

USING MITIGATING MEASURES TO DETERMINE DISABILITY UNDER THE AMERICANS WITH DISABILITIES ACT

PERRY MEADOWS, M.D.[†]

RICHARD A. BALES[‡]

I. INTRODUCTION

II. DISABILITY UNDER THE ADA

- A. THE FIRST PRONG: THE MEANING OF IMPAIRMENT
- B. THE SECOND PRONG: HAVING A RECORD OF AN IMPAIRMENT
- C. THE THIRD PRONG: "REGARDED AS"

III. MITIGATING MEASURES

- A. LEGISLATIVE HISTORY
- B. EEOC GUIDELINES
- C. CASE LAW
 - 1. Exclude Mitigating Measures
 - 2. Include Mitigating Measures
 - 3. Sometimes Include Mitigating Measures

IV. THE *SUTTON* TRILOGY

- A. *SUTTON V. UNITED AIR LINES, INC.*
- B. *MURPHY V. UNITED PARCEL SERVICE, INC.*
- C. *ALBERTSON'S, INC. V. KIRKINGBURG*

V. APPLICATION OF THE *SUTTON* TRILOGY TO SPECIFIC MEDICAL CONDITIONS

- A. DIABETES MELLITUS
 - 1. INSULIN-DEPENDENT DIABETES MELLITUS
 - 2. NON-INSULIN-DEPENDENT DIABETES MELLITUS
 - 3. SECONDARY DIABETES
 - 4. IMPAIRED GLUCOSE TOLERANCE
 - 5. GESTATIONAL DIABETES.
- B. HYPERTENSION
- C. SEIZURE DISORDER
- D. VISUAL IMPAIRMENTS

VI. CONCLUSION

[†] Medical Director, Bethesda Care Eastgate Occupational Medicine Center, Cincinnati, Ohio. M.D. Marshall University School of Medicine, 1984; M.S. Marshall University 1980; B.S. Marshall University 1979. Thanks to my wife, Angela, for her assistance and support, and to Douglas Linz, M.D., for his invaluable assistance in reviewing this manuscript.

[‡] Assistant Professor of Law, Northern Kentucky University, Chase College of Law. Thanks to Timothy Hall, David Franklyn, Edward Brewer, Maureen Cruse, and Rose Herzog.

I. INTRODUCTION

A job applicant has 20/200 vision which is correctable to 20/20 with glasses or contacts.¹ Is the applicant "disabled,"² and therefore entitled to a reasonable accommodation,³ under the Americans with Disabilities Act (ADA)?⁴ The answer depends on whether courts consider "mitigating measures,"⁵ such as glasses, medicine or prosthetic devices,⁶ in the determination of a disability.

Until recently, the federal circuit courts were divided on this issue. Most courts ruled that the determination should be made without regard to mitigating measures.⁷ In these courts, the applicant with 20/200 vision would be considered disabled. A few courts decided that the determination should take mitigating measures into account.⁸ In these courts, the applicant with poor vision would not be considered disabled. One court held that "serious impairments" should be considered in an unmitigated state, but that mitigating measures should be considered for other impairments.⁹ In this situation, the applicant with poor vision might or might not be considered disabled, depending on whether the court considered the vision impairment to be "serious."¹⁰

In 1999, the Supreme Court resolved the circuit conflict by deciding three cases which we collectively will call the *Sutton Trilogy*: *Sutton v. United Air Lines, Inc.*,¹¹ *Murphy v. United Parcel Service, Inc.*,¹² and *Albertson's, Inc. v. Kirkingburg*.¹³ In these cases, the Court ruled that lower courts must consider mitigating measures when making a determination of whether an individual is disabled under the ADA.¹⁴ According to the Court, the individual must be evaluated in the "present state"¹⁵ of impairment, and this present state must take into account the use of medication or other mitigating measures.¹⁶ Therefore, courts should not consider

1. See, e.g., *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2143 (1999).

2. See *infra* notes 24-36 and accompanying text.

3. For discussions of the employer's duty of reasonable accommodation, see R. Bales, *Libertarianism, Environmentalism, and Utilitarianism: An Examination of Theoretical Frameworks for Enforcing Title I of the Americans with Disabilities Act*, 1993 DET. C.L. REV. 1163, 1175-77(1993); R. Bales, *Title I of the Americans with Disabilities Act: Conflicts Between Reasonable Accommodation and Collective Bargaining*, 2 CORNELL J.L. & PUB. POL'Y. 161, 172-73 (1992).

4. 42 U.S.C. §§ 12101- 12213 (1994).

5. See *infra* notes 70-93 and accompanying text.

6. See 29 C.F.R. § 1630.2(h), app. (1999).

7. See *infra* notes 94-114 and accompanying text.

8. See *infra* notes 115-118 and accompanying text.

9. See *infra* notes 119-130 and accompanying text.

10. *Id.*

11. 119 S. Ct. 2139 (1999) [hereinafter "Sutton III"].

12. 119 S. Ct. 2133 (1999) [hereinafter "Murphy III"].

13. 119 S. Ct. 2162 (1999) [hereinafter "Kirkingburg III"].

14. *Sutton III*, 119 S. Ct. at 2143.

15. *Id.* at 2146-47.

16. *Id.*

theoretical problems or complications which may develop in the future.¹⁷

This article explores the scope of the Court's rulings in the *Sutton* Trilogy and applies those rulings to several medical conditions which have been the subject of frequent litigation under the ADA. Our analysis illustrates the profound practical effect that the *Sutton* Trilogy will have on the scope of the Americans With Disabilities Act.¹⁸ Before the *Sutton* Trilogy, courts considered conditions such as diabetes and epilepsy to be, for all practical purposes, *per se* disabilities, and persons with those conditions were protected by the ADA. Now, however, because these conditions usually are treatable with medication or other forms of medical intervention, persons with these conditions are unlikely to be protected by the ADA. Persons with other treatable conditions, such as hypertension and vision disorders, similarly, will be much less likely to find protection under the ADA. The result is a dramatic diminution in the number of people to whom the ADA will offer protection from workplace discrimination.

One can argue whether, from a policy perspective, the direction taken by the *Sutton* Trilogy is good or bad. Efficiency enthusiasts will hail the Trilogy as curtailing legal intervention on behalf of employees who have little need for it. Disability advocates who view the ADA as a remedial statute that should sweep as widely as possible will be disappointed. Our article leaves that debate to future commentators; our goal is simply to illustrate that the practical effects of *Sutton* are far-reaching and deserve further reflection.

Part II of our article describes the relatively complex way that the ADA defines disability.¹⁹ Part III explores the pre-*Sutton* legal authority concerning the use of mitigating measures in the determination of disability, including an analysis of the ADA legislative history, the Guidelines issued by the Equal Employment Opportunity Commission (EEOC),²⁰ and the circuit court split discussed above.²¹ Part IV analyzes the cases of the *Sutton* Trilogy.²² Part V examines the practical application of the *Sutton* Trilogy to four frequently-litigated conditions: diabetes mellitus, hypertension, seizure disorder, and certain visual disturbances.²³ For each condition, Part V first briefly describes the medical nature of the condi-

17. *Id.*

18. See *Todd v. Academy Corp.*, 57 F. Supp.2d 448, 452 (S.D. Tex. 1999) (noting that the *Sutton* decision "made a significant change in ADA analysis").

19. See *infra* notes 24-69 and accompanying text. See also, Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans With Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1405 (1999) (arguing that the ADA definition of disability "undercuts the effectiveness of the ADA").

20. For a discussion of the deference (or lack thereof) that courts give to EEOC Guidelines and other EEOC policy pronouncements, see Richard A. Bales, *Compulsory Employment Arbitration and the EEOC*, __ PEPPERDINE L. REV. __ (forthcoming Fall 1999).

21. See *infra* notes 70-130 and accompanying text.

22. See *infra* notes 131-179 and accompanying text.

23. See *infra* notes 180-304 and accompanying text.

tion, then examines how courts evaluated the condition prior to the *Sutton* Trilogy, and finally applies the holdings of the *Sutton* Trilogy to the conditions to predict the likely outcome of future cases.

II. DISABILITY UNDER THE ADA

The ADA prohibits disability discrimination²⁴ against individuals²⁵ by employers.²⁶ The ADA provides:

[n]o covered entity²⁷ shall discriminate against a qualified individual with a disability²⁸ 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.²⁹

The first element in a plaintiff's prima facie case is proof of a disability within the meaning of the ADA.³⁰ The definition of disability under the ADA has three prongs.³¹ A person must meet at least one of these definitions to fulfill the requirements of the first element of a plaintiff's prima facie case.³² A person is considered disabled under the ADA if they (1) have a "physical or mental"³³ impairment that substantially limits one or more of the person's major life activities;³⁴ (2) have "a record of such an impairment;"³⁵ or (3) are regarded by the employer "as having such an impairment."³⁶

A. THE FIRST PRONG: THE MEANING OF IMPAIRMENT

The first prong of the definition of disability is "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."³⁷ Under the EEOC interpretation, any disorder

24. 42 U.S.C. § 12112(b) (defining "discrimination" under the ADA).

25. *Id.* at § 12102(2) (defining "disability" under the ADA).

26. *Id.* at § 12111(2) (defining "covered entity" under the ADA).

27. *Id.*

28. *Id.* at § 12111(8).

29. *Id.* at § 12112(a).

30. *Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758 (5th Cir. 1996); *Aucutt v. Six Flags Over Mid-America, Inc.* 85 F.3d 1311, 1318 (8th Cir. 1996); *Valentine v. American Home Shield Corp.*, 939 F. Supp. 1376, 1396 (N.D. Iowa 1996). The elements of a plaintiff's prima facie case are "(1) she has a disability; (2) she was qualified for the job; and (3) an adverse employment decision was made solely because of her disability." *Rizzo*, 84 F.3d at 763.

31. 42 U.S.C. § 12102(2).

32. *See id.*

33. For a thorough discussions of the judicial treatment of mental disabilities under the ADA, see Laura F. Rothstein, *The Employer's Duty to Accommodate Performance and Conduct Deficiencies of Individuals with Mental Impairments Under Disability Discrimination Laws*, 47 SYR. L. REV. 931 (1997); Stephanie Proctor Miller, *Keeping the Promise: The ADA and Employment Discrimination on the Basis of Psychiatric Disability*, 85 CALIF. L. REV. 701 (1997).

34. 42 U.S.C. § 12102(2)(A).

35. *Id.* at § 12102(2)(B).

36. *Id.* at § 12102(2)(C).

37. *Id.* at § 12102(2)(A).

which is physiological in nature is an impairment.³⁸ Any active disease is considered an impairment.³⁹ Examples include epilepsy, speech and hearing impairments, multiple sclerosis, cancer, heart disease, diabetes, learning disabilities, and HIV infection.⁴⁰ Physical characteristics of a person, such as eye color, hair color or normal height and weight, are not considered disabilities.⁴¹ Certain personality traits, such as a quick temper or poor judgement which are not the result of a psychological or mental impairment, similarly are not considered impairments.⁴² Pregnancy is not a *per se* disability because it is not "a physiological disorder,"⁴³ though pregnancy-related complications can create disability.⁴⁴ Similarly, advanced age is not considered an impairment under the ADA, although certain medical conditions associated with age, such as hearing loss, arthritis, or osteoporosis may be considered impairments within this definition.⁴⁵

Even if an impairment is present, it must significantly affect a major life activity.⁴⁶ Major life activities include caring for one's self, talking, breathing, walking, seeing, learning and hearing.⁴⁷ A paraplegic will have a substantial limitation of the major life activity of walking.⁴⁸ A deaf person will have trouble with hearing.⁴⁹ A person with HIV infection is considered substantially limited in the major life activity of reproduction.⁵⁰ Working is also considered to be a major life activity.⁵¹ In order to be considered to have a limitation that affects the life activity of working, the impairment must restrict a plaintiff from a broad class of jobs rather than a single position.⁵² For purposes of this evaluation, the individual must be compared to the average person with comparable training, skills and

38. 29 C.F.R. § 1630.2(h), app. (1999).

39. *See id.*

40. H. R. REP. NO. 101-484(II), at 52 (1990).

41. 29 C.F.R. § 1630.2(h), app. (1999).

42. *Id.*

43. *Id.*

44. *See* Jessica Lynne Wilson, *Technology As A Panacea: Why Pregnancy-Related Problems Should Be Defined Without Regard to Mitigating Measures Under the ADA*, 52 VAND. L. REV. 831 (1999).

45. 29 C.F.R. § 1630.2(h), app. (1999).

46. H. R. REP. NO. 101-485(II) 1, 52 (1990).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Bragdon v. Abbott*, 118 S. Ct. 2196, 2206 (1998); *see also* Leanne Mashburn Foster, *Asymptomatic HIV-Infection and Its Place Within the Americans with Disabilities Act After Bragdon v. Abbott*, 43 St. Louis U. L.J. 177 (1999); Michelle Kaemmerling, Note, *Bragdon v. Abbott, ADA Protection for Individuals with Asymptomatic HIV*, 77 N.C. L. REV. 1266 (1999).

51. *See* 29 C.F.R. § 1630.2(i), app. (1999).

52. *Sutton III*, 119 S.Ct. at 2151. For a thorough discussions of this topic, *see* Reed L. Russell, Comment, *Arguing for More Principled Decision Making In Deciding Whether an Individual is Substantially Limited in the Major Life Activity of Working Under the ADA*, 47 CATHOLIC U. L. REV. 1057 (1998); R. Bales, *Once Is Enough: Evaluating When A Person Is Substantially Limited In Her Ability To Work*, 11 HOFSTRA LAB. L.J. 203 (1993).

abilities.⁵³

An impairment that is of short term duration will likely not be considered a disability, even if it temporarily limits a major life activity.⁵⁴ Examples include influenza, fractures, appendicitis, and sprains.⁵⁵ To substantially limit a major life activity, the impairment must prevent a person from performing the activity, or significantly restrict the performance of the activity, when compared to the general population.⁵⁶ Examples include paraplegia, hearing loss, and HIV infection as described above.⁵⁷ In making this determination, courts consider factors such as (1) the duration of the impairment; (2) the nature and severity of the impairment; and (3) the long term effect of the impairment.⁵⁸

B. THE SECOND PRONG: HAVING A RECORD OF AN IMPAIRMENT

The second prong of the definition protects persons who have a record of some type of disability.⁵⁹ If a covered entity discriminates against someone on the basis of a disability found in the historical records of the employee, this is considered to meet the definition of a disability under the ADA, and the individual is protected even if she does not meet the first prong of the definition.⁶⁰ This information pertaining to an individual's record of impairment may be found in employment, education or medical records.⁶¹ Thus, a former cancer patient cannot be discriminated against based solely on the history of cancer.⁶² The second prong also protects persons who have been misclassified with a disability.⁶³ For example, a person classified with a learning disability is covered by the ADA, even though the diagnosis is in error.⁶⁴

C. THE THIRD PRONG: "REGARDED AS"

An individual who has an impairment which does not result in a substantial limitation of a major life activity, but who is considered substantially impaired by the actions or attitudes of the employer, is protected by

53. *Sutton III*, 119 S.Ct. at 2151.

54. 29 C.F.R. § 1630.2(j), app. (1999). See, e.g., *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755 (5th Cir. 1996); *Hamm v. Runyon*, 51 F.3d 721 (7th Cir. 1995). See also Elizabeth A. Crawford, Comment, *The Courts' Interpretations of A Disability Under the Americans with Disabilities Act: Are they Keeping Our Promise to the Disabled?*, 35 HOU. L. REV. 1207 (1998).

55. 29 C.F.R. § 1630.2(j), app. (1999).

56. *Id.*; see also *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50 (5th Cir. 1997); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723 (5th Cir. 1995).

57. See *supra* note 40 and accompanying text.

58. *Id.*

59. 42 U.S.C. § 12102(2)(B).

60. 29 C.F.R. § 1630.2(k), app. (1999).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

the third prong of the ADA definition of disability.⁶⁵ For example, a person with controlled high blood pressure, which is not substantially limiting, who the employer transfers to a less strenuous position because of an unfounded fear of a stroke or heart attack, would be covered under this definition.⁶⁶ Similarly, an individual with a serious facial scar or an occasional involuntary jerk which does not affect the person's major life activities is protected if the employer discriminates against the individual because of the employer's fear of adverse reactions from customers.⁶⁷ An individual who has no impairment at all, but is considered by the employer to have an impairment, is also covered under this prong.⁶⁸ An example would be an employee discharged because of an unfounded rumor that she is infected with HIV.⁶⁹

III. MITIGATING MEASURES

To determine if an individual is disabled under the first prong of the definition of disability, the court must determine if the individual has a substantial limitation of a major life activity as a result of a physical or mental impairment.⁷⁰ The text of the statute does not address the issue of mitigating measures in the evaluation of disability under the ADA.⁷¹ Until the recent Supreme Court decisions, there was significant disagreement among the circuits regarding the use of mitigating measures in this evaluation. This Part will examine the concept of mitigating measures as discussed in the ADA's legislative history, pertinent EEOC Guidelines, and pre-*Sutton* Trilogy case law.

A. LEGISLATIVE HISTORY

The legislative history from the House of Representatives indicates that courts should make disability determinations without considering the effects of mitigating measures under the ADA.⁷² The House Labor Report defines mitigating measures as reasonable accommodations or auxiliary aids,⁷³ and provides, as an example, the use of a hearing aid by a person with hearing loss.⁷⁴ According to the House Labor Report, the individual should be considered disabled even though the hearing loss is corrected by the use of the hearing aid.⁷⁵ The House Report does not

65. 42 U.S.C. § 12102(2)(C).

66. 29 C.F.R. § 1630.2(l), app. (1999).

67. *Id.*

68. *Id.*

69. *Id.*

70. 42 U.S.C. § 12102(2)(A).

71. *See* 42 U.S.C. §§ 12101-17.

72. H. R. REP. NO. 101-484 (II) at 52 (1990).

73. *Id.*

74. *Id.*

75. *Id.*

specifically include medication in the definition of a mitigating measure, but it does state that persons with diabetes or epilepsy are covered by the ADA even if their condition is controlled by medication.⁷⁶ Similarly, the House Judiciary Report states that disabilities should be evaluated without regard to mitigating measures, since the mitigating measures may result in less than substantial limitations.⁷⁷

Legislative history emanating from the Senate, however, arguably is inconsistent with this legislative history from the House. Like the House Report, the Senate Labor and Human Resources Committee Report⁷⁸ states that "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids."⁷⁹ But the Senate Report then goes on to describe the purpose of the third ("regarded as") prong as follows:

Another important goal of the third prong of the definition is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. [Examples include:] individuals with controlled diabetes or epilepsy . . . [or individuals who] wear hearing aids⁸⁰

The Fifth Circuit has interpreted the Senate Report as suggesting that persons who have an impairment that is controllable by medication may be protected only under the third prong of the definition of disability.⁸¹

Moreover, both the House and the Senate Reports specify that disability determinations should be evaluated on a case-by-case basis. This could be interpreted merely as a Congressional direction to avoid *per se* categorization of conditions as either disabling or nondisabling. Under this interpretation, for example, it would be inappropriate for a court to rule that all vision impairments are disabling, without making further inquiry into the degree of impairment, or the effect of the impairment, on the particular individual's major life activities. On the other hand, this language also could be interpreted to mean that the disability determination should be made in light of the present effect of the impairment on major life activities; *i.e.*, with consideration toward mitigating measures.

B. EEOC GUIDELINES

The EEOC has issued both notice-and-comment regulations for administering the Act,⁸² and an Appendix to those regulations entitled "Interpretive Guidance on Title I of the Americans with Disabilities Act"

76. *Id.*

77. H. R. REP. NO. 101-485(III) at 28, 29 (1990).

78. S. REP. NO. 101-116 at 22-23 (1989).

79. *Id.* at 23.

80. *Id.* at 24.

81. *Washington v. HCA Health Serv. of Tex., Inc.*, 152 F.3d 464, 468 (5th Cir. 1998).

82. 42 U.S.C. § 12116 (requiring the EEOC to issue regulations).

(“Guidelines”).⁸³ Though the administrative regulations are entitled to a relatively strong degree of deference, the Guidelines are entitled to less deference,⁸⁴ though they do “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”⁸⁵

The EEOC administrative regulations do not mention the use of mitigating measures in the evaluation of disability under the first prong of the definition.⁸⁶ Mitigating measures are discussed in the Guidelines.⁸⁷ The Guidelines define mitigating measures as medicines and assistive or prosthetic devices; and the Guidelines specifically provide that courts should make disability determinations without taking mitigating measures into account.⁸⁸ One example provided by the Guidelines is that an individual with epilepsy whose symptoms are completely eliminated by medication should, nonetheless, be considered impaired under the ADA.⁸⁹ An individual with a substantial hearing loss should be considered impaired, according to the EEOC Guidelines, even if the condition is corrected with a hearing aid.⁹⁰ A person who uses artificial limbs is substantially limited in the activity of walking, according to the Guidelines, because she could not walk without the prosthetic devices.⁹¹ Likewise, the Guidelines also cover a diabetic who without medication would develop a substantial limitation in numerous life functions as a result of a coma.⁹²

In addition to specifying that disability determinations should be made without regard to possible mitigating measures, the Guidelines, like the Senate Report, also provide that determinations of disability should be made on a case-by-case basis.⁹³ As with the Senate report, this could mean merely that courts making disability determinations must go beyond *per se* categorizations of different medical conditions, and consider the severity of the conditions’ impact on the particular individual’s major life activities. It also could be interpreted to mean, however, that courts should inquire even further, and also consider the effect of mitigating measures. As discussed in the next section, most pre-*Sutton* Trilogy courts adopted the former interpretation.

83. 29 C.F.R. § 1630 app. (1997) (announcing “[t]his appendix represents the Commission’s interpretation of the issues discussed, and the Commission will be guided by it when resolving charges of employment discrimination”).

84. See *id.*; see also Crawford, *supra* note 54 at 1218.

85. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (referring to the EEOC’s interpretation of Title VII in deciding what constitutes a “hostile environment” in a sexual harassment claim).

86. 29 C.F.R. § 1630.2(h) (1999).

87. 29 C.F.R. § 1630, Appendix to Part 1630 - Interpretive Guidance on Title I of the Americans with Disabilities Act.

88. 29 C.F.R. § 1630.2(h) app. (1999).

89. *Id.*

90. *Id.*

91. 29 C.F.R. § 1630.2(j) app. (1999).

92. *Id.*

93. 29 C.F.R. § 1630.2, app (1999).

C. CASE LAW

Prior to the Supreme Court's 1999 decisions in the *Sutton* Trilogy, the circuits varied in their approach to the use of mitigating measures in the determination of disability under the ADA. Most courts ruled that the determination should be made without regard to mitigating measures. Some courts held that the determination should take mitigating measures into account. One court decided that "serious impairments" should be considered in unmitigated state, but that mitigating measures should be considered for other impairments.

1. Exclude Mitigating Measures

The majority of courts; including the First,⁹⁴ Third,⁹⁵ Sixth,⁹⁶ Seventh,⁹⁷ Eighth,⁹⁸ Ninth,⁹⁹ and Eleventh¹⁰⁰ Circuits; followed the EEOC Guidelines¹⁰¹ and held that disabilities should be evaluated without regard to mitigating measures.¹⁰² These courts, noting the absence of statutory guidance,¹⁰³ gave significant deference to the EEOC Guidelines¹⁰⁴ and the legislative history from the House of Representatives.¹⁰⁵

For example, in *Harris v. H & W Contracting Co.*, the plaintiff Ellen Harris suffered a panic attack due to mismedication for her thyroid condition.¹⁰⁶ When she returned to work, she discovered that her boss had replaced her.¹⁰⁷ H & W argued that in her properly medicated state, Harris' condition did not substantially limit her life activities in any way and, therefore, did not constitute a disability.¹⁰⁸ The court reviewed the legislative history and EEOC Guidelines and determined that the condition should be evaluated without regard to the medication.¹⁰⁹ Since there was

94. *Arnold v. United Parcel Service*, 136 F. 3d 854 (1st Cir. 1998) (insulin-dependent diabetes mellitus).

95. *Matczak v. Frankford Candy & Chocolate Co.*, 136 F. 3d 933 (3d Cir. 1997) (epilepsy).

96. *Gilday v. Mecosta County*, 124 F.3d 760 (6th Cir. 1997) (diabetes mellitus).

97. *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626 (7th Cir. 1998) (diabetes mellitus); *Roth v. Lutheran General Hospital*, 57 F. 3d 1446 (7th Cir. 1995) (strabismus).

98. *Doane v. City of Omaha*, 115 F. 3d 624 (8th Cir. 1997) (glaucoma).

99. *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362 (9th Cir. 1996).

100. *Harris v. H&W Contracting Co.*, 102 F.3d 516 (11th Cir 1996) (thyroid disease).

101. 29 C.F.R. § 1630.2. (1999).

102. *See also* *Fallacaro v. Richardson*, 965 F. Supp. 87, 93 (D.D.C. 1997) (finding the EEOC's "no mitigating measures eminently reasonable [and] consistent with the language and purpose of the Rehabilitation Act"); *Wilson v. Pennsylvania State Police Dep't*, 964 F. Supp. 898, 902-03 (E.D. Pa. 1997).

103. *See* *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 838 (1984) (noting that the Court must give considerable weight to an agency's interpretation of a statute if the interpretation does not conflict with the statute itself or the legislative history).

104. 29 C.F.R. § 1630.2(h) app. (1999).

105. H. R. REP. NO. 101-485(II) at 52.

106. *Harris*, 102 F.3d at 517-18.

107. *Id.* at 518.

108. *Id.* at 520.

109. *Id.* at 519-22.

a possibility of fatigue, weight loss, coma, or death if the plaintiff did not take her medication, the court held this was sufficient to raise a question of whether the plaintiff was disabled due to the possible consequences of the disease without medication.¹¹⁰

In *Baert v. Euclid Beverage, Ltd.*, the Seventh Circuit similarly evaluated the plaintiff without regards to mitigating measures.¹¹¹ The plaintiff had a history of insulin-dependent diabetes mellitus.¹¹² The court held that the condition should be evaluated without regard to the fact that the plaintiff was able to control his disease with medication.¹¹³ The court stated it was irrelevant to the determination of disability under the ADA that he was "perfectly healthy" when he was taking his insulin.¹¹⁴

2. Include Mitigating Measures

The Tenth Circuit¹¹⁵ and several federal district courts¹¹⁶ took the opposite approach, and concluded that courts *should* consider mitigating measures when making disability determinations. In a decision later affirmed by the Supreme Court, the Tenth Circuit in *Sutton v. United Air Lines, Inc.* stated the two plaintiffs' 20/200 and 20/400 vision, correctable to 20/20, should be evaluated in the mitigated state.¹¹⁷ The court looked at the impairment in fact, and concluded that, although plaintiffs' uncorrected vision was a physical impairment under the ADA, it did not, in its mitigated state, substantially impair their ability to see.¹¹⁸

3. Sometimes Include Mitigating Measures

The Fifth Circuit, alone among the circuits, held that mitigating measures should sometimes be used to determine disability. In *Washington v. HCA Health Services of Texas, Inc.*,¹¹⁹ the plaintiff Kelvin Washington had a degenerative condition of the bones and joints.¹²⁰ Medicated, he was able to live a relatively normal life; unmedicated, he would have been bedridden and unable to work.¹²¹ HCA fired him shortly after he presented a recommendation from his doctor that his hours be reduced to

110. *Id.* at 522.

111. *Baert*, 149 F.3d at 630.

112. *Id.* at 628.

113. *Id.* at 630.

114. *Id.*

115. *See Sutton v. United Air Lines, Inc.*, 130 F.3d 893 (10th Cir. 1997)[hereinafter "*Sutton II*"].

116. *See, e.g.,* *Cline v. Fort Howard Corp.*, 963 F. Supp. 1075, 1080 n.6 (E.D. Okla. 1997); *Gaddy v. Four B Corp.*, 953 F. Supp. 331, 337 (D. Kan. 1997); *Moore v. City of Overland Park*, 950 F. Supp. 1081, 1088 (D. Kan. 1996).

117. *Sutton II*, 130 F.3d at 902.

118. *Id.* at 906.

119. 152 F. 3d 464 (5th Cir. 1998); *see also Gilday*, 124 F.3d at 767, 768 (Kennedy & Guy J.J., dissenting).

120. *Washington*, 152 F. 3d at 466.

121. *Id.*

no more than fifty hours a week; Washington then sued under the ADA.¹²² HCA moved for summary judgment, arguing that Washington was not disabled under the ADA since his condition was effectively controlled by medication.¹²³ The district court denied the motion but certified the issue for interlocutory appeal.¹²⁴

The court, after considering the legislative history of the ADA and the EEOC Guidelines,¹²⁵ concluded that only "serious impairments" and impairments that are analogous to those mentioned in the EEOC Guidelines and the legislative history should be considered in their unmitigated state.¹²⁶ Such impairments would require that the individual use the mitigating measures on a frequent basis, such as by putting on a prosthesis every morning or by taking medication on a set schedule.¹²⁷ However, individuals with "permanent" mitigating measures, such as artificial joints or transplanted organs, should be evaluated in their mitigated state.¹²⁸ The decision as to whether or not a particular impairment is sufficiently "serious" to justify consideration in an unmitigated state should be made on a case-by-case basis.¹²⁹

Given the indeterminacy that almost certainly would have resulted from the Fifth Circuit approach, it is not particularly surprising that other circuits did not rush to follow it. In any event, the issue was mooted by the Supreme court's affirmance of the Tenth Circuit's approach in *Sutton*.¹³⁰

IV. THE *SUTTON* TRILOGY

A. *SUTTON V. UNITED AIR LINES, INC.*

As briefly discussed above, *Sutton* involved two plaintiffs, Karen Sutton and Kimberly Hinton, who were twin sisters with myopia (nearsightedness).¹³¹ Each of them was denied a position as a commercial airline pilot with United Air Lines.¹³² Each had uncorrected vision of 20/200 or worse in the right eye and 20/400 or worse in the left eye,¹³³ but each had a corrected vision of 20/20 or better.¹³⁴ Because the airline required the uncorrected vision to be 20/100 or better, and neither Sutton

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 467-70.

126. *Id.* at 470 (including diabetes, epilepsy, and hearing impairments).

127. *Id.*

128. *Id.* at 471.

129. *Id.*

130. *Sutton III*, 119 S.Ct. at 2143.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

nor Hinton met this requirement, they were not offered positions as pilots.¹³⁵

The District Court held that the petitioners were not substantially limited in any major life activity, since their vision could be corrected,¹³⁶ and the Tenth Circuit affirmed.¹³⁷ The Supreme Court, in a 7-2 decision authored by Justice O'Connor, agreed.¹³⁸

The Court began with the definition of disability under 42 U.S.C. § 12102 (2)(A).¹³⁹ The Court interpreted Congress' present tense use of the phrase "substantially limits" as requiring courts to consider the state of the individual *at the time of the evaluation*, and not to consider the possibility that a substantial limitation might arise at some point in the future.¹⁴⁰ The Court concluded that there was no need to review the statute's legislative history because the statutory text was clear.¹⁴¹ According to the Court, a person may have some type of impairment, but if it is correctable or controllable with mitigating measures and does not currently substantially limit a major life activity, then the person does not have a disability under the ADA.¹⁴²

The Court also clearly stated that the evaluation must be on an individual case-by-case basis and not by classifying persons based upon their diagnosis.¹⁴³ In citing the first prong of the statutory definition of disability,¹⁴⁴ as well as the applicable EEOC regulations,¹⁴⁵ the Court held that classifying individuals as disabled or nondisabled based on diagnosis was inconsistent with the statutory mandate to make disability determinations "with respect to the individual."¹⁴⁶ This conclusion was reached without further individualized inquiry into the degree of impairment or the impact on the individuals' major life activities.¹⁴⁷

The Court clarified that the use of mitigating measures in making disability determinations does not necessarily preclude a finding of disability under the ADA.¹⁴⁸ If a person uses some type of mitigating measure and still has a substantial limitation of a major life activity, the indi-

135. *Id.*

136. *Sutton v. United Air Lines, Inc.*, CIV.A. 96-5-121, 1996 WL 588917, (D. Colo. 1996)[hereinafter "Sutton I"].

137. *Sutton II*, 130 F.3d at 902.

138. *Sutton III*, 119 S.Ct. at 2143.

139. *Id.* at 2146-47.

140. *Id.* at 2146-47. (emphasis added).

141. *Id.* at 2146.

142. *Id.* at 2146-47.

143. *Id.*

144. 42 U.S.C. § 12102(2)(A) (defining the term disability "with respect to an individual- (A) a physical or mental impairment that substantially limits one or more of the major life activities of the individual").

145. 29 C.F.R. § 1630.2(j) app. (1999) (providing that one must consider the "effect of that impairment on the life of the individual").

146. 42 U.S.C. § 12102(2)(a).

147. *Sutton III*, 119 S.Ct. at 2147.

148. *Id.* at 2149.

vidual will be classified as disabled under the first prong of the statutory definition of disability.¹⁴⁹ As the Court observed "the use or nonuse of a corrective device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual actually faces are in fact substantially limiting."¹⁵⁰

Justice Stevens, joined by Justice Breyer, dissented, and stated that the Court should have followed the legislative history and deferred to the EEOC Guidelines.¹⁵¹ Justice Stevens cited the House reports indicating that epilepsy and diabetes, even when controllable by medication, should be considered impairments that substantially limit a major life activity.¹⁵² He concluded that if persons with diabetes and epilepsy were intended to be covered by Congress in the uncorrected state, then persons with myopia should be considered in the uncorrected state as well.¹⁵³

B. *MURPHY V. UNITED PARCEL SERVICE, INC.*¹⁵⁴

Two other Supreme Court opinions on the issue of mitigating measures were issued on the same day as the *Sutton* opinion. One of which was *Murphy v. United Parcel Service, Inc.* Vaughn Murphy was a mechanic whose job with United Parcel Service (UPS) required him to drive a commercial vehicle and to meet the standards of the Department of Transportation (DOT) for medical certification of commercial drivers.¹⁵⁵ Erroneously qualified by UPS' medical examiner, he began working for UPS.¹⁵⁶ Shortly thereafter, UPS discovered the error and required Murphy to submit to another medical evaluation.¹⁵⁷ This evaluation revealed that even with his medication his blood pressure was too high for certification, though it was not so high as to substantially limit his major life activities,¹⁵⁸ and UPS fired him.¹⁵⁹

The Tenth Circuit held that Murphy was not disabled under the ADA because he did not have a substantial limitation of a major life activity when on medication.¹⁶⁰ Concomitantly, the court affirmed the district court's grant of summary judgement to UPS.¹⁶¹ The Circuit Court held that mitigating measures should be considered in the determination

149. *Id.*

150. *Id.*

151. *Id.* at 2152-57 (Stevens, J., dissenting).

152. *Id.* at 2155 (Stevens, J., dissenting).

153. *Id.* at 2158 (Stevens, J., dissenting).

154. 119 S. Ct. 2133 (1999).

155. *Murphy III*, 119 S. Ct. at 2134.

156. *Id.*

157. *Id.*

158. *Id.*, (quoting *Murphy v. United Parcel Service, Inc.* 946 F. Supp. 872, 875 (D. Kan. 1996))[hereinafter "Murphy I"].

159. *Id.*

160. *Id.*, (quoting *Murphy v. United Parcel Service, Inc.* 141 F. 3d. 1185(10th Cir. 1998))[hereinafter "Murphy II"].

161. *Id.*

of disability.¹⁶²

The Supreme Court limited its analysis of mitigating measures in *Murphy* to the question of whether the measures should be considered in the determination of whether the impairment substantially limits a major life activity.¹⁶³ Applying *Sutton*, the Court affirmed the judgement without further analysis.¹⁶⁴ *Murphy* is important not only because it re-emphasizes the holding of *Sutton*, but also because it extends the Court's understanding of mitigating measures to include medications, in addition to the corrective devices considered in *Sutton*.

C. ALBERTSON'S, INC. V. KIRKENBURG¹⁶⁵

The third opinion in the Supreme Court's *Sutton* Trilogy is *Albertsons, Inc. v. Kirkingburg*. Like the plaintiff in *Murphy*, Hallie Kirkingburg was a commercial driver, who was erroneously certified under DOT standards.¹⁶⁶ Because of this erroneous certification, he began a truck driver's job with Albertson's despite having 20/200 vision in his left eye due to amblyopia (monocular vision), an uncorrectable condition.¹⁶⁷ Kirkingburg had developed a subconscious mechanism for compensating for the amblyopia; the brain had adjusted to the abnormality, giving him normal vision if he used both eyes together.¹⁶⁸

After an unrelated one-year leave of absence, he underwent a physical exam, was correctly assessed, and was not certified under the DOT regulations.¹⁶⁹ Albertson's fired Kirkingburg because he did not meet the minimum vision requirements of the DOT, although he had applied for a waiver under an experimental program.¹⁷⁰ He later obtained the waiver, but was not rehired, and subsequently sued Albertson's under the ADA.¹⁷¹

The Ninth Circuit held that Kirkingburg was disabled under the ADA because, due to his monocular vision, he had a different manner of sight compared to the general population.¹⁷² On appeal, the Supreme Court determined that Kirkingburg had a physical impairment under the ADA in the amblyopia.¹⁷³ The Court also stated that sight is considered a

162. *Id.*

163. *Murphy III*, 119 S.Ct. at 2137.

164. *Id.*

165. 119 S. Ct. 2162 (1999).

166. *Id.* at 2163.

167. *Id.*

168. *Id.* at 2168, (quoting *Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228, 1232 (9th Cir. 1997))[hereinafter "*Kirkingburg II*"].

169. *Kirkingburg III*, 119 S.Ct. at 2166.

170. *Id.*

171. *Kirkingburg II*, 143 F.3d at 1228.

172. *Kirkingburg III*, 119 S.Ct. at 2166-67.

173. *Id.* at 2167.

major life activity.¹⁷⁴ The remaining question, therefore, was whether the condition was substantially limiting.¹⁷⁵

The Supreme Court held there was no basis for distinguishing between mitigating measures which were "artificial," such as medication, and mitigating measures which were a result of the body's adaptation to the impairment.¹⁷⁶ Since Kirkingburg's brain had compensated for his amblyopia and given him normal vision, he was not substantially limited in the major life activity of seeing.¹⁷⁷ Therefore, the Court ruled, Kirkingburg was not disabled under the ADA.¹⁷⁸

Like *Murphy*, *Kirkenburg* extended the rule announced in *Sutton*. Not only must external measures, such as corrective lenses and medication, be taken into account when making a disability determination. Internal measures taken by the individual's own body to correct or control the impairment must also be considered when evaluating whether an impairment substantially limits a major life activity, and thereby, qualifies a person as disabled under the ADA.¹⁷⁹

V. APPLICATIONS OF THE *SUTTON* TRILOGY TO SPECIFIC MEDICAL CONDITIONS

Prior to the *Sutton* Trilogy, the circuits were split on the use of mitigating measures in the determination of disability under the ADA. *Sutton* and its companion cases require courts to consider mitigating factors in the evaluation of whether there is a substantial and present limitation of a major life activity.¹⁸⁰ This section will review certain medical conditions which have been the subject of frequent litigation under the ADA and evaluate these conditions in light of the new rule. Each subpart will begin with an overview of the medical condition. It then will review the pre-*Sutton* case law applicable to the condition, and will conclude with a proposed application of the *Sutton* Trilogy to each condition.

A. DIABETES MELLITUS

Diabetes mellitus is a chronic disease¹⁸¹ characterized by abnormal glucose levels in the blood.¹⁸² This is linked to an abnormality in the utilization of insulin by the body or an absence (total or partial) of insulin

174. *Id.*

175. *Id.* at 2168.

176. *Id.* at 2169.

177. *Id.*

178. *Id.* at 2170.

179. *Id.*

180. *Sutton III*, 119 S. Ct. at 2146.

181. J. CLAUDE BENNETT, M.D., ET AL., CECIL TEXTBOOK OF MEDICINE 1268-77 (20th ed. 1996).

182. ROBERT B. TAYLOR, M.D., et al., FAMILY MEDICINE PRINCIPALS AND PRACTICE 1066-76 (5th ed. 1998); An example of an abnormal glucose level is a fasting blood sugar level greater than 126mg/dl or two hour postprandial sugar greater than 200mg/dl. *Id.*

production by the body.¹⁸³ Insulin, a hormone produced by the pancreas, allows the cells of the body to use the blood glucose as a fuel.¹⁸⁴ Without insulin, the blood glucose is high and the glucose absorbed by the body's cells is low.¹⁸⁵ There are three classes of diabetes mellitus and two conditions related to diabetes mellitus; all five will be addressed in this section.¹⁸⁶

The first type of diabetes mellitus is insulin-dependent, or Type I, diabetes. This condition has an onset in children or young adults and develops fairly rapidly: approximately 75% of patients are diagnosed before the age of 20.¹⁸⁷ Common symptoms include increased thirst, increased urination and weight loss.¹⁸⁸ Type I diabetes patients have little or no insulin produced by the body and depend on exogenous insulin (insulin injections) to prevent markedly high blood glucose levels and death.¹⁸⁹ Type I diabetes accounts for approximately 10% of cases of diabetes mellitus in the United States.¹⁹⁰

Persons with non-insulin-dependent diabetes, Type II diabetes, may have mild or no symptoms, and may only be diagnosed after complications develop.¹⁹¹ It comprises 85-90% of cases of diabetes in the United States.¹⁹² It is typically seen in patients over 40 years of age and is often associated with obesity.¹⁹³ Persons with Type II diabetes typically will produce insulin, but the body's cells are unable to use the insulin to utilize the glucose in the blood, resulting in elevated blood sugar levels.¹⁹⁴ Treatment of non-insulin dependent diabetes mellitus is with diet, weight loss, and oral medications.¹⁹⁵ Insulin is used for these patients after other therapies have not achieved adequate control of the condition.¹⁹⁶

Secondary diabetes is abnormal glucose metabolism as a result of a specific condition.¹⁹⁷ Certain drugs, such as cortisone preparations, which are used to treat a number of medical conditions, can cause a marked increase in the blood sugar and symptoms of diabetes mellitus.¹⁹⁸ Burns, trauma, and severe infections can also cause an elevation of the blood

183. BENNETT *supra* note 181, at 1258.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 1266.

197. *Id.* at 1258.

198. *Id.*

glucose.¹⁹⁹ This type of glucose abnormality may resolve when the underlying condition resolves.²⁰⁰ Therefore, a diagnosis of diabetes should not be made until the underlying disease process has been resolved.

There are two related conditions to diabetes mellitus, each of which will be addressed briefly. The first is impaired glucose tolerance. This is a condition where the blood glucose is lower than the level required for diagnosis of diabetes mellitus, but higher than the normal level.²⁰¹ This disorder frequently is asymptomatic and is found on routine screening exams.²⁰² Approximately 25% of persons with this disorder later develop type II diabetes.²⁰³

The second related condition is gestational diabetes. It occurs in about 2% of pregnancies and involves abnormal glucose levels detected during pregnancy in women who have no previous history of diabetes.²⁰⁴ Gestational diabetes is related to abnormal insulin utilization in later pregnancy as a result of an increase in certain other hormones related to the pregnancy, which are antagonistic to insulin.²⁰⁵ Approximately 30 to 40% of women with gestational diabetes develop type II diabetes.²⁰⁶ Symptoms of gestational diabetes are mild, but treatment during the pregnancy is aggressive due to possible fetal complications.²⁰⁷ Blood sugar levels usually return to normal after delivery.²⁰⁸

1. Insulin-Dependent Diabetes Mellitus

When courts make disability determinations under the ADA, they tend to describe diabetes as one disease process, and fail to differentiate between the several classes of diabetes.²⁰⁹ Most reported cases have involved Type I (insulin-dependent) diabetes. Most courts prior to *Sutton* held that insulin-dependent diabetes should be evaluated in an unmitigated state.²¹⁰

A person with untreated Type I diabetes occasionally will develop catastrophic metabolic complications and possibly death.²¹¹ A Type I diabetic without insulin can become substantially limited in a number of major life activities, including consciousness and sight.²¹² The EEOC

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. See *Washington*, 152 F.3d at 470; *Arnold*, 136 F.3d at 866; *Baert*, 149 F.3d at 626; see also, *Erjavac v. Holy Family Health Plus*, 13 F. Supp. 2d 737 (N.D. Ill 1998).

210. *Id.*

211. TAYLOR *supra* note 182, at 1069-71.

212. *Id.*

Guidelines state that a diabetic without insulin would lapse into a coma and be substantially limited.²¹³ The courts which have accepted that diabetes should be evaluated in an unmedicated state have accepted these Guidelines.

In *Arnold v. United Parcel Service, Inc.*, one of the frequently-cited cases involving Type I diabetes, the First Circuit followed the EEOC Guidelines and held that persons with diabetes should be evaluated without regard to mitigating measures (in this case, use of insulin to control the blood sugar).²¹⁴ Glen Arnold applied for a position with United Parcel Service, but was rejected because he was unable to obtain a DOT certificate to operate a commercial vehicle which was a prerequisite for the job.²¹⁵ He was unable to obtain the certificate because DOT regulations prohibit an individual with insulin-dependent diabetes mellitus from obtaining the certification.²¹⁶ UPS offered Arnold another position with the company, but Arnold did not respond, and instead sued.²¹⁷

Arnold had been well controlled on insulin for twenty three years.²¹⁸ There was no reported evidence of any symptoms associated with Mr. Arnold's medical condition while he was on medication.²¹⁹ There similarly was no indication of any present problems or limitations on Arnold's life activities, other than the probability of future problems if he did not take his insulin.²²⁰ There was testimony from a physician that Arnold would die without insulin.²²¹ On this evidence, the First Circuit reasoned that, if courts were to take mitigating measures into account when making disability determinations, they would effectively punish individuals who took the initiative to control their diabetes, while rewarding those who did not.²²² The court concluded that this would "creat[e] a disincentive to self-help."²²³ Though Arnold had no present limitation due to his diabetes, the court held he was disabled under the ADA and reversed the contrary judgement of the trial court.²²⁴

While most courts which have evaluated Type I diabetes in the unmitigated state appear to regard Type I diabetes as a *per se* disability, *Arnold* seems to send mixed signals in this regard.²²⁵ In one section of the opinion, the court states that it is providing an individualized analysis and

213. 29 C.F.R. § 1630.2(j) app. (1999).

214. *Arnold*, 136 F.3d at 863-64.

215. *Id.* at 856.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 857.

220. *Id.*

221. *Id.* at 856.

222. *Id.* at 863 n.7.

223. *Id.*

224. *Id.* at 866.

225. *Id.* at 865.

not applying a *per se* rule.²²⁶ In another section, however, the court acknowledges that its determination that Arnold was disabled within the meaning of the ADA was based on Arnold's underlying condition without regard to whether any limitations would be controlled through treatment.²²⁷ The *Arnold* opinion further states that the "holding . . . is limited to the condition presented here, namely diabetes mellitus."²²⁸ The court essentially took the position that diabetes mellitus, evaluated in its untreated state, is a disability, regardless of the efficacy of treatment.²²⁹ This appears to be a blanket statement regarding this condition, contradicting the individualized analysis described elsewhere in the opinion.

Under the rule announced in *Sutton*, an insulin-dependent diabetic must be evaluated in the mitigated state.²³⁰ This requires a case-by-case evaluation of the individual to determine the level of control of the blood sugar, the effects of the blood sugar level on the body, and its impact, if any, on major life activities. As discussed in Part II, a major life activity is one which the average person in the population can perform with little or no difficulty, such as walking, seeing, hearing and caring for oneself.²³¹ Though eating is not specifically mentioned in the statute or the regulations, it could be considered a subset of the broader activity of caring for oneself.

A diet which stringently controls the intake of sugar is essential to the treatment of all types of diabetes mellitus.²³² Some sugar is permitted in the diet, but only in controlled amounts. Courts are unlikely to find that, by itself, restrictions on the quantity of sugar a person can eat substantially limits a person's ability to eat. First, the actual activity of eating is not impaired; the condition only limits the type of foods that can be eaten. Second, as discussed above, some sugar may remain in the diet, albeit in small quantities. For these reasons, absent other complications or symptoms, an individual with well-controlled diabetes is capable of performing major life activities without difficulty.²³³ Such an individual, therefore, is unlikely to meet the definition of disability under the ADA, in light of the *Sutton* Trilogy requirement that the impairment be evaluated in its mitigated state.

The *Sutton* Trilogy requires that courts evaluate the existence of a disability in the individual's mitigated state. Arnold's Type I diabetes was

226. *Id.*

227. *Id.* at 866.

228. *Id.*

229. *Id.*

230. *Sutton III*, 119 S. Ct. at 2146.

231. 29 C.F.R. § 1630(2)(i) app. (1999).

232. Bennett *supra* note 181, at 1264-68.

233. See *Seaman Unified Sch. Dist. No. 345 v. Kansas Com'n of Human Rights*, ___ P.2d ___, 1999 WL 777505 (Kan. App. 1999) (determining that an insulin-dependent diabetic was not disabled within the meaning of the Kansas Act Against Discrimination because he was able to control his diabetes with proper diet and monitoring, and his physical activities were not limited).

well-controlled with medication and there was no evidence of any substantial limitation of a major life activity while on his treatment regimen. Therefore, Arnold was not disabled and not protected by the ADA. Under this analysis, the court should have granted judgement in favor of the employer.

2. Non-Insulin-Dependent Diabetes Mellitus

There is a limited amount of case law discussing the application of the ADA to non-insulin-dependent diabetes mellitus.²³⁴ One case involving a plaintiff with non-insulin-dependent (Type II) diabetes is *Gilday v. Mecosta County*.²³⁵ Kevin Gilday was a non-insulin dependent diabetic individual who became agitated whenever his blood sugar level fluctuated.²³⁶ He also reportedly had other unspecified problems before he sought medical intervention. His physician prescribed a treatment regimen consisting of a modified diet, oral medication and exercise.²³⁷ Once on his treatment regimen, his condition was brought under control²³⁸ and he had no further complications.²³⁹ The Sixth Circuit held that Gilday should be evaluated in his unmitigated state, and that the various symptoms Gilday reported prior to beginning treatment substantially limited the major life activity of working.²⁴⁰ The court, therefore, held that Gilday was disabled and protected under the ADA.²⁴¹

After the *Sutton* Trilogy, courts would make the determination of whether Gilday was disabled by evaluating whether his Type II diabetes substantially limited a major life activity *after* his treatment regimen was implemented, rather than evaluating his condition in its pre-treatment state as did the Sixth Circuit. The evidence presented in *Gilday* demonstrated that, once on this regimen, Gilday had no reported difficulty with any major life activity. Therefore, he would not be considered disabled under the ADA under the new rule.

Thus, after the *Sutton* Trilogy, the non-insulin-dependent diabetic individual will be evaluated in a manner similar to the insulin-dependent diabetic. However, the mitigating measures used in the treatment of non-insulin dependent diabetic individuals will vary, depending upon the individual. While certain individuals will be treated with diet, exercise and weight loss, others will utilize, in addition, a single drug or a combination

234. See, *Schaefer v. The State Insurance Fund*, 95 CIV. 0612, 1998 WL 126061 (S.D. N.Y. 1998).

235. 124 F.3d 760 (6th Cir. 1997).

236. *Gilday*, 124 F.3d at 761.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 765.

241. *Id.* at 761.

of drugs.²⁴²

The *Sutton* Trilogy does not directly address the issue of whether an individual should be evaluated according to the mitigating measures actually used, or the possible measures which may be available.²⁴³ However, some guidance may be inferred from the Court's prescription that the phrase "substantially limits" should be interpreted as directing courts to look to an individual's actual present limitations, and not potential or hypothetical limitations.²⁴⁴ This issue could arise under two circumstances.

The first is where the employer argues that the individual should be evaluated according to a treatment regimen other than the one that has been prescribed for the individual. Say, for example, that Gilday's disability claim arose only a few weeks after he was diagnosed with Type II diabetes. Upon diagnosis, his doctor prescribed only exercise and dietary restrictions, in the hope that the symptoms would abate without the necessity of prescribing medication. At the time the claim arose, however, the symptoms had not yet abated. The employer might argue that the court should make a disability determination of Gilday not in his present state, but rather in the state he would be in if he were taking medication. More likely than not, once on medication, Gilday would be asymptomatic.

We believe this would be a mistake. It might turn out, for example, that Gilday is allergic to the medication that the employer is proposing. It might be that there are other good reasons for Gilday's physician to refrain from prescribing the medication. In any event, this approach would be inconsistent with language in the *Sutton* Trilogy requiring that individuals be evaluated on an case-by-case basis²⁴⁵ in the present state of their condition.²⁴⁶

There is a second circumstance under which courts will have to determine whether individuals should be evaluated according to the mitigating measures she actually is using or the possible measures which may be available to her. This circumstance arises when a physician has prescribed a treatment regimen, but the individual has refused to follow it. Under these circumstances, we believe that the individual should be evaluated according to the state of her impairment while she is following the treatment plan. If she has never complied with the treatment plan, and it is therefore impossible to determine conclusively what her state would be under the plan, she should not be protected under the ADA.²⁴⁷ This approach is consistent with the body of case law that has developed around determinations of mental disability where the plaintiff has refused to take

242. See *supra* notes 191-196 and accompanying text.

243. *Sutton III*, 119 S. Ct. at 2146.

244. *Id.* at 2147.

245. *Id.* at 2149.

246. *Id.*

247. *Bowers v. Multimedia Cablevision, Inc.*, CIV.A. 96-1298-JTM, 1998 WL 856074 (D. Kan 1998).

her medication. Under these circumstances, courts routinely refuse to extend ADA protection.

3. *Secondary Diabetes*

A person with secondary diabetes should not be considered disabled under the ADA in regards to blood sugar. The elevated blood glucose is a side-effect of another disease or condition, such as a burn or severe infection, and typically resolves when the underlying cause is resolved.²⁴⁸ Because of this, courts should classify secondary diabetes mellitus as a temporary non-chronic impairment. As discussed in Part II, both the EEOC regulations and pertinent case law indicate that such impairments are not disabilities under the ADA.²⁴⁹ If, however, the elevated blood sugar persists after the resolution of the underlying cause, the individual then would be medically classified as an insulin-dependent or non-insulin-dependent diabetic, and should be evaluated for ADA purposes in light of the mitigating measures as described above.

4. *Impaired Glucose Tolerance*

Impaired glucose tolerance rarely causes symptomatic disease. It generally is treated with diet modification. As discussed above, it is unlikely that a court will consider the inability to eat sugar in one's diet to be a substantial limitation of a major life activity. However, approximately 25% of individuals with impaired glucose tolerance develop non-insulin dependent diabetes mellitus.²⁵⁰ If the condition progresses to this state, the individual should be evaluated in the manner described for that condition above.

5. *Gestational Diabetes*

Pregnancy, absent complications, is not considered an impairment under the ADA.²⁵¹ Though gestational diabetes is a possible complication of pregnancy, it typically resolves after delivery.²⁵² Consequently, courts are likely to treat it as a temporary non-chronic impairment which is not considered a disability.²⁵³

B. HYPERTENSION

Hypertension is an elevation of the blood pressure.²⁵⁴ Blood pressure is the amount of pressure required to stop the flow of blood in the arteries

248. See *supra* notes 179-200 and accompanying text.

249. 29 C.F.R. § 1630.2(j) app. (1999); See also *supra* notes 24-69 and accompanying text.

250. Bennett *supra* note 181, at 1258.

251. 29 C.F.R. § 1630.2(h) app. (1999).

252. Bennett *supra* note 181, at 1258.

253. 29 C.F.R. § 1630.2(j) app. (1999).

254. Taylor *supra* note 182, at 640.

and is assumed to be the equivalent of the pressure in the heart. The systolic pressure (top number) is the pressure of when the heart is contracting. The diastolic pressure (bottom number) is the pressure when the heart is at rest between beats. A blood pressure of less than 140/90 is considered to be within the normal range.²⁵⁵ A diagnosis of hypertension generally is not made on one blood pressure reading, but on the basis of at least three readings over a period of time.²⁵⁶ The diagnosis and stage of hypertension is based upon the average of the three readings in accordance with the standards established by the National Institutes of Health.²⁵⁷ Complications of hypertension may include dizziness, headache, stroke, heart attack, or kidney failure.²⁵⁸

Treatment of hypertension typically begins with non-pharmacologic therapies, treatment without the use of medication, such as weight reduction, alcohol restriction, exercise, reduction of dietary sodium, and the addition of dietary potassium, calcium, and magnesium.²⁵⁹ Smoking cessation, caffeine restriction and stress reduction also are recommended.²⁶⁰ Pharmacologic therapy typically is initiated when the diastolic blood pressure remains above 90-94 mm HG in spite of non-pharmacologic measures.²⁶¹ Individuals with systolic blood pressure above 160 despite non-pharmacologic treatment also are candidates for pharmacologic treatment.²⁶²

In *Murphy v. United Parcel Service, Inc.*,²⁶³ the district court concluded that a person who could control their disease with medication was not disabled under the ADA.²⁶⁴ The district court found that Murphy's elevated blood pressure on medication did not substantially limit him in a major life activity.²⁶⁵ The Tenth Circuit agreed, noting that Murphy's physician had testified that Murphy, when medicated, functioned normally as an everyday person does.²⁶⁶ As discussed in Part III, the lower courts' decision to evaluate Murphy in his medicated state was affirmed by the Supreme Court.²⁶⁷

Each individual with hypertension is different and the need for medication, the type of medication, and the response to medication varies with

255. *Id.* at 641.

256. *Id.* at 640.

257. *Id.* at 641; An example of such readings are as follows: Normal <130/85; High normal 130-139/85-89; Hypertension: Stage 1 140-159/90-99; Stage 2 160-179/100-109; Stage 3 180-209/110-119; Stage 4 >210/120. *Id.*

258. *Id.* at 641-42.

259. *Id.* at 642.

260. *Id.*

261. *Id.*

262. Bennett *supra* note 181, at 261.

263. *Murphy I*, 946 F. Supp. at 872.

264. *Id.* at 881.

265. *Id.*

266. *Murphy II*, 141 F.3d at 1187.

267. *Murphy III*, 119 S. Ct. at 2134.

each person. Evaluation of each individual in regards to her circumstances is appropriate. The individual must be evaluated as to whether there is a substantial limitation of a major life activity in light of the current prescribed treatment, not in regards to possible treatments. With regard to the use of mitigating measures, each individual must be assessed in light of the measures used, if any, and the limitations of life activities of the individual to determine if the individual meets the definition of disability under the ADA.

For example, a person with hypertension may not be disabled if the blood pressure can be controlled by medication. If, however, the hypertension cannot be controlled by medication, or if a complication has developed from the hypertension and it cannot be ameliorated by medication, a finding of disability may be appropriate. In making this individualized assessment of whether a person with hypertension is disabled, courts should consider the hypertension itself, the complications, if any, from the hypertension, and restrictions imposed on the individual by the treatment regimen. Of course, under the *Sutton* Trilogy, each must be considered in the person's mitigated state.

C. SEIZURE DISORDER

Seizure disorder (epilepsy) is caused by electrical disturbances in one part of the brain. This disease classification encompasses a broad range of conditions, ranging from grand mal seizures involving muscle contractions, apnea (temporary cessation of breathing), and loss of consciousness to simple staring spells or a mild twitch.²⁶⁸ Only 25% of untreated persons with seizures are actually incapacitated by the disorder.²⁶⁹ Most reported seizure disorder cases brought under the ADA have been brought by plaintiffs with grand mal seizures.²⁷⁰

A grand mal seizure is a generalized seizure, which involves an electrical disturbance in a significant portion of the brain.²⁷¹ The seizure is characterized by the sudden onset of rolled back eyes, muscle contractions and rigidity, cyanosis (bluish skin), apnea, and possibly loss of bladder or bowel control.²⁷² The seizure usually lasts one to two minutes and is typically followed by headache, confusion, fatigue, or memory loss, which may last up to 24 hours.²⁷³

In *Matczak v Frankford Candy & Chocolate Company*, Joseph Matczak had a thirty year history of epilepsy and was seemingly controlled by

268. Taylor *supra* note 182, at 547.

269. *Id.* at 554.

270. See *Matczak*, 136 F.3d at 938; *see also* *Deas v. River West, L.P.*, 152 F.3d 471 (5th Cir. 1998); *Granzow v. Eagle Food Centers, Inc.*, 27 F. Supp. 2d 1105 (N.D. Ill. 1998).

271. Taylor *supra* note 182, at 547.

272. *Id.* at 548.

273. *Id.* at 548-49.

medication, until he had a seizure at work.²⁷⁴ His physician prescribed new medication. The physician also restricted his operation of machinery and vehicles and his working at heights for five and one-half months,²⁷⁵ presumably to maintain Matczak's safety while a determination was made as to the efficacy of the new medication. Several months later, the candy company fired Matczak because "business was slow" and "he did not adequately perform the tasks he was given after he returned to work."²⁷⁶ The district court determined that Matczak was not substantially limited in a major life activity, since he was only restricted in a small number of activities for a short period of time, and granted the employer's motion for summary judgment.²⁷⁷

The Third Circuit reversed.²⁷⁸ The court held that it was error for the district court to have treated this case like a temporary impairment case.²⁷⁹ Although Matczak's physician had only limited his activities for a short period of time, his condition would not be cured after that time, but only would be, at best, controlled by medication.²⁸⁰ Similarly, the court discounted the trial court's finding that Matczak's major life activities had not been adversely affected by his epilepsy, by pointing out that this was the result of his use of medication.²⁸¹ This was error, the court ruled, because Matczak should be evaluated in his unmitigated state.²⁸² The court concluded that the district court had erred in the determination of whether Matczak was disabled under the ADA, and that the issue was "better left for resolution by a jury."²⁸³

In *Granzow v. Eagle Food Centers, Inc.*,²⁸⁴ the District Court for the Northern District of Illinois followed a similar approach. The plaintiff who had been seizure-free for some years after she began taking medication,²⁸⁵ recounted that several years before, at a time when she was not on medication, she had gone into a seizure-induced coma.²⁸⁶ The court evaluated her in her unmedicated state²⁸⁷ and concluded that because the coma episode had substantially limited her major life activities, she met the definition of disability under the first prong of the ADA.²⁸⁸

Under the rule announced in *Sutton*, an individual must have a pres-

274. *Matczak*, 136 F.3d at 935.

275. *Id.*

276. *Id.*

277. *Id.* at 936.

278. *Id.* at 940.

279. *Id.* at 936.

280. *Id.*

281. *Id.*

282. *Id.* at 937.

283. *Id.* at 938.

284. *Granzow*, 27 F. Supp.2d at 1108.

285. *Id.* at 1109.

286. *Id.* at 1106.

287. *Id.*

288. *Id.* at 1109.

ent limitation of a major life activity.²⁸⁹ A person with a past history of seizures or seizure-related complications, but who now is controlled and seizure-free on medication, would not have a present limitation of a major life activity. An individual who has been free from seizures on or off medication for an extended period of time would not likely be considered disabled simply because of the diagnosis or because of the potential of a seizure at some time in the future.²⁹⁰ An individual who continues to have seizures on medication or while medication is being adjusted should be evaluated on a case-by-case basis to determine if the seizure disorder substantially limits a major life activity.

D. VISUAL IMPAIRMENTS

ADA plaintiffs have presented the courts with several different visual conditions, and the courts have not always been consistent in their determinations of whether these conditions are disabilities within the meaning of the ADA. Monocular vision (loss of vision in one eye) and abnormal visual acuity (nearsightedness and farsightedness) have been frequently litigated.

In *Doane v. City of Omaha*, Roger Doane was totally blind in one eye due to glaucoma.²⁹¹ His vision was corrected to 20/20 (normal visual acuity) with glasses, although he could see with only one eye.²⁹² The City of Omaha dismissed Mr. Doane from his position as a police officer, claiming he had diminished peripheral vision and depth perception and could not meet the essential qualifications of the job.²⁹³ Doane's medical experts testified that his brain had compensated allowing him to develop his own sense of depth perception, and that Doane had compensated for the lack of peripheral vision by adjusting the position of his head.²⁹⁴ The Eighth Circuit considered the adjustments by the brain to vision loss in one eye to be a mitigating measure, but concluded that disability evaluations should be made in the plaintiff's unmitigated state.²⁹⁵ The court therefore held that Doane was disabled under the ADA.²⁹⁶

The Ninth Circuit reached a similar conclusion in *Kirkingburg*,²⁹⁷ a case involving monocular vision and which was discussed in Part 3(B)(3).²⁹⁸ Conversely, the Fifth Circuit, after holding that the plaintiff

289. *Sutton III*, 119 S.Ct. at 2146.

290. *See Todd*, 57 F. Supp.2d 448, 1999 WL 591996 (S.D. Tex. 1999) (finding where an individual with epilepsy was not disabled under ADA because his condition was largely controlled by medication).

291. *Doane*, 115 F.3d at 625.

292. *Id.*

293. *Id.* at 626.

294. *Id.* at 627.

295. *Id.* at 627-28.

296. *Id.*

297. *Kirkingburg II*, 143 F. 3d. at 1237.

298. *See supra* notes 165-179 and accompanying text.

who had monocular vision should be evaluated in her mitigated state, found no disability because the plaintiff was able to perform normal daily activities.²⁹⁹ The Supreme Court, in one of the *Sutton* Trilogy cases, reversed *Kirkingburg* and held that the body's adjustment to an impairment is a mitigating measure which must be taken into account in the determination of disability under the ADA.³⁰⁰ Thus, if a person with a visual disturbance has compensated by the body's own mechanisms, this must be considered in determining whether the individual has a present substantial limitation of a major life activity.³⁰¹

Regarding visual acuity, most pre-*Sutton* Trilogy courts considered the use of corrective lenses in the determination of disability,³⁰² reasoning that the correction allows the individual to have a normal life without limitations and, therefore, they should not be considered disabled.³⁰³ The Supreme Court specifically addressed this issue in *Sutton* and held that mitigating measures, in the form of corrective lenses, must be considered in the determination of whether there is a substantial limitation of a major life activity.³⁰⁴

VI. CONCLUSION

The first prong of the ADA definition of disability defines a person as disabled if she has a physical or mental impairment which substantially limits one or more major life activities.³⁰⁵ Many Americans have a physical or mental impairment which is controlled with medication or some other form of treatment, allowing them to lead a normal life. Prior to the Supreme Court's 1999 *Sutton* Trilogy, most lower courts treated these persons as disabled under the ADA by refusing to consider mitigating measures when making disability determinations.

The *Sutton* Trilogy firmly rejected this approach, ruling that courts must, when making disability determinations, evaluate a person in her mitigated state. As the specific medical conditions discussed in this article illustrate, the practical ramifications of the *Sutton* Trilogy are profound. Before, Type I and Type II diabetes and seizure disorders were for all practical purposes considered *per se* disabilities. Now, because these conditions often are treatable with medication or other forms of medical

299. *Still*, 120 F.3d at 53.

300. *Kirkingburg III*, 119 S.Ct. at 2169.

301. *Sutton III*, 119 S. Ct. at 2147; see also *Pacella v. Tufts University Sch. of Dental Medicine*, 66 F. Supp.2d 234, 1999 WL 759857 (D. Mass. 1999) (plaintiff was not disabled under ADA because vision was correctable with contact lenses and plaintiff could compensate for his lack of depth perception by the use of visual cues).

302. *Sutton II*, 130 F.3d at 902; *Cline v. Fort Howard Corp.*, 963 F. Supp. 1075 (E.D. Okla. 1997); *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993); but see *Denson v. Village of Bridgeview*, 19 F. Supp. 2d 289 (N.D. Ill. 1998) (vision of 20/400 was disability, even though correctable to 20/20 with glasses or contacts).

303. *Id.*

304. *Sutton III*, 119 S.Ct. at 2146.

305. 42 U.S.C. § 12102(2)(A).

intervention, many persons with the conditions will not be considered disabled under the meaning of the ADA.³⁰⁶ Persons with other conditions, such as hypertension and vision problems, will find it much more difficult to obtain protection under the ADA.

306. See also *Whitney v. Apfel*, ___ F. Supp.2d ___, 1999 WL 786369 (N.D. Cal. 1999) (plaintiff was not disabled under the ADA because her depression was controlled with medication); *Robb v. Horizon Credit Union*, 66 F. Supp.2d 913, 1999 WL 786369 (C.D. Ill. 1999).