congress delegated to the EEOC the authority to promulgate regulations for Title I of the ADA that concern employment discrimination. Therefore, the EEOC regulations interpreting Title I are entitled to deference if the statutory language is ambiguous because Congress requested the EEOC to promulgate the regulations.

However, the definition of disability is defined in the general provisions of the ADA. Therefore, as Justice O'Connor noted in Sutton, the EEOC was not given any authority to interpret this portion of the ADA. This brings into question not only the interpretive guidelines, but also the EEOC regulations defining "substantially limits," "physical and mental impairment" and "major life activity," which are at issue in almost every ADA case. The interpretive guidelines in the appendix carry "less weight than the administrative regulations because it is an interpretation, and not an implementation, of the statute." Arguably, given the Court's rejection of the no mitigating measures guidelines and the dicta by Justice O'Connor, lower courts are free to disregard the EEOC regulations and interpretive guidelines pertaining to the general provisions of the ADA that fall outside Title I of the ADA.

In Skidmore v. Swift, the Supreme Court discussed the deference given to agency regulations that were promulgated without

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79. See Chevron, 467 U.S. at 842.
80. Id. at 842-843.
81. Id.
85. See Randall, supra note 74, at 31.
Congress appointed an Administrator to monitor industries and seek injunctions for violations of the Fair Labor Standards Act. However, the Administrator was not given the power to determine "whether particular cases fall within or without the Act." Even though the Administrator's opinions do not have the force of law, the Supreme Court found as follows:

[The] opinions of the Administrator under this Act, while not controlling upon the Courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Based on Skidmore, courts can look to the EEOC guidelines and regulations for guidance in their opinions if the courts find the guidelines and regulations persuasive, but courts are not obligated to grant any deference to the EEOC guidelines and regulations interpreting the general provisions of the ADA.

VII. RECENT CIRCUIT DECISIONS POST-SUTTON: ARE THE CIRCUITS GRANTING THE EEOC REGULATIONS AND INTERPRETIVE GUIDELINES DEFERENCE?

This section reviews case law since the decision in Sutton to explore how the circuits are treating EEOC regulations and interpretive guidelines in light of the Supreme Court's rejection of the no mitigating measures interpretation and the statement that the EEOC does not have the authority to interpret provisions outside of Title I. Most circuits will continually grant the EEOC deference until the Supreme Court clarifies the vague statement made by Justice O'Connor.

87. 323 U.S. 134 (1944).
88. See id. at 137.
89. Id.
90. Id. at 140.
A. Circuits Granting Deference

Some circuits continue to grant deference to the EEOC. The Second Circuit recently decided that "until a more definite pronouncement" by the Supreme Court, the EEOC regulations and interpretations will be given weight. The Third Circuit agreed with the Second Circuit's finding that the EEOC definition of "substantially limits" is entitled to deference because the definition has been applied in prior cases.

B. Circuits Refusing to Address the Issue of Deference

Some circuits have refused to address the issue of deference. The Fifth Circuit in a recent opinion declined to address the issue of whether the EEOC regulations are entitled to deference. The Fifth Circuit concluded:

[Sutton] now casts a shadow of doubt over the validity and authority of the EEOC's regulations. However, because we conclude, based on the plain text of the ADA, that working is indeed a major life activity, we need not decide whether the EEOC's regulations are due any deference, or whether we are bound by our own precedent to respect them.

Also, the Ninth Circuit in a recent opinion accepted the EEOC

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91. See infra, notes 89-90 and accompanying text.
92. Muller v. Costello, 1999 U.S. App. LEXIS 18651, at *36 (2d Cir. Aug. 11, 1999)(holding that a former New York correctional officer with asthma that prevented the officer from exposure to tobacco smoke had not proven that he was substantially limited in a major life activity; however, the court upheld the lower court's finding that the officer was unlawfully retaliated against by the Department of Corrections because of his asthma); see also Heyman v. Queens Village Comm. for Mental Health for Jamaica Comm. Adolescent Program, Inc., 1999 U.S. App. LEXIS 30720, at *10 (2d Cir. Nov. 30, 1999) (granting substantial deference to EEOC on the basis of the decision in Muller, 1999 U.S. App. Lexis 18651, at *36).
93. See Taylor v. Phoenixville Sch. Dist., 184 F.3d 296 (3d Cir. 1999) (reversing the lower court decision granting summary judgment on the grounds that "a reasonable jury could conclude that Taylor requested accommodations, that the school district made no effort to help Taylor find accommodations and was responsible for the breakdown in the process, and that there were accommodations that the school district could have provided that would have made Taylor able to perform the essential functions of her job." Id. at 320).
94. EEOC v. R. J. Gallagher Co., 181 F.3d 645, 655 n.5 (5th Cir. 1999) (holding that the President of Gallagher Co. with cancer was not substantially limited in a major life activity; however, a genuine issue of material fact existed over whether the former president was regarded as disabled. Id. at 655-57.)
regulations as valid and relied on the EEOC regulations because the parties accepted the regulations as valid.95

VIII. OPTIONS FOR EMPLOYERS IN LIGHT OF SUTTON

This section outlines options that employers could consider given the Court's decision in Sutton. Employers could challenge the EEOC regulations interpreting the general provisions of the ADA, particularly the definitions of "major life activity" and "substantially limits." In addition, employers should evaluate and consider the negative effects of the mitigating measures that an employee uses. Further, employers could argue that employees must take steps to mitigate conditions that can be easily corrected.

A. EEOC Provisions that Should Be Challenged

The Second and Third Circuits continue to grant deference to the EEOC regulations and guidelines, while the Fifth and Ninth Circuits have refused to address the issue of whether the EEOC regulations and guidelines are entitled to deference. Based on the circuits' opinions in this area, employers should continue to follow the EEOC requirements under Title I and the definitions of disability in order to ensure compliance with the ADA.

However, the EEOC regulations interpreting the general provisions that fall outside of Title I could be challenged on the grounds that the EEOC does not have the authority to promulgate definitions for "substantially limits," "physical or mental impairment" and "major life activity."

1. Challenging the EEOC Position that Work is a Major Life Activity

The major life activity of "working" could be challenged. Inclusion of working in the definition of major life activity provides a catch all for plaintiffs that cannot fit within another category such as breathing and walking. The Court suggests in Sutton that it is circular to argue that working is a major life activity.96 The Court cites the example of a person who is unable to work with others.97 The inability to work would

95. See Broussard v. Univ. of Cal., 192 F.3d 1252, 1256 n.2 (9th Cir. 1999) (holding that a technician with carpal tunnels syndrome was not substantially limited in the major life activity of working); see also Mcalindin v. County of San Diego, 192 F.3d 1226, 1233 (9th Cir. 1999) (applying EEOC regulations because parties did not contest their validity).
97. See id.
be the impairment and the major life activity. This is circular because the inability to work should be the result of a "handicap." Given the Supreme Court's rejection of the EEOC interpretive guidance and the doubt cast on the validity that working is a major life activity, lower courts have ample authority for finding that working is not a major life activity. Most importantly, one court recently held that working was not a major life activity.83

The United States District Court for the Northern District of Alabama relying on Sutton held in Mullins v. Crowell that working is not a major life activity under the Rehabilitation Act.99 The court concluded:

[W]orking is not a life activity in the sense that it is an aspect of basic human physical or mental functioning. A limitation in one's ability to work is contingent upon an impairment limiting some other area of physical or mental functioning. It makes sense to say that one is limited in his or her ability to work because he or she is limited in his or her ability to see; it makes no sense to say the contrary. Thus, a limitation on working is itself not a limitation on a basic aspect of human functioning. Rather it is a consequence—...—of a limitation on an area of basic human functioning.100

The court held that working as a major life activity "paves over" establishing the causation link between the impairment and the inability to work.101 The impairment is what limits the ability of the individual to work. The analysis in this case is persuasive. It would be a significant advantage for employers if working was eliminated as a major life activity because "'working' seems to be the 'major life activity' most often cited in claims brought under the act."102

2. Challenging the Definition of "Substantially Limits"

Employers should also challenge the definition of "substantially limits." In Sutton, the Court first looked to the dictionary and second to the EEOC definition of "substantially limits" to define "substantially"

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89. See id.
99. See id.
100. Id. at 1141.
101. See id.
in evaluating whether the twin sisters were "regarded as disabled." This supports the inference that the Court does not believe that the EEOC regulations interpreting the general provisions of the ADA are entitled to much, if any deference. If the Court believed that the regulations were entitled to deference, the Court would have relied solely on the EEOC definition. The emphasis of the Court is on the plain meaning of the ADA. Weakening this conclusion is the Supreme Court's ruling in an earlier decision, Bragdon v. Abbot, where the court "relied on EEOC regulations and interpretive guidance in determining what is a disability." However, the Court in Bragdon did not employ the EEOC definitions of those provisions falling outside of Title I and the Court in Sutton did not question the EEOC authority to issue regulations to implement Title I. Therefore, a viable argument can be espoused challenging the EEOC definition of "substantially limits."

B. The Caveat for Employers: The Importance of the Requirement that the Negative Effects of Mitigating Measures Be Considered

Under the Court's analysis in Sutton employers must carefully consider the negative effects of any mitigating measures an employee uses. The Eighth Circuit, in Belk v. Southwestern Bell Telephone Co., extensively interpreted the Supreme Court's ruling in Sutton that mitigating measures must be considered including the negative effects of mitigating measures. The plaintiff wore a full-length leg brace as a result of polio. In order to qualify for the job of Customer Service Technician, the plaintiff had to pass arm lift, arm strength endurance, sit-ups and leg lift tests. The plaintiff asked for an accommodation for

103. See Sutton, 527 U.S. at 491. There was no need to define substantially limits under the first portion of the opinion addressing whether the twins were actually disabled because this part of the decision turned on whether the mitigating effects of the glasses was considered.
104. See id. at 491 (quoting Webster's Third Int'l Dictionary 2280 (1976)); see also Steinberg, supra note 99, at 4.
107. See Bragdon, 524 U.S. at 647.
109. 194 F.3d 946 (8th Cir. 1999).
110. See id. at 948.
the leg lift test, which the defendant refused. The plaintiff did not pass the leg lift test and was not hired as a result. In determining whether the plaintiff was disabled under the ADA, the Eighth Circuit noted that "the Sutton Court stated that the mere use of a corrective device alone is not enough to relieve an individual of a disability; rather, 'one has a disability under subsection A if, notwithstanding the use of a corrective device, that individual is substantially limited in a major life activity.' Based on this premise, the Eighth Circuit concluded that the plaintiff was substantially limited in the major life activity of walking because the plaintiff's range of motion was limited and the plaintiff walked with a significant limp. The court concluded that "[t]hese considerations abide by the language in Sutton which directs courts to contemplate the negative side effects of mitigating measures, as well as the positive, in determining disability."

This opinion is noteworthy because it supports the view that although mitigating measures are going to be considered, courts will seriously consider the negative effects of the corrective device on the person. Therefore, if a person has an illness or physical impairment that is easily correctable with medication or a corrective device, like a prosthesis, then the negative side effects in the workplace and to the individual ought also be considered. Most medications have side effects. For example, many medications list side effects like headaches, drowsiness, nausea, dehydration and dizziness. Potentially, there will be situations where the side effects of medication substantially limit a major life activity. Therefore, employers must carefully evaluate an employee to ensure that although the employee is not presently disabled by the underlying illness or condition, the employee is not disabled as a result of the negative effects of the mitigating measures.

C. Should Employees Be Required to Take Steps to Mitigate Their Condition?

The decision in Sutton also left open the issue of whether employees should be required to take steps to mitigate their condition, particularly for conditions that are easily corrected by medication or corrective

111. See id. at 948-49.
112. See id. at 949.
113. Id. at 950 (quoting Sutton, 527 U.S. at 488); see also Popko v. Pa. State Univ., 84 F. Supp. 2d 589, 594 (M.D. Pa. 2000).
114. See Belk, 194 F.3d at 950.
115. Id.
devices, such as eyeglasses or medication to control mental illness or chronic illnesses like diabetes. The Sutton decision might discourage some people from taking steps to improve their condition. The observation has been made that "[i]t does not seem to be a great stretch to bar from ADA coverage employees whose 'disabilities' could be easily corrected, but who do not do so." Employees should be required to take steps to mitigate easily correctable conditions in order to give effect to the Sutton decision. If courts must consider the mitigating effects of a corrective device, then the courts should consider the mitigating measures that an employee could use for an easily correctable condition. This is necessary to protect employees that are truly disabled.

IX. CONCLUSION

The Supreme Court's decision in Sutton v. United Air Lines, Inc. represents some relief for employers. The court correctly concluded that the plain language of the Americans with Disabilities Act requires that mitigating measures must be considered when determining whether an individual is disabled. However, the Court failed to address the amount of deference EEOC regulations and guidelines should receive. In light of Sutton, employers should continue to challenge the EEOC regulations and interpretive guidelines interpreting the general provisions of the ADA. Employers should assert that employees must first take steps to mitigate their conditions in order to be protected under the ADA.

In addition, employers should challenge the EEOC's approach that working is a major life activity. Working should not be considered a major life activity because individuals should be evaluated to determine whether they are disabled, and as a result, the disability prevents them from working, not the inability to work. In addition, employees could be required to employ mitigating measures to correct easily correctable problems because employers should not be liable under the ADA when the employee makes the decision not to correct his or her condition. Finally, employers should consider the negative effects of the mitigating measures a person employs in ensuring compliance with the ADA. More lawsuits likely will arise under the auspices that the negative effects of the mitigating measures render the individual disabled. All of these questions remain for the courts to decide. Most importantly, until

116. Steinberg, supra note 99, at 5.
a more certain pronouncement by the courts, employers should continue to rely on EEOC regulations and guidelines interpreting the ADA to minimize litigation.

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