Defining Disabled: A Study of the ADA Amendments Act of 2008 in Eliminating the Consideration of Certain Mitigating Measures

John W. Leonard

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I. INTRODUCTION

In 1999, the Supreme Court decided the case *Sutton v. United Air Lines, Inc.* During oral arguments, Justice Scalia succinctly captured the issue presented for review by questioning:

I cannot read without reading glasses, and I would not be able to function in this job or in any job I’ve ever had [without them].... Now, there are a lot of Americans like that whose job requires reading, maybe 100 million.... Are they all covered by the Americans with Disabilities Act?  

Thus, the Court was asked to answer whether any mitigating measures (eyeglasses, in this particular case) should be considered when determining if a person is disabled under the Americans with Disabilities Act (ADA). In affirming the dismissal of Sutton’s discrimination claim against United Air Lines (United), and in subsequent cases, the Court concluded that such

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* J.D. Candidate, The Catholic University of America, Columbus School of Law, May 2010; B.A. University of Richmond, May 2002. The author would like to thank Administrative Judge Richard Schneider for his assistance bringing this article to life, and Professor of Law, George P. Smith, II, for all of the work he has done, and continues to do, for *The Journal of Contemporary Health Law and Policy*. The author also would like to thank the entire Volume XXVI team for their dedication, the previous Executive Board for their guidance, and his fiancée, Heidi, and family for their complete support.


3. For an exhaustive list of auxiliary aids and other forms of assistance considered mitigating measures, *see infra* Part IV.

measures should be taken into account. This interpretation, which effectively removed persons using mitigating measures from the definition of disabled, led some to conclude that the ADA's protected class was decreased.

Since Sutton, Congress has revisited the issue of whether a person should be considered inclusive or exclusive of mitigating measures, resulting in the passage of the ADA Amendments Act of 2008 (ADA Amendments Act) in the 110th Congress. Among other provisions, the law effectively overturns the Supreme Court's decision in Sutton, and requires that courts and employers ignore mitigating measures when deciding if a person is legally disabled. As explicitly stated in the Act, its purpose is "to carry out the ADA's objectives . . . by reinstating a broad scope of protection to be available under the ADA."

The purpose of this Note is to explore the legislative history of the ADA's employment provisions and subsequent Supreme Court interpretations, as found in Sutton and its companion cases, to determine how the issue of mitigating measures has evolved. These topics will be covered in the first two sections of the Note. The third section introduces the ADA Amendments Act and explores how Congress has approached overturning the Supreme Court's interpretation. Finally, this Note will discuss the possible impact of the new law governing the mitigating measures issue. These ramifications include the expansion of a protected class, a probable increase in initial litigation under the ADA, and possible subtle employer adjustments in the practice of hiring and firing disabled persons to alleviate the increased risk of potential liability.


6. One recent estimate placed the post-Sutton protected class of disabled individuals under the ADA around 13.5 million Americans, approximately thirty million less than the original forty-three million that Congress sought to protect when enacting the ADA in 1990. Ruth Colker, The Mythic 43 Million Americans with Disabilities, 49 WM. & MARY L. REV. 1, 1 (2007). See also infra Part V.


8. ADA Amendments Act of 2008 § 2(b)(2).

9. Id. at § 2(b)(1).

10. In discussing the potential for employer adjustments as a ramification of the ADA Amendments Act, the author has used evidence of employment trends following
II. TITLE I OF THE AMERICANS WITH DISABILITIES ACT OF 1990: OVERVIEW AND LEGISLATIVE HISTORY

A. Historical Background

President George H.W. Bush signed the ADA into law on July 26, 1990.11 This "comprehensive piece of civil rights legislation" sought to prohibit employment discrimination with regard to private employers on the basis of disability.12 However, this was not Congress' first endeavor to provide a prohibition against such discrimination. The ADA "incorporates many of the standards of discrimination set out in regulations implementing . . . the Rehabilitation Act of 1973"13 (Rehabilitation Act14), a predecessor law prohibiting discrimination based on disability within the public sector.15 Whereas the Rehabilitation Act prohibits disability discrimination "on the part of the federal government, federal contractors, and institutions receiving federal funds," the ADA "extend[s] to private employers, private educational institutions, and private businesses and service providers."16 This extension to the private sector is of particular importance to the topics discussed in this Note.

As "[t]he employment title of the ADA [only] protects 'qualified persons with disabilities,'" it is important to note how the law differs from other


12. Id.


employment discrimination statutes. For an individual to be covered under the provisions of the ADA, he must first qualify under the definitions of the Act as a disabled person. Rather than other bases for discrimination, such as race, gender, or national origin, a plaintiff in a disability discrimination suit bears the initial burden of proving that he is in fact disabled before the ADA protections even apply. This initial burden is jurisdictional. A successful plaintiff must gain standing to pursue a discrimination suit on the merits. Therefore, the language used in the ADA that defines the term “disabled” becomes of utmost importance. Without it, there would be no protected class of individuals.

In defining the term “disabled”, the ADA incorporates “the same definition which Congress adopted to define a ‘person with handicap’ for purposes of [the employment provisions] of the Rehabilitation Act of 1973.” There are three possible ways for an individual to be covered under the definition of disability. First, the person may show that he has “a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment.”


18. For purposes of the ADA, “[t]he term ‘disability’ means, with respect to an individual—(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 impairment; or (C) being regarded as having such an impairment.” 42 U.S.C. § 12102(2) (2006). See also infra Part II.

19. Lisa Eichorn, Applying the ADA to Mitigating Measures Cases: A Choice of Statutory Evils, 31 Ariz. St. L.J. 1071, 1082-83 (1999). “While an African-American man bringing a race discrimination suit under Title VII of the Civil Rights Act of 1964 need not prove his racial status, the ADA plaintiff is forced to prove a disability . . . before a court can even consider whether a defendant discriminated because of a disability.” Id. (internal citations omitted).

20. Id.

21. Id.

22. Feldblum, supra note 11, at 11. While the original definition included in the Rehabilitation Act of 1973 “was [deemed] too narrow to deal with the range of discriminatory practices in housing, education, and health care programs . . . Congress . . . amended the definition in 1974,” and that definition was ultimately used for the ADA employment provisions. Id. at 12.

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major life activities of such individual."24 Second, a person may show "a record of such an impairment."25 And, third, the individual may claim to be "regarded as having such an impairment."26 As the second and third prongs incorporate much of the definition found in the first, this discussion need not stray beyond "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."27 Furthermore, an individual will gain standing and be afforded coverage under the law by successfully proving any of the three definitions of "disabled."28 Then, upon a successful showing on the merits, the individual will have redress for employment discrimination based on the disability.29

While the ADA provides three ways in which a person may be considered disabled under the statute, missing from the enacted text was sufficient guidance on what is meant by "major life activities" and "substantially limits."30 Specifically, the text of the ADA, in similar fashion to the Rehabilitation Act as first implemented, was silent in regards to any consideration of mitigating measures.31 The ADA made no mention of whether a person was to be considered with or without such measures when viewed as "substantially limited" in a "major life activity."32 As Congress


28. See Eichom, supra note 19, at 1082-83 (discussing the importance of first demonstrating that one is legally disabled so that they may be within the protected class).

29. See 42 U.S.C. § 12112(a) (2006) (inferring that an individual must first be within the disabled definition before having any redress for discrimination). See also Eichom, supra note 19, at 1082-83.


has since touched upon, and as the legislative history of the ADA demonstrates, Congressional silence on this matter was not to be construed as including mitigating measures during the determination of a legal disability. The Supreme Court, however, adopted the opposite interpretation.

B. Legislative History

The House of Representatives’ committee reports for the original ADA provide a prime resource for determining whether Congress intended to include or exclude mitigating measures. After stating that “[i]t is not possible to include in the legislation a list of all the specific conditions, diseases, or infections that would constitute physical or mental impairments,” the House Committee on Education and Labor went on to state 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. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.


34. See infra Part II.B.

35. See generally Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) (holding that eyeglasses should be considered when deciding whether a person is legally disabled); Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999) (holding that medication should be considered when deciding whether a person is legally disabled); Albertson’s, Inc. v. Kirkingburg, 527 U.S. 555 (1999) (inferring that the body’s own adaptation should be considered when deciding whether a person is legally disabled). See also infra Part III.A, B.


37. Id. at 52.

38. Id.
Furthermore, the House Committee on the Judiciary stated an equivalent interpretation upon approving the ADA. The Committee expressed that “[t]he impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation. For example . . . even if the hearing loss is corrected by the use of a hearing aid.” Thus, before enacting the ADA, both committees in the House of Representatives agreed that mitigating measures would not be taken into account.

Likewise, the Senate concurred that mitigating measures should not be considered. In its report on the ADA, the Senate Committee on Labor and Human Resources described its understanding of the proposed definition of disabled, particularly with regard to an individual experiencing a “‘substantial limitation of one or more major life activities.’” The Committee explained:

A person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort. Moreover, whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids.

Throughout the legislative process, therefore, neither the House of Representatives nor the Senate appear to have advocated for the inclusion of mitigating measures.

The report generated by the House of Representatives and the Senate conference committee further demonstrates that there was no difference in how the two chambers viewed the issue. Neither chamber disagreed on the


40. Id.


43. Id. at 22.

44. Id. at 23. See also id. at 24 (suggesting that “persons with medical conditions that are under control, and that therefore do not currently limit major life activities,” would also be covered under the third prong of the disability definition).

exclusion of mitigating measures; rather, the conference report only resolves other issues that were of concern among the legislators at the time. Such disputes centered on the powers to enforce the Act, regulatory functions of the several agencies, and other matters not related to employment discrimination or concerning the definition of disability.

Therefore, upon passing the ADA, Congress believed that its intent was clear that mitigating measures would not be considered. Unfortunately, the text of the ADA did not specifically address the issue. Instead, such an interpretative question was left to the courts to determine in the years subsequent to the law's enactment.

III. INTERPRETING “DISABLED”: THE SUPREME COURT INCLUDES CONSIDERATION OF MITIGATING MEASURES

A. Mitigating Myopic Vision: The Sutton Decision

When deciding if an individual is disabled within the meaning of the ADA, the question of whether courts and employers need to consider mitigating measures was addressed in the 1999 decision *Sutton v. United Air Lines, Inc.* Writing for the majority, Justice O'Connor concluded "that disability under the Act is to be determined with reference to corrective measures," meaning that a person with eyeglasses should be evaluated with the glasses, rather than without.

In *Sutton*, twin sisters were denied positions with United as commercial pilots. The women "met [United's] basic age, education, experience, and Federal Aviation Administration certification qualifications." However,
both women had "severe myopia," and, consequently, their "uncorrected visual acuity [was] 20/200 or worse in [the] right eye and 20/400 or worse in [the] left eye . . . ."\textsuperscript{53} Upon learning of the vision impairment, United cancelled their interviews, flight simulation tests, and did not offer a position to either candidate.\textsuperscript{54} While each woman experienced 20/20 vision or better when wearing corrective eyeglasses, both fell short of United's minimum vision requirement of "uncorrected visual acuity of 20/100 or better."\textsuperscript{55}

The two sisters filed suit in United States District Court, alleging discrimination based upon disability in violation of the ADA.\textsuperscript{56} The District Court "dismissed [the] complaint for failure to state a claim upon which relief could be granted."\textsuperscript{57} The District Court determined that the sisters "were not actually substantially limited in any major life activity and thus had not stated a claim that they were disabled within the meaning of the ADA."\textsuperscript{58} In reaching its conclusion, the court considered the plaintiffs' use of mitigating measures, which "could fully correct their visual impairments."\textsuperscript{59} The Tenth Circuit Court of Appeals affirmed, placing it in conflict with other circuits that had considered the same question.\textsuperscript{60} The Supreme Court granted certiorari to resolve the conflicting interpretations.\textsuperscript{61}

\textsuperscript{53} Id. at 475.

\textsuperscript{54} Id. at 476.

\textsuperscript{55} Sutton, 527 U.S. at 475-76.

\textsuperscript{56} Id. at 476.

\textsuperscript{57} Id.

\textsuperscript{58} Id.

\textsuperscript{59} Id.

\textsuperscript{60} See Bartlett v. New York State Bd. of Law Exam'rs, 156 F.3d 321 (2nd Cir. 1998) (disregarding the use of mitigating measures); Baert v. Euclid Beverage, Ltd., 149 F.3d 626 (7th Cir. 1998) (disregarding the use of mitigating measures); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933 (3rd Cir. 1997) (disregarding the use of mitigating measures); Arnold v. United Parcel Serv., Inc., 136 F.3d 854 (1st Cir. 1998) (disregarding the use of mitigating measures); Washington v. HCA Health Servs. of Texas, Inc., 152 F.3d 464 (5th Cir. 1998) (disregarding the use of mitigating measures). See also Sutton, 527 U.S. at 477.

\textsuperscript{61} Sutton, 527 U.S. at 477.
In affirming the Circuit Court's decision, the Supreme Court relied upon "[t]hree separate provisions of the ADA, read in concert." First, the Court considered the ADA's definition of "disability," in which "the phrase 'substantially limits' appears . . . in the present indicative verb form . . . requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability." Accordingly, "[a] person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently" demonstrates a legal disability.

Second, the Court concluded that applying this definition of disabled "is an individualized inquiry." If such an individualized inquiry excluded consideration of mitigating measures, "courts and employers [would have] to speculate about a person's condition." Such speculation would, in the view of the Court, be "contrary to both the letter and the spirit of the ADA." In other words, to be a more accurate individual inquiry, mitigating measures must be included.

Finally, the Court noted that at the time of the ADA's enactment Congress determined that forty-three million Americans were disabled. The Court reasoned that if Congress intended to include within the definition of disabled those individuals who function in everyday life through the use of mitigating measures (such as eyeglasses), the number would have been much greater. The lesser number led the Court to conclude that mitigating measures were to be included.

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62. Id. at 482.
63. Id.
64. Id.
65. Id. at 483.
66. Id.
67. Sutton, 527 U.S. at 484.
68. Id.
69. Id.
70. See also id. at 494 (Ginsburg, J., concurring) (providing "[t]he strongest clues to Congress' perception of the domain of the [ADA], as I see it, are legislative findings that 'some 43,000,000 Americans have one or more physical or mental disabilities,' . . .").
Justice Stevens, in his dissenting opinion in *Sutton*, did not agree with the Court's rationale, and would have primarily relied upon the legislative history of the ADA to reach the conclusion that mitigating measures should not be considered. As he believed, "[t]he Committee Reports on the bill that became the ADA make it abundantly clear that Congress intended the ADA to cover individuals who could perform all of their major life activities only with the help of ameliorative measures." However, such an approach to statutory construction was not adopted by a majority of the Court. Rather, in the view of the seven-member majority, the plain language of the statute was conclusive and, for the three reasons explained above, the issue resolved itself. Consequently, there existed no need to employ statutory construction and consider the ADA’s legislative history. The holding in *Sutton* became the rule of law with regard to mitigating measures. In deciding whether a person was in fact disabled for the purposes of the ADA, a court would be required to evaluate the person inclusive of their mitigating measures.

### B. Mitigating Through Other Means

In a companion case to *Sutton*, *Murphy v. United Parcel Service, Inc.*, the Supreme Court held that a person taking medication that controlled high blood pressure was not substantially limited in a major life activity, and, thus, not disabled. Specifically, the case involved a mechanic for United Parcel Service (UPS) who was initially "erroneously granted [Department of Transportation] certification" and hired for the position. One month into his employment, "a UPS medical supervisor who was reviewing [Murphy's] medical files discovered the error and requested that [he] have his blood pressure retested." Upon learning that Murphy's "pressure was measured

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71. *Id.* at 498-99 (Stevens, J., dissenting).

72. *Id.* at 499.

73. *Sutton*, 527 U.S. at 482. "Justice STEVENS relies on the legislative history of the ADA for the contrary proposition that individuals should be examined in their uncorrected state. . . . Because we decide that, by its terms, the ADA cannot be read in this manner, we have no reason to consider the ADA’s legislative history." *Id.*


75. *Id.* at 518-19.

76. *Id.* at 519-20.

77. *Id.* at 520.
at 160/102 and 164/104 . . . [UPS] fired [Murphy] on the belief that his blood pressure exceeded the DOT’s requirements.”78

Murphy filed a discrimination suit under the ADA, and the United States District Court for the District of Kansas granted UPS’ Motion for Summary Judgment on the basis “that when [Murphy] is medicated he is inhibited only in lifting heavy objects but otherwise functions normally.”79 Therefore, Murphy was “not ‘disabled’ under the ADA.”80

By relying upon the holding in Sutton, the Supreme Court agreed.81 Justice O’Connor, writing for the majority again, wrote that “[g]iven [Sutton’s] holding, the result in this case is clear.”82 Mitigating measures included not only eyeglasses and contacts, but also medication for illnesses or other conditions.83 Consequently, Murphy’s medication to control his high blood pressure was considered a mitigating measure and he was not considered legally disabled.84 The Court, however, was not asked to consider, and refused to answer sua sponte, whether medication itself would bring an individual within the ADA’s definition of disability.85 For purposes of the case, it was only significant that Murphy, while medicated, was not considered disabled under the ADA. Therefore, he lacked standing to bring suit.86

However, the largest possible expansion of the requirement to consider mitigating measures is found in the dicta of the final companion case to Sutton, Albertson’s, Inc. v. Kirkingburg.87 In that case, Justice Souter

78. Id.
79. Id.
80. Murphy, 527 U.S. at 520.
81. Id.
82. Id. at 521.
83. See, e.g., Sutton, 527 U.S. at 475; Murphy, 527 U.S. at 520-21.
84. Murphy, 527 U.S. at 520.
85. Id. at 520.
86. Id. at 521.
delivered the majority opinion, which focused primarily on other aspects of the ADA. However, the Court stated that "[t]hough we need not speak to the issue whether Kirkingburg was an individual with a disability to resolve this case . . . we think it worthwhile to address it briefly in order to correct three missteps the Ninth Circuit made in its discussion of the matter." In one such misstep, the "Ninth Circuit was too quick to find a disability." While "Kirkingburg . . . suffer[ed] from amblyopia, an uncorrectable condition that . . . [caused] 20/200 vision in his left eye and monocular vision in effect," the Ninth Circuit "appeared to suggest that . . . a court not take account of the individual's ability to compensate for the impairment." The Ninth Circuit found that "Kirkingburg's 'brain has developed subconscious mechanisms for coping with [his] visual impairment and thus his body compensates for his disability.'" In contrast to Sutton, the mitigating measure contemplated by the Court in Kirkingburg was the body's own ability to compensate over time and adjust to vision impairment. The Court found "no principled basis for distinguishing between measures undertaken with artificial aids, like medication and devices, and measures undertaken, whether consciously or not, with the body's own systems." Thus, the door was opened to a much broader definition of mitigating measures in the future, including the body's own adaptation to an otherwise disabling condition.

88. Id. at 557.

89. "Petitioners primary contention is that even if Kirkingburg was disabled, he was not a 'qualified' individual with a disability," rather than being an individual without any disability whatsoever. Id. at 567.

90. Id. at 562.

91. Id. at 564.

92. Id. at 559.


94. Id.

95. Id. at 565-66.

96. Id.
For nearly a decade, the law in this area remained unchanged. With the Supreme Court's interpretation controlling,\textsuperscript{97} the protected class of individuals under the ADA was effectively narrowed.\textsuperscript{98} Only recently has Congress revisited the issue and restored its legislative intent through the enactment of the ADA Amendments Act.

IV. CONGRESSIONAL RESPONSE: THE EXCLUSION OF MITIGATING MEASURES

A. Legislative Action in the 110th Congress

In September 2006, Representatives Hoyer (MD-5) and Sensenbrenner (WI-5) introduced what would later be named the ADA Amendments Act in the House of Representatives.\textsuperscript{99} The bill, "which ultimately garnered over 240 cosponsors," was, however, "seen by many as extending the protections of the ADA beyond those that Congress originally intended to provide."\textsuperscript{100} Eventually, a compromise was achieved, and during the ensuing committee hearings, numerous witnesses testified regarding the need to restore legislative intent.\textsuperscript{101} After being "reported out of the Education and Labor

\textsuperscript{97} For further information on the Supreme Court's interpretation of the Americans with Disabilities Act, see Diane L. Kimberlin & Linda Ottinger Headley, ADA Overview and Update: What Has the Supreme Court Done to Disability Law?, 19 REV. LITIG. 579, 586-91 (2000).

\textsuperscript{98} See, e.g., Orr v. Wal-Mart Stores, Inc., 297 F.3d 720 (8th Cir. 2002) (rejecting diabetes as a disability when controlled by insulin); Muller v. Costello, 187 F.3d 298 (2d Cir. 1999) (rejecting asthma as a disability due to the use of inhalers and other medication); Didier v. Schwan Food Co., 465 F.3d 838 (8th Cir. 2006) (compensating through the use of the left hand while the right hand has suffered an injury precludes being disabled under the ADA); Walton v. U.S. Marshals Service, 492 F.3d 998 (9th Cir. 2006) (lacking the ability to localize sound not considered a disability when the body is able to compensate through visual localization).

\textsuperscript{99} 154 CONG. REC. H6,067 (2008).

\textsuperscript{100} Id.

\textsuperscript{101} H.R. 3195, The ADA Restoration Act of 2007 Before the H. Comm. On Education and Labor, 110th Cong. (2008) (statement of David K. Fram, Esq., Director, National Employment Law Institute); "A fair reading of the ADA's legislative history supports the notion that the law was to be read expansively and that individuals were to be analyzed [without regard to mitigating measures]." Id. (statement of Robert L. Burgdorf, Jr. Professor, University of the District of Columbia); "Before the Supreme Court upset the applecart, all relevant authorities were nearly unanimous in the view that mitigating
Committee by a vote of 43-1, and out of the Judiciary Committee by a vote of 27-0," the bill passed the House of Representatives by an overwhelming vote of 402 to seventeen on June 25, 2008.102

Following passage by the House, Senators Harkin (D-IA) and Hatch (R-UT) introduced a similar bill in the Senate.103 Senate passage was quick to follow, and unanimous consent was reached on September 11, 2008.104 Shortly thereafter, the House of Representatives passed the Senate bill unchanged, and submitted it to the White House for President George W. Bush's signature.105 On September 25, 2008, with the President's signature, the ADA Amendments Act became law.106

B. The Mechanics of Overturning Supreme Court Interpretation

In substance, the ADA Amendments Act specifically "reject[s] the requirement enunciated by the Supreme Court in Sutton v. United Air Lines, Inc. . . . and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures."107 In order to accomplish this goal, the Act seeks to create a more concrete definition of disability. Specifically, the definition of disability provided in 42 U.S.C. § 12102 is modified by section four of the ADA Amendments Act to add certain "rules

measures should not be considered in deciding whether a person has a disability under the ADA." ld. (statement of Carey L. McClure, Plaintiff, ADA Lawsuit v. General Motors); "Because I'd adapted so well to living with muscular dystrophy, the court said I wasn't protected by the ADA." ld. (statement of Andrew J. Imparato, President and CEO, American Association of People with Disabilities); "Whereas Congress intended the ADA to tear down the shameful wall of exclusion that had barred people with a wide range of disabilities from achieving to their full potential, the federal courts have contorted the law to the point where they have created a new wall." ld.


104. ld. at S8,356.

105. 154 Cong. Rec. H8,298.


of construction." In applying the new rules of construction, the Act mandates that "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to . . . mitigating measures," which include:

- medication, medical supplies, equipment, or appliances, low vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; . . . use of assistive technology; . . . reasonable accommodations or auxiliary aids or services; or . . . learned behavioral or adaptive neurological modifications.

While Congress was expansive in its inclusion of specific mitigating measures, it is important to note that ordinary eyeglasses were excluded from the revised statutory construction. Thus, within the Act, "[t]he ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity."

The ADA Amendments Act became effective on January 1, 2009. Presently, courts and employers are required to view individuals without regard to any mitigating measures when determining whether that individual is disabled under the law.

V. POTENTIAL RAMIFICATIONS OF THE ADA AMENDMENTS ACT OF 2008

A. Expanded Protected Class and Increased Litigation

The ADA Amendments Act seeks to restore Congress's legislative intent with regard to the ADA's original coverage for the purposes of employment

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108. Id. at § 4(a).

109. Id. (emphasis added).

110. Id.

111. Id.

112. Id.


114. Id. at § 4(a).
The Act requires that courts and employers view individuals without regard to any mitigating measures when evaluating possible legal disability. The primary ramification of this “expanded definition of ‘disability’ under the act will [be to] increase the number of individuals protected by federal law.” Logically, with a broader definition comes a broader class of covered individuals.

Since the Supreme Court’s decision in Sutton, courts have been forced to narrowly construe the definition of disabled. Consequently, they have limited the size of the protected class under the law. As originally enacted, the ADA was intended to cover “some 43,000,000 Americans [who] have one or more physical or mental disabilities.” However, as at least one study has determined, “the approach chosen by the Court [in Sutton and other ADA interpretative cases] only results in about 13.5 million Americans receiving statutory coverage.” With the changes included in the ADA Amendments Act, however, “the range of ADA coverage will expand significantly.” While the law does not extend to the vast population of individuals who wear prescription eyeglasses, it will extend to those individuals who use medication and certain devices to mitigate their disabling condition.

Indicative of the potential for protected class expansion, the American Heart Association estimates that “[a]bout 73 million people in the United

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115. Id.

116. Id. at § 4(a).


118. Colker, supra note 6, at 6-7. “[T]he Court has undermined the ADA’s anti-subordination approach by construing the term ‘disability’ so narrowly that the statute is unable to provide meaningful protection to individuals with disabilities who face employment-related discrimination.” Id.


120. Colker, supra note 6, at 7. See also supra Part III.


States age 20 and older have high blood pressure." ¹²³ Such statistics alone do not quantify the number of Americans who mitigate their hypertension with medication or are substantially limited in major life activities due to their condition. Nevertheless, the potential for an expansion of class members well beyond the original forty-three million Americans contemplated by Congress in 1990 remains apparent given that the ADA Amendments Act "makes clear that impairments that are episodic or in remission can still be considered a 'disability' . . ." ¹²⁴ No doubt, the number of members in the protected class will continue to increase if other conditions are added that can be mitigated through medication, such as asthma and diabetes, and conditions mitigated through devices, such as hearing aids or prosthetics. ¹²⁵

The expanded protected class of individuals under the ADA leads to the potential of "an initial uptick in litigation involving the scope of the expanded ‘disability’ definition" and other changes provided in the ADA Amendments Act. ¹²⁶ In the years preceding the Sutton decision, including fiscal years 1997 through 1999, the Equal Employment Opportunity Commission received an average of approximately 17,640 charges filed under the ADA. ¹²⁷ However, post-Sutton, that average dropped to approximately 15,906 charges per year from 2000 to 2007, never once reaching the high-water mark of 18,108 claims in 1997. ¹²⁸ The chilling effect of courts narrowly interpreting the ADA, or stated differently, the overall decrease in protected class size in the post-Sutton era, may explain the decrease in charges brought on the basis of disability discrimination. If true, a reasonable expectation is that the number of charges will increase in the years following enactment of the ADA Amendments Act, as the law mandates broad construction of the ADA provisions and increases the persons covered under the law through the elimination of mitigating measure


¹²⁴. Lorber, supra note 117, at 27.

¹²⁵. Id. at 26 (noting that "the range of ADA coverage will expand significantly").

¹²⁶. Id. at 27.


¹²⁸. Id.
considerations. However, as one study has indicated in a separate area of civil rights law, the ultimate sustainability of increased litigation under the ADA may not be a long-term trend.

B. Firing Versus Non-Hiring: The Potential Long-Term Impact of the ADA Revisions

Approximately twenty years ago, "[t]he early 1990s saw a rebirth of congressional interest in employment discrimination legislation." The ADA represents one of these congressional enactments, while the Civil Rights Act of 1991 represents another. Similar to the goal of the ADA Amendments Act seventeen years later, the Civil Rights Act of 1991 sought to revise existing law that the Supreme Court narrowly construed. Two specific outcomes of the legislation were "changes in the ability of plaintiffs to use statistical evidence to prove discrimination, and increases in damage awards available to plaintiffs who prove discriminatory intent on the part of an employer." Those in favor of the legislation argued that . . . the Act was necessary to open opportunities for women and minorities in fields that had traditionally been unwelcoming. At least one study has documented that there was an initial increase in litigation following enactment of this corrective civil rights legislation. However, the same study concluded that, "[w]hile the 1991 Civil Rights Act did not have large beneficial or adverse effects on employment or average wages for protected workers, employers did change their behavior in subtle ways after its passage.

129. Lorber, supra note 117, at 26-27.

130. Oyer, supra note 10, at 42. See also infra Part V.B.

131. Id.


134. Id.

135. Id. at 42.

136. Id. at 43.

137. Id.
Two of these "subtle ways" included "employers with higher susceptibility to employment discrimination litigation reduced their hiring of protected workers [and] ... employers also shifted their means of dismissing protected workers toward layoffs and away from individual firings." Each behavioral change was made with the purpose of reducing the employer's potential liability.

Although the changes enacted by the Civil Rights Act of 1991 differ from those in the ADA Amendments Act, the effect within the employer community may be similar. The Civil Rights Act of 1991 allowed for, among other things, a different means for plaintiffs to argue discrimination on the merits through the use of disparate impact statistics. In an analogous manner, by eliminating any consideration of mitigating measures and allowing more disabled persons to have standing to pursue a claim of discrimination under the ADA, more disability discrimination cases will be heard on the merits by "remov[ing] the focus from a 'disability' inquiry" alone. As employers once relied upon arguing against jurisdiction (because a plaintiff utilized a mitigating measure), they are now forced to argue the merits of discrimination, just as employers were forced to do after the introduction of statistical evidence following enactment of the Civil Rights Act of 1991.

With those similarities in mind, it is not illogical to presume a similar trend will occur within the realm of disability discrimination as happened in the wake of the Civil Rights Act of 1991 for minorities and women. That is to say, employers may again subtly adapt their behavior to avoid an increased risk of litigation. In short, "employers know that far more lawsuits are brought, and far greater damages awarded, for claims of

138. Oyer, supra note 10, at 47.
139. Id.
140. Id. at 42.
141. Lorber, supra note 117, at 27.
142. Stuart Taylor, Jr., The 1991 Civil Rights Act Has Hurt Its Intended Beneficiaries, 35 NAT'L J. 2665, 2675 (2003) (noting that "new incentives for employers to hire more minorities and women were apparently overwhelmed by employers' fears of discriminatory-discharge suits by any of the new hires who might not work out.").
143. Id.
144. Id.
discrimination in firing than in hiring.\textsuperscript{145} For that very reason, employers may be less likely to hire persons with disabilities, particularly in light of the increased class size and the requirement that they defend lawsuits on the merits of discrimination rather than disputing whether a person is in fact legally disabled. Furthermore, in the years following the passage of the Civil Rights Act of 1991, "employers also shifted their means of dismissing protected workers toward layoffs and away from individual firings," as the latter is more difficult to defend in court than the former.\textsuperscript{146} This trend could also impact working persons with disabilities in the years to come.

While the particular ramifications remain to be seen, there is no doubt that the ADA Amendments Act will have some impact upon the courts and employers.\textsuperscript{147} In the near future, there will be an increased protected class size under the ADA, and, probably, an initial increase in litigation.\textsuperscript{148} The long-term effects, however, are much less clear. In light of the impact following the Civil Rights Act of 1991, it seems possible that employers will subtly change their hiring and firing practices in order to reduce their exposure to increased liability.

\section*{VI. CONCLUSION}

The legislative history of the ADA reveals that Congress intended not to consider mitigating measures when determining whether a person is legally disabled.\textsuperscript{149} However, such guidance was not included in the ADA as enacted.\textsuperscript{150} As a result, the Supreme Court was left to interpret the statute and decide whether mitigating measures should be considered. Ultimately, the Court determined that such measures should be taken into account.\textsuperscript{151} In reaching its conclusion, the Court found it unnecessary to consider the

\textsuperscript{145} Id.

\textsuperscript{146} Oyer, supra note 10, at 47.

\textsuperscript{147} See Lorber, supra note 117, at 26-27 (discussing the ultimate increased class size and probable "uptick in litigation.").

\textsuperscript{148} Id.


\textsuperscript{150} 42 U.S.C. § 12102(2).

\textsuperscript{151} Sutton, 527 U.S. at 482.
legislative history of the ADA, finding the text of the statute sufficient to answer the question.152

Congress, believing that its intent had been misconstrued by the Supreme Court, took action to effectively overturn the Court's decision by mandating that mitigating measures (with the exception of "ordinary eyeglasses or contact lenses")153 not be considered in any disability determination under the ADA.154 The 110th Congress passed and the President signed the ADA Amendments Act.155 The new law makes clear that the courts and employers must adopt a standard construction that does not include mitigating measures when determining whether an individual is considered disabled under the ADA.156 Consequently, employment law, and specifically disability law, is entering a new era.

Probable short-term ramifications of the ADA Amendments Act include an increased class of covered individuals and at least an initial increase in litigation.157 Where an aggrieved individual suffering from high blood pressure was previously not protected under the ADA because of his use of medication controlling the condition, that individual is now part of the expanded class mandated by the ADA Amendments Act.158 With more people being covered, and the litigation focusing on the merits of the claim rather than on standing, more people will likely bring suit.159

In the long-term, however, the ramifications are less clear. Certain trends within the employer community following enactment of similar civil rights laws may shed some light on the probabilities of long-term effects in the wake of the ADA Amendments Act.160 Following the Civil Rights Act of 1991, which, like the ADA Amendments Act, created an easier path for

152. Id.


154. Id.

155. Id.

156. Id.

157. Lorber, supra note 117, at 26-27; see also supra Part V.

158. ADA Amendments Act of 2008 § 4(a).

159. Lorber, supra note 117, at 27.

160. See supra Part V.B.
individuals to bring discrimination suits, employers changed their hiring and firing practices to avoid an increase in liability.\textsuperscript{161} Notably, employers that were more susceptible to liability hired fewer individuals from the protected classes and, when releasing a protected worker, tended to utilize mass layoffs rather than individual firings.\textsuperscript{162} Similar patterns may occur with regard to employers and persons with disabilities following the ADA Amendments Act. As such, employers may be less willing to hire disabled persons knowing that those individuals now have a greater likelihood of success in the courts should problems arise within the workplace. Furthermore, disabled individuals might be grouped into a mass layoff situation in order for the employer to protect itself against the greater risk of liability that stems from an individual firing.

In sum, the ADA Amendments Act has altered disability law such that an individual will be considered without regard to any mitigating measures (save eyeglasses) when deciding whether the individual is legally disabled. Congress has restored its intent, created a much broader protected class of individuals, and shifted the focus in litigation from standing to the merits of the claim. However, as with at least one previous effort to accomplish similar objectives, the ADA Amendments Act could have long-term unintended ramifications. Such ramifications may have the effect of actually increasing adversity in the private sector for persons with disabilities, as employers attempt to proactively limit their potential exposure to liability.

\textsuperscript{161} Oyer, supra note 10, at 43-46. See also supra Part V.

\textsuperscript{162} Id. at 47.