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REQUIRING INDIVIDUALS TO USE MITIGATING MEASURES IN REASONABLE ACCOMMODATION CASES AFTER THE *SUTTON* TRILOGY: PUTTING THE BRAKES ON A POTENTIAL RUNAWAY TRAIN

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I. INTRODUCTION

In 1999, the United States Supreme Court decided *Sutton v. United Air Lines, Inc.*[1] and *Murphy v. United Parcel Service, Inc.*,[2] in which the Court held that for purposes of determining whether an individual suffers from a disability under the Americans with Disabilities Act ("the Act" or "ADA"),[3] the individual must be evaluated in his mitigated or corrected state.[4] Additionally, on the same day as it handed down the *Sutton* and *Murphy* opinions, the Court decided in *Albertson's, Inc. v. Kirkingburg*[5] that the mitigating measures which must be evaluated in this disability determination include both "artificial" mitigating measures such as prosthetic devices and medication, as well as those measures that the individual's body has developed in order to adequately compensate for the at-issue physical or mental impairment.[6]

1. 527 U.S. 471 (1999).
2. 527 U.S. 516 (1999).
3. Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2000).
4. *Sutton*, 527 U.S. at 475; *Murphy*, 527 U.S. at 521. The scope of this Article only covers the Americans with Disabilities Act. Interestingly, under some state law equivalents of the Americans with Disabilities Act, state courts have taken the opposite approach and have concluded that mitigating measures should *not* be evaluated when determining whether an individual suffers from a disability under the ADA. *See, e.g.*, Dahill v. Police Dep't of Boston, 748 N.E.2d 956, 963 (Mass. 2001) (concluding that mitigating measures should not be taken into consideration when determining whether an individual suffers from a disability under the Massachusetts equivalent of the Americans with Disabilities Act).
5. 527 U.S. 555 (1999).
6. *Id.* at 565-66. In *Albertson's* the plaintiff's brain developed a mechanism to compensate for the visual impairment from which the plaintiff suffered. *Id.* at 565.

Despite the shared opinion of the Equal Employment Opportunity Commission[7] (EEOC) and the Department of Justice[8] that mitigating measures should *not* be considered when determining disability status,[9] the Court agreed with the minority position expressed by courts such as the Tenth Circuit and concluded that the Act's definition of disability required an evaluation of the individual in his corrected or mitigated state.[10] In addition to being inconsistent with the various agency interpretations of the Act, this conclusion is also inconsistent with various parts of the Act's legislative history.[11]

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7. Pursuant to 42 U.S.C. § 12116 (2000), the Equal Employment Opportunity Commission has authority to issue regulations interpreting the employment provisions of Title I of the ADA.

8. Pursuant to 42 U.S.C. § 12134 (2000), the Attorney General of the United States has authority to issue regulations interpreting the public service sections of Title II of the ADA. Additionally, pursuant to 42 U.S.C. § 12149 (2000), the Secretary of Transportation has authority to issue regulations to cover the transportation provisions of Titles II and III of the ADA.

9. 28 C.F.R. § 35.104 app. at 521 (1998). Specifically, the Department of Justice indicated its belief that

> [t]he question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids and services. For example, a person with hearing loss is substantially limited in the major life activity of hearing, even though the loss may be improved through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, that 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.

Id.

The EEOC had issued a similar interpretation. Specifically, the EEOC indicated that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. § 1630.2(j) app. at 348 (1998).

10. Sutton v. United Air Lines, Inc., 527 U.S. 471, 475-77 (1999).

11. There are various pieces of legislative history that indicate that mitigating measures were not to be considered when evaluating whether an ADA plaintiff suffers from a disability under the Act. The most clear and persuasive pieces of such history can be found in the House and Senate reports. Specifically, the House Judiciary Committee Report indicates that, when determining whether an impairment substantially limits a major life activity, "the impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation." *Sutton*, 527 U.S. at 500 (Stevens, J., dissenting) (quoting H.R. REP. NO. 101-485, pt. 3, at 28 (1990)). Similarly, the Report from the House Committee on Education and Labor indicated 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." *Sutton*, 527 U.S. at 500 (Stevens, J., dissenting) (quoting H.R. REP. NO. 101-485, pt. 2, at 52 (1990)). The same House Report also indicated that "persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity," are considered to have a disability "even if the effects of the impairment are controlled by medication." *Sutton*, 527 U.S. at 501 (Stevens, J., dissenting) (emphasis omitted) (citing H.R. REP. NO. 101-485, pt. 2, at 52 (1990)). The Report also indicated that "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." *Sutton*, 527 U.S. at 500

Despite these facts, the purpose of this Article is not to criticize the Court's conclusion that mitigating measures should be considered when evaluating whether an individual who uses mitigating measures has a disability under the Act. However, one question the Court apparently left unanswered in *Sutton*, *Murphy*, and *Albertson's*[12] was how to evaluate individuals who have mitigating measures available to them, yet decide *not* to avail themselves of these measures, either for cost reasons, cosmetic reasons, reasons affecting autonomy over personal medical choices, fear of potential side effects, or for any other reasons.[13] Both before and after the *Sutton* trilogy was decided, some courts maintained that these individuals must also be evaluated with regard to mitigating measures, even if the individuals decide not to take these available measures.[14] In fact, just recently, the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the United States District Court for the District of Maryland, in which the lower court ruled that mitigating measures must be considered even when the plaintiff in that case was not using the mitigating measure available to her.[15] Shortly thereafter, the United States District Court for the Northern District of New York relied on the Fourth

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(Stevens, J., dissenting) (emphasis omitted) (citing H.R. REP. NO. 101-485, pt. 3, at 52 (1990)). Similarly, the Senate Labor and Human Resources Committee Report indicates 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." *Sutton*, 527 U.S. at 499-500 (Stevens, J., dissenting) (citing S. REP. NO. 101-116, at 23 (1989)).

12. Collectively, these three opinions will be referred to as the "*Sutton* trilogy."

13. The reason I use the word "apparently" is because after the *Sutton* trilogy, as this Article will demonstrate, courts have not yet come to a unanimous decision as to whether individuals who do *not* avail themselves of available mitigating measures must be evaluated in their corrected or uncorrected state. *Compare* Tangires v. Johns Hopkins Hosp., 79 F. Supp. 2d 587, 596 (D. Md. 2000) (holding that plaintiff did not have a disability under the ADA because, had she used the available medication, her condition would not have substantially limited any of her major life activities), *aff'd*, 230 F.3d 1354 (4th Cir. 2000), *with* Finical v. Collections Unlimited, Inc., 65 F. Supp. 2d 1032, 1037-38 (D. Ariz. 1999) (holding that even though plaintiff refused to employ mitigating measures, she had a disability under the ADA because, in her unmitigated condition, she was substantially limited in a major life activity).

14. The following cases, all of which will be discussed in greater detail, *infra*, can each be read to stand for the proposition that courts must look at available mitigating measures even if the plaintiff is not using the mitigating measures: *Tangires*, 79 F. Supp. 2d at 596 (holding that plaintiff was not disabled because, had she used the available medication, her asthma would not have substantially limited her in any major life activities); *Hewitt v. Alcan Aluminum Corp.*, 185 F. Supp. 2d 183, 189 (N.D.N.Y. 2001) (following *Tangires* and concluding that plaintiff who suffered from post traumatic stress disorder did not have a disability within the meaning of the Act because with medication, which the plaintiff did not take, he was not substantially limited in any major life activities); and *Bowers v. Multimedia Cablevision, Inc.*, No. 96-1298-JTM, 1998 U.S. Dist. LEXIS 19319, at *4 (D. Kan. Nov. 3, 1998) (concluding that a plaintiff who suffered from depression but who did not take prescribed medication did not have a disability within the meaning of the Act).

15. *Tangires*, 79 F. Supp. 2d at 596. The Sixth Circuit reached a similar conclusion in *Hein v. All America Plywood Co.*, 232 F.3d 482, 487-88 (6th Cir. 2000) (concluding that plaintiff did not qualify as having a disability under the ADA when he failed to take his medication for hypertension).

Circuit's conclusion and held that an individual who did not take advantage of an available mitigating measure was not protected under the Act.[16] Therefore, it appears that the pro-employer momentum that the *Sutton* trilogy started is gaining steam and perhaps shutting the ADA doors on plaintiffs who, because they are not using mitigating measures and, as a result, are suffering from the effects of their impairments, need the protection of the Act.[17]

However, the approach approved by the Fourth and Sixth Circuits and followed by the Northern District of New York and other courts, which will be discussed later in this Article,[18] fails to recognize that an individual should not be forced to choose between his possible[19] protection under the Act and the way in which he chooses to live with his physical or mental impairment.[20] The purpose of this Article is to question the courts that have, both before and after *Sutton*, looked at mitigating measures to conclude that an individual is not disabled under the Act even though the plaintiff was not using those measures and was suffering from the effects of the impairment. Additionally, this Article provides an approach to be used in reasonable accommodation cases brought under the Act, which would balance the employees' and employers' interests and further advance the goals and purposes of the Act.

This approach, which would be applicable to cases where an employee requests a reasonable accommodation from his employer,[21] would *require*

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16. *Hewitt*, 185 F. Supp. 2d at 189 (following *Tangires* and concluding that plaintiff who suffered from post traumatic stress disorder did not have a disability within the meaning of the Act because with medication, which the plaintiff did not take, he was not substantially limited in any major life activities).

17. As was mentioned briefly in note 15, *supra*, after the *Sutton* trilogy, the Sixth Circuit also concluded that mitigating measures must be taken into account when making the disability determination even if the employee was not utilizing the mitigating measure. Specifically, in *Hein*, the court affirmed the district court's granting of summary judgment after concluding that the plaintiff did not have a disability because he was at fault for not using medication to help his hypertension. *Hein*, 232 F.3d at 487.

18. *See* discussion *infra* Part I.B.1.

19. The word "possible" is used because even if an ADA plaintiff can establish that he has a disability under the Act, he must still prove that he is a "[q]ualified individual with a disability," who could perform the essential functions of his job with or without a reasonable accommodation. *See* 42 U.S.C. § 12111(8) (2000).

20. As will be discussed, *infra*, a plaintiff must establish three elements to demonstrate that he has a disability within the meaning of the Act. *See* 42 U.S.C. § 12102(2)(A) (2000). First, he must establish that he has a "physical or mental impairment." *Id.* This first prong is typically the least difficult prong for the plaintiff to establish. Second, he must identify a "major life activit[y]" that the impairment affects. *Id.* Finally, he must demonstrate that the impairment "substantially limits" the major life activity. *Id.*

21. Under the ADA, employers are required to provide "reasonable accommodations" for individuals with disabilities. *See* 42 U.S.C. § 12112(b)(5)(A) (2000). Examples of "reasonable accommodations" include, but are not limited to, restructured work schedules, physical alterations to the work premises, the provision of qualified readers or interpreters, and the acquisition or modification of equipment or devices. § 12111(9)(A)-(B). One defense to the providing of a reasonable accommodation is the "undue hardship" defense. § 12112(b)(5)(A). If an employer can prove that the requested accommodation would cause undue hardship, it will successfully defend the claim. *Id.* The factors to be considered when analyzing whether an

courts to evaluate an uncorrected or unmitigated plaintiff in his uncorrected or unmitigated state when determining whether he has a disability. But, when determining what constitutes a reasonable accommodation or undue hardship under the Act, courts could then look at the plaintiff's available mitigating measures along with his reasons for not availing himself of them and analyze these factors when deciding these issues. Accordingly, the issue of why the plaintiff is not availing himself of mitigating measures would go to the issue of what an employer must do to accommodate the employee and not to the issue of whether the employee has a disability. This approach would provide an appropriate balance between the employers' and the employees' interests and would result in the proper outcome in reasonable accommodation cases brought under the Act. Additionally, employees would not be forced to make important personal medical decisions based on how such decisions would affect their employment status.

The specific factors courts should analyze when making this determination include the mitigating measure's cost, its level of invasiveness, its potential side effects, its effectiveness, the cosmetic ramifications of the mitigating measure, and any other factors that went into the employee's decision not to avail himself of the mitigating measure. The more expensive, invasive, cosmetically unappealing, and risky the available mitigating measure becomes, the more the employer must do to accommodate the employee. On the other hand, if the mitigating measure is inexpensive, effective, non-invasive, and relatively risk-free, the employer would not be required to do as much for the employee seeking the accommodation. Therefore, this "sliding scale" approach would require courts to look at the reasons behind the employee's decision not to use the available measure and then determine what accommodation is reasonable or would pose undue hardship on the employer under the Act.[22] This approach would certainly require a case-by-case analysis, but such analysis is consistent with ADA case law.[23]

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accommodation would impose an undue hardship include the cost of the accommodation, the financial resources of the employer, the number of employees, and the impact of the accommodation on the operation of the employer. 29 C.F.R. § 1630.2(p) (2002).

22. For a similar approach, see Debra Burke & Malcolm Abel, *Ameliorating Medication and ADA Protection: Use it and Lose it or Refuse it and Lose it?*, 38 AM. BUS. L.J. 785 (2001).

23. In *Sutton* the Supreme Court, relying on its previous opinion in *Bragdon v. Abbott*, 524 U.S. 624, 641-42 (1998) (holding that plaintiff's asymptomatic HIV-positive status was a disability under the Act), indicated that these disability determinations must be made on a case-by-case basis. *Sutton*, 527 U.S. at 483. Specifically, the *Sutton* Court stated that "whether a person has a disability under the ADA is an individualized inquiry." *Id.* Cases from most United States courts of appeals have echoed this proclamation about the need for cases to be analyzed on a case-by-case basis. *See* Cotter v. Ajilon Servs., Inc., 287 F.3d 593, 598 (6th Cir. 2002); Bristol v. Bd. of County Comm'rs, 281 F.3d 1148, 1156-57 (10th Cir. 2002); Pollard v. High's of Baltimore, Inc., 281 F.3d 462, 468 (4th Cir. 2002); Waddell v. Valley Forge Dental Assocs., Inc., 276 F.3d 1275, 1280 (11th Cir. 2001); Mason v. United Air Lines, Inc., 274 F.3d 314, 317 (5th Cir. 2001); Mathieu v. Gopher News Co., 273 F.3d 769, 775 (8th Cir. 2001); Thornton v. McClatchy Newspapers, Inc., 261 F.3d 789, 794 (9th Cir. 2001); Navarro v. Pfizer Corp., 261

Although this approach is certainly more pro-employee than the Court's opinions in *Sutton*, *Murphy*, and *Albertson's*, it is an allowable and appropriate interpretation of the *Sutton* trilogy, as it will neither give unreasonable employees the benefits of the Act, nor encourage individuals to become "voluntarily disabled."[24] Instead, this approach creates a reasonable, balanced analysis that takes both the employers' and employees' needs into consideration when determining whether an employee is entitled to protection under the Act. Such a result is beneficial to all those protected by the Act and will not unduly benefit employees or unduly burden employers.

However, before addressing this approach, Part II of this Article will first briefly discuss the Act's definition of disability and the relevant definitions in the Code of Federal Regulations. Part III will discuss the split that emerged in the circuits over the issue of whether individuals who *are* using mitigating measures should be evaluated in their mitigated or unmitigated state. Part IV will discuss the *Sutton* trilogy, placing an emphasis on why the *Sutton* trilogy allows for the approach suggested in this Article. Part V will discuss several cases (both before and after the *Sutton* trilogy) that have addressed the precise issue involved in this article: whether individuals who do *not* avail themselves of available mitigating measures must be treated as though they do use such measures. Finally, Part VI will provide examples of why the *Sutton* trilogy should *not* apply to individuals who are *not* using mitigating measures, and why the courts should adopt a more pro-plaintiff approach to the issue, an approach that will further the goals of the Act and will not handcuff employers in the process.

II. THE ACT'S DEFINITION OF DISABILITY[25]

Under the Act, a plaintiff can establish he has a disability in one of three ways.[26] Specifically, the individual could prove he suffers from "a physical or mental impairment that substantially limits one or more of [that individual's] major life activities";[27] the individual could prove he has "a record of such an

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F.3d 90, 104 (1st Cir. 2001); Tice v. Centre Area Transp. Auth., 247 F.3d 506, 515 (3d Cir. 2001); Lawson v. CSX Transp. Inc., 245 F.3d 916, 928 (7th Cir. 2001); Schaefer v. State Ins. Fund, 207 F.3d 139, 143 (2d Cir. 2000).

24. For a discussion of the term "voluntary disability," see Lisa E. Key, *Voluntary Disabilities and the ADA: A Reasonable Interpretation of 'Reasonable Accommodations,'* 48 HASTINGS L.J. 75 (1996).

25. This definition was modeled after the applicable definition in the Rehabilitation Act of 1973, 29 U.S.C. § 705(9) (2000). The definition provided in the ADA states, with respect to an individual, that the term "disability" means: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2) (2000). However, for purposes of this Article, I will only be focusing on the first prong of the "disability" definition.

26. § 12102(2).

27. § 12102(2)(A).

impairment";[28] or the individual could prove he is "regarded as having such an impairment."[29] Although the United States Code defines "disability," it is the Code of Federal Regulations that further elaborates on the essential terms of this definition.[30] Specifically, one must look to the Code of Federal Regulations for the definitions of the terms "impairment,"[31] "substantially limits,"[32] and "major life activity."[33]

Although most plaintiffs are able to satisfy the definition of physical or mental impairment and are typically able to identify a major life activity that is limited by such an impairment, it is the substantially limits definition that causes plaintiffs so much trouble when attempting to prevail on a claim brought under the Act. With respect to the issue raised in this Article, it is the definition of substantially limits that is most critical. As more and more ADA cases were brought by plaintiffs who believed they were covered by the Act, this definition led various district courts and courts of appeals to come to different conclusions about the meaning of that term, especially how that term applies when the issue of mitigating measures arises.

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28. § 12102(2)(B).

29. § 12102(2)(C).

30. The regulations that apply to the employment-related aspects of the Act, which were promulgated by the Equal Employment Opportunity Commission, can be found at 29 C.F.R. § 1630 (2002).

31. Section 1630.2(h) defines a physical or mental impairment as:

> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
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> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

32. Section 1630.2(j)(1) defines "substantially limits" as:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

The EEOC also listed factors that must be considered when determining whether an individual is substantially limited in a major life activity. These factors include "(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." § 1630.2(j)(2).

33. Section 1630.2(i) defines "major life activity" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."

III. OPINIONS LEADING UP TO THE SUTTON *TRILOGY*

Prior to the Supreme Court's opinions in *Sutton, Murphy,* and *Albertson's*, various circuits in the United States courts of appeals had reached inconsistent answers to the question of whether, when determining if an individual suffers from a disability within the meaning of the Act, the individual should be evaluated in his mitigated or unmitigated condition. Some circuits had ruled that plaintiffs must be evaluated with their corrective measures taken into account,[34] while other circuits believed that plaintiffs should be evaluated without respect to mitigating measures.[35] Finally, one circuit took the middle ground between the two positions and concluded that only in certain, limited circumstances should plaintiffs be evaluated without regard to mitigating measures.[36] This conflict led the Supreme Court to grant certiorari in the *Sutton* case.[37]

A. Opinions in Which Courts Refused to Look at Mitigating Measures

One circuit that had determined mitigating measures should *not* be taken into account when determining whether an individual had a disability and thus was covered by the Act was the First Circuit.[38] In *Arnold v. United Parcel Service, Inc.*[39] the plaintiff sued after the defendant decided that it would not hire the insulin-dependent plaintiff as a mechanic.[40] The plaintiff was originally informed that he would be hired as a mechanic, but after learning about the plaintiff's diabetes, the employer told the plaintiff that he could not be hired as a mechanic and instead offered the plaintiff a substantially lower-paying job.[41] This decision was based on the fact that the Department of Transportation (DOT) did not allow insulin-dependent diabetics to obtain the DOT certification required to operate commercial motor vehicles.[42]

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34. *See, e.g*, Sutton v. United Air Lines, Inc., 130 F.3d 893, 902 (10th Cir. 1997) (holding that the determination of whether an individual's impairment substantially limits a major life activity should take into consideration the mitigating or corrective measure utilized by the individual).

35. For example, the following cases, in addition to others that will be referenced later in this Article, held that mitigating measures should *not* be taken into account when making the disability determination under the Act: *Bartlett v. New York State Board of Law Examiners*, 156 F.3d 321, 329 (2d Cir. 1998); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 629 (7th Cir. 1998); *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 863 (1st Cir. 1998); *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937 (3d Cir. 1997); *Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997); and *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362 (9th Cir. 1996).

36. Washington v. HCA Health Servs. of Tex., Inc., 152 F.3d 464, 471 (5th Cir. 1998).

37. 527 U.S. at 477.

38. *See Arnold*, 136 F.3d at 863.

39. *Id.* at 854.

40. *Id.* at 856-57.

41. *Id.*

42. *Id.*

The plaintiff sued United Parcel Service, alleging violations of the ADA and the equivalent Maine Human Rights Act.[43] The district court granted summary judgment in favor of United Parcel Service, concluding that the plaintiff's diabetes needed to be evaluated in its mitigated state.[44] The court decided that because the plaintiff had been able to control his diabetes for twenty-three years, he did not have a disability under the ADA because his condition, with medication, did not substantially limit one or more of his major life activities.[45]

The First Circuit reversed and instead held that the ADA plaintiff must be evaluated in his unmitigated or uncorrected state.[46] The court reached this conclusion after reciting and relying on various canons of statutory construction.[47] First, the First Circuit concluded that the plain language of the

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43. *Id.* The Maine Human Rights Act can be found at ME. REV. STAT. ANN. tit. 5, § 4551-55 (West 2002).

44. *Arnold*, 136 F.3d at 857. The district court's opinion can be found at *Arnold v. United Parcel Service, Inc.*, No. 96-294-P-H, 1997 U.S. Dist. LEXIS 22026, at *13 (D. Me. May 5, 1997).

45. *Arnold*, 136 F.3d at 857. As was indicated earlier, the three elements the plaintiff in an ADA case must establish to prove he suffers from a disability are (1) a physical or mental impairment; (2) that substantially limits; (3) a major life activity. *See* 42 U.S.C. § 12102(2)(A) (2000).

46. *Arnold*, 136 F.3d at 863. Interestingly, the First Circuit limited its opinion to a certain extent. Specifically, in footnote 10 of the opinion, the First Circuit noted that it might have come to a different conclusion under a different set of facts. *Id.* at 866 n.10. Specifically, the court observed the following:

> For example, we might reach a different result in the case of a myopic individual whose vision is correctable with eyeglasses. The availability of such a simple, inexpensive remedy, that can provide assured, total and relatively permanent control of all symptoms, would seem to make correctable myopia the kind of "minor, trivial impairment[]," that would not be considered a disability under the ADA.

Id. at 866 n.10 (alteration in original) (citation omitted). Interestingly, the factors the First Circuit took into account in this footnote, the cost of the corrective measure, the effectiveness of the corrective measure, and the simplicity of the corrective measure, are factors this Article suggests that courts analyze in making the determination of whether a requested accommodation is reasonable under the Act.

47. Specifically, the court utilized the following canons of statutory construction: "The 'starting point for interpretation of a statute "is the language of the statute itself."'" *Arnold*, 136 F.3d at 857 (quoting Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 835 (1990)); "If the language of a statute 'is plain and admits of no more than one meaning' and 'if the law is within the constitutional authority of the law-making body which passed it,' then 'the duty of interpretation does not arise' and 'the sole function of the courts is to enforce the statute according to its terms.'" *Id.* at 857-58 (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)); "The plain meaning of a statute's text must be given effect 'unless it would produce an absurd result or one manifestly at odds with the statute's intended effect.'" *Id.* at 858 (quoting Parisi by Cooney v. Chater, 69 F.3d 614, 617 (1st Cir. 1995)); "[W]e focus on 'the plain meaning of the whole statute, not of isolated sentences.'" *Id.* (quoting Beecham v. United States, 511 U.S. 368, 372 (1994)); and "[W]e interpret the statute's words 'in light of the purposes Congress sought to serve.'" *Id.* (quoting Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 118 (1983) (citation omitted)).

ADA was not clear on the issue of whether mitigating measures should be evaluated when determining whether an individual suffers from a disability under the Act, and that because of this ambiguity, other methods of statutory interpretation were necessary.[48] After reaching this conclusion about the unclear language of the ADA, the First Circuit moved to the legislative history behind the ADA.[49]

Relying on the legislative history, the First Circuit concluded that mitigating measures should *not* be taken into consideration when evaluating whether a plaintiff satisfies the Act's definition of disability.[50] Specifically, the court noted the following:

> Both the explicit language and the illustrative examples included in the ADA's legislative history make it abundantly clear that Congress intended the analysis of an "impairment" and of the question whether it "substantially limits a major life activity" to be made on the basis of the underlying (physical or mental) condition, without considering the ameliorative effects of medication, prostheses, or other mitigating measures.[51]

The First Circuit looked specifically at the House and Senate committee reports, which unequivocally indicated that when making the determination of whether an individual has a disability under the Act, the "impairment 'should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation.'"[52] The First Circuit also observed that Congress "spoke directly" to the issue of diabetes when, in the House Labor Report, it indicated that "'persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity,' are considered to have a disability, 'even if the effects of the impairment are controlled by medication.'"[53]

The First Circuit then looked at other, potentially conflicting parts of the Act's legislative history and concluded that despite this potential conflict, mitigating measures should *not* be taken into account when making the disability determination.[54] Therefore, the court reversed the district court's

48. *Id.* at 858-59.
49. *Arnold*, 136 F.3d at 859.
50. *Id.* at 863.
51. *Id.* at 859.
52. *Id.* at 859-60 (quoting H.R. REP. NO. 101-485, pt. 3, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 451).
53. *Id.* at 860 (quoting H.R. REP. NO. 101-485, pt. 2, at 51-52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334; S. REP. NO. 101-116, at 22 (1989)).
54. *Id.* at 860.

granting of summary judgment in favor of the employer.[55] The court also noted that because the Act was a remedial statute and that these remedial statutes must be interpreted in a way to effectuate the congressional purpose behind the legislation,[56] requiring an evaluation with mitigating measures taken into consideration would have helped employers at the expense of employees and, thus, gone against this general principle.[57]

After addressing the Act's legislative history, the First Circuit then addressed the EEOC's interpretation of the Act, which had indicated that mitigating measures should not be used in determining whether an individual suffers from a disability.[58] The court recognized that the EEOC Interpretive Guidelines, although not controlling like the regulations promulgated by executive agencies, "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[59] Because the EEOC's position was therefore entitled to some deference, and because it was consistent with the legislative history and broad remedial purpose behind the Act, the First Circuit concluded that it reached the correct result in this case.[60]

The First Circuit also noted that the majority of United States courts of appeals addressing this issue had ruled in favor of *not* looking at plaintiffs in

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55. *Arnold*, 136 F.3d at 860-61. The specific part of the Act's legislative history that the First Circuit thought to be in conflict with the plaintiff's position came from the Senate Report, which indicated:

> 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. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified. Such denials are the results of negative attitudes and misinformation.

Id. at 860 (citing S. REP. NO. 101-116, at 24 (1989)).

The district court found that this language was clear evidence that people with controlled impairments did not satisfy the first prong of the disability definition under the Act. *Id.* at 860. The First Circuit ultimately dismissed this pro-employer interpretation of the legislative history, reasoning that the pro-employee language came after the Senate Report, that the broad remedial purpose of the Act would not be furthered by the pro-employer interpretation of the Act, and that the two different parts of the legislative history were not necessarily inconsistent with one another. *Id.*

56. *Id.* at 861.

57. Other courts have also concluded that mitigating measures should *not* be considered when determining whether an individual has a disability within the meaning of the ADA. Specifically, the Second Circuit, in *Bartlett v. New York State Board of Law Examiners*, 156 F.3d 321, 329 (2d Cir. 1998), concluded that the plaintiff did have a disability even though she was able to correct her reading or learning impairment through self-accommodation. This outcome was also reached by the Eighth Circuit in *Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997), when the court concluded that an individual who learned to adjust for his visual impairment was still disabled because mitigating measures should not be taken into account when making the initial determination of disability under the Act.

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

59. *Id.* at 864 (quoting Meritor Sav. Bank, F.S.B., v. Vinson, 477 U.S. 57, 65 (1986)).

60. *Id.*

their corrected states.[61] Thus, the First Circuit, while it did limit its holding to the facts of the case before it, took a pro-employee stance and concluded that mitigating measures should *not* be evaluated when making the disability determination under the Act.[62]

B. Opinions in Which Courts Looked at Mitigating Measures

Unlike the First Circuit, the Tenth Circuit took a pro-employer stance when confronted with the issue of whether to evaluate ADA plaintiffs in their corrected or uncorrected state.[63] Before the *Sutton* case went to the Supreme Court, the Tenth Circuit heard the case and was faced with the issue of whether mitigating measures must be taken into consideration when determining whether an individual has a disability within the meaning of the ADA.[64] In *Sutton* the plaintiffs were sisters who suffered from vision problems (severe myopia) and were eventually rejected as candidates for the position of commercial airline pilot.[65] Without the use of corrective measures (eyeglasses or contact lenses), the plaintiffs' vision was substantially worse than the employer required.[66] However, with the corrective measures, both plaintiffs enjoyed 20/20 vision.[67]

The district court granted the defendant's motion to dismiss, concluding that because the plaintiffs had 20/20 vision with the assistance of the eyeglasses, they were not disabled under the Act.[68] The plaintiffs appealed, and the Tenth Circuit considered whether mitigating measures should be taken into account when determining whether a plaintiff has a disability under the Act.[69]

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61. *Id.* at 865. Specifically, the court cited the following cases: *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937-38 (3d Cir. 1997) (holding that the determination of whether an individual has a disability under the ADA should be made without reference to mitigating measures); *Doane v. City of Omaha*, 115 F.3d 624, 627-28 (8th Cir. 1997) (holding that even when an individual is employing self-accommodations to compensate for his disability, he is not precluded from gaining possible protection under the ADA); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996) (holding that mitigating measures should not be considered when assessing whether an individual has a disability under the ADA); *Harris v. H & W Contracting Co.*, 102 F.3d 516, 521 (11th Cir. 1996) (holding that under an ADA claim, an individual should be assessed in his unmitigated condition); and *Roth v. Lutheran General Hospital*, 57 F.3d 1446, 1454 (7th Cir. 1995) (holding that the analysis of whether an individual has a disability does not include consideration of mitigating measures).

62. *Arnold*, 136 F.3d at 866.

63. *See* Sutton v. United Air Lines, Inc., 130 F.3d 893 (10th Cir. 1997).

64. *Id.*

65. *Id.* at 895.

66. *Id.*

67. *Id.*

68. *Id.* at 896. The district court's opinion can be found at *Sutton v. United Air Lines, Inc.*, No. 96-S-121, 1996 WL 588417 (D. Colo. Aug. 28, 1996).

69. *Sutton*, 130 F.3d at 896-97.

After indicating that an ADA plaintiff must prove she suffers from an impairment that substantially limits a major life activity,[70] the Tenth Circuit concluded that the plaintiffs' vision problems were indeed impairments[71] and that seeing was a major life activity.[72] Therefore, the issue on appeal was whether these vision impairments substantially limited the major life activity of seeing.[73] Although the Tenth Circuit acknowledged that the EEOC had already determined mitigating measures should *not* be considered in this issue, the court decided to reject the EEOC's position.[74] The Tenth Circuit concluded that the EEOC's position was in direct conflict with the substantially limits language of the Act and that the EEOC's proclamations on this issue were also in conflict with other portions of its own Interpretive Guidelines.[75] Specifically, the Tenth Circuit pointed to the following language from the Interpretive Guidelines:

> Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities . . . .
>
> The ADA and this part, like the Rehabilitation Act of 1973, do not attempt a "laundry list" of impairments that are "disabilities." The determination of whether an individual has a disability is not necessarily based on the name or the diagnosis of the impairment the person has, but rather on *the*

70. *Id.* at 898.

71. *Id.* at 900.

72. *Id.*

73. *Id.* at 900-01.

74. *Id.* at 902. Under the *Chevron* doctrine, which originated in *Chevron U.S.A., Inc., v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984), unless the plain language of a statute is clear, courts should defer to an interpretation of the statute by the agency charged with its enforcement if the agency's interpretation is a "permissible construction" of the statute's language and legislative history. A "permissible construction" is one that is not "arbitrary, capricious, or manifestly contrary to the statute." *Id.* Under this doctrine, "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at n.11 (citing FEC V. Democratic Senatorial Campaign Comm., 454 U.S. 27, 39 (1981); Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978); Train v. Natural Res. Def. Council, Inc., 421 U.S. 60, 75 (1975); Udall v. Tallman, 380 U.S. 1, 16 (1965); Unemployment Comp. Comm'n v. Aragon, 329 U.S. 143, 153 (1946); and McLaren v. Fleischer, 256 U.S. 477, 480-481 (1921)). Although the regulations promulgated by the appropriate agency are entitled to this deference, the Interpretive Guidelines issued by those agencies are not entitled to such a high degree of deference. Batterson v. Francis, 432 U.S. 416, 424-26 (1977) (noting that regulations issued pursuant to a statutory grant of authority can be set aside only if they exceed the given authority or are "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with the law," but agency interpretations of those regulations are not entitled to such a great level of deference).

75. *Sutton*, 130 F.3d at 902.

> *effect of that impairment on the life of the individual.* Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.[76]

The Tenth Circuit concluded that this language, especially the language focusing on the *effect* the impairment had on the individual's life, was proof that the EEOC's position was inconsistent and therefore not worthy of being followed.[77] The Tenth Circuit also focused on an apparent inconsistency with other parts of the Interpretive Guidelines, which addressed the difference between an actual disability (under the first part of the definition of disability) and the "regarded as" prong of the definition of disability.[78] Therefore, the Tenth Circuit concluded that the plaintiffs' mitigating measures must be taken into consideration when making the initial determination of whether they had a disability under the Act.[79] Because of this, the Tenth Circuit concluded that the plaintiffs were not disabled; therefore, United was entitled to prevail.[80]

C. *A Court That Took a "Middle Ground" Approach Between the Two Positions*

An example of a pre-*Sutton* case where the court took a middle ground on the issue of whether mitigating measures should be evaluated when determining if an individual suffers from a disability within the meaning of the Act is *Washington v. HCA Health Services of Texas, Inc.*[81] In *Washington* the Fifth Circuit reached a middle ground between the two conflicting positions articulated by the First and Tenth Circuits. Specifically, although the Fifth Circuit ruled in favor of the plaintiff on the issue of whether mitigating measures should be evaluated in the disability determination in this case, the court specified that it was not adopting a bright-line rule that mitigating measures should *never* be taken into consideration when making the disability determination under the ADA.[82]

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76. *Id.* at 902 (quoting 29 C.F.R. § 1630.2(j) app. at 350 (2002)) (alteration in original).
77. *Id.* at 902.
78. *Id.*
79. *Id.* The Tenth Circuit proceeded to address the issue of the plaintiffs' being regarded as disabled. *Id.* at 902-05. However, that part of the opinion is not directly relevant to the focus of this Article. As was indicated previously, this Article focuses only on the first prong of the definition of disability.
80. *Sutton*, 130 F.3d at 902-03.
81. 152 F.3d 464 (5th Cir. 1998).
82. *Id.* at 470-71.

In *Washington* the plaintiff sued his former employer after he was released from his position as a senior accountant.[83] The plaintiff suffered from Adult Stills Disease, a condition that affected his bones, joints, and kidneys.[84] To treat himself for this disease, the plaintiff took medication and was, according to the court, able to lead a "relatively normal life."[85] After originally granting the employer's motion for summary judgment and then being reversed by the Fifth Circuit,[86] the district court eventually denied the employer's second motion for summary judgment, concluding that the plaintiff's corrective measures should *not* be taken into consideration when making the initial disability determination, and that the plaintiff did indeed suffer from a disability within the meaning of the ADA.[87] The sole issue before the Fifth Circuit was whether the court must "assess an individual's condition with or without regard to mitigating measures, when determining whether that individual is disabled under the ADA."[88]

Similar to the First Circuit, the Fifth Circuit first concluded that the plain language of the ADA was not unambiguous and therefore required an examination into other sources to determine how to evaluate an ADA plaintiff.[89] Not surprisingly, the Fifth Circuit turned to the legislative history and the EEOC for guidance on this issue.[90] With respect to the legislative history, the Fifth Circuit cited two provisions that weighed heavily in favor of ADA plaintiffs.[91] First, the court looked at the House Education and Labor Committee Report, which noted:

> 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,

83. *Id.* at 466.
84. *Id.*
85. *Id.*
86. Washington v. HCA Health Servs. of Tex., Inc., 906 F. Supp. 386 (S.D. Tex. 1995), *rev'd* 95 F.3d 45 (5th Cir. 1996).
87. *Washington*, 152 F.3d at 466.
88. *Id.* at 467.
89. *Id.* at 467.
90. *Id.* at 467-70.
91. *Id.* at 467-68.

> even if the effects of the impairment are controlled by medication.[92]

The court then looked at a provision from the House Judiciary Committee Report that essentially reached the same conclusion.[93] Specifically, the court looked at the following language:

> The 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, a person with epilepsy, an impairment which substantially limits a major life activity, is covered under this test, even if the effects of the impairment which substantially limits a major life activity, is also covered, even if the hearing loss [sic] is corrected by the use of a hearing aid.[94]

Although the Fifth Circuit then addressed some legislative history that it found to be inconsistent with this position,[95] it ultimately concluded that the legislative history behind the ADA led to the conclusion in this case that mitigating measures should *not* be taken into consideration when determining whether an individual suffers from a disability within the meaning of the Act.[96] The Fifth Circuit reached this conclusion because the House Report came after the Senate Report and because the House Report spoke directly to the issue at hand, while the Senate Report was not directly on point with the issue currently pending before the court.[97]

The Fifth Circuit then evaluated the EEOC's Interpretive Guidelines.[98] The EEOC, as well as the Department of Justice,[99] had already established the position that mitigating measures should *not* be taken into account when

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92. *Id.* at 467 (quoting H.R. REP. NO. 101-485, pt. 2, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334).

93. *Washington*, 152 F.3d at 468.

94. *Id.* (quoting H.R. REP. NO. 101-485, pt. 3, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 451).

95. *Id.* at 468. Specifically, the court looked at the Senate Labor and Human Resources Committee Report, which, when describing the third prong of the disability definition, observed that "[a]nother 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." *Id.* (quoting S. REP. NO. 101-116, at 24 (1989)).

96. *Id.*

97. *Id.*

98. *Washington*, 152 F.3d at 468-70.

99. As was addressed earlier, the Department of Justice previously addressed this issue and concluded that mitigating measures should *not* be taken into account when making a disability determination under the Act. *See* 28 C.F.R. § 35.104 app. at 521 (1998).

making the initial disability determination in an ADA case.[100] Specifically, the Fifth Circuit noted that in its Interpretive Guidelines, the EEOC indicated "that under the ADA a plaintiff should be assessed in his *unmedicated* condition in order to determine whether he is disabled."[101] The Fifth Circuit further noted that the EEOC also indicated that the "existence of an impairment must be determined *without regard to mitigating measures* such as medicines, or assistive or prosthetic devices."[102] Similarly, the Fifth Circuit noted that the EEOC concluded that "the 'determination of whether an individual is substantially limited in a major life activity' must be made *without regard to mitigating measures* such as medicines, or assistive or prosthetic devices."[103] Although the Fifth Circuit noted that not all courts had decided to follow the EEOC's position, it felt somewhat compelled to follow the legislative history behind the ADA and the EEOC's interpretation of it.[104]

However, in reaching its conclusion, instead of announcing a blanket rule that mitigating measures were not to be taken into consideration when making the disability determination, the Fifth Circuit emphasized that only in *some* circumstances (such as in situations where the impairments are serious) were mitigating measures not to be taken into account, and that this determination was to be made on a case-by-case basis.[105] Specifically, the Fifth Circuit noted:

> Although we think it is more reasonable to say that mitigating measures must be taken into account, we recognize that our position is not so much more reasonable to warrant overruling the EEOC. Thus, we will follow the EEOC Guidelines and the legislative history, but we read them narrowly. There is nothing in the Interpretive Guidelines or the legislative history that suggests that *all* impairments must be considered in their unmitigated states and *no* mitigating measures may ever be taken into account.
>
> We hold that only serious impairments and ailments that are analogous to those mentioned in the EEOC Guidelines and the legislative history–diabetes, epilepsy, and hearing impairments–will be considered in their unmitigated state. The impairments must be serious in common parlance, and they must require that the individual use mitigating measures on a frequent basis, that is, he must put on his prosthesis every morning or take his medication with some continuing

100. *Washington*, 152 F.3d at 468.

101. *Id. See* 29 C.F.R. § 1630.2(h) app. at 347 (1998).

102. *Washington*, 152 F.3d at 468-69 (quoting 29 C.F.R. § 1630.2(h) app. at 347).

103. *Id.* at 469 (quoting 29 C.F.R. § 1630.2(j) app. at 348).

104. *Id.* at 469. Interestingly, when referring to the cases which had determined that mitigating measures *should* be taken into consideration, the Fifth Circuit indicated that those opinions offered the most reasonable reading of the Act. *Id.*

105. *Id.* at 470-71.

> regularity. In order for us to ignore the mitigating measures, they must be continuous and recurring; if the mitigating measures amount to permanent corrections or ameliorations, then they may be taken into consideration.[106]

The Fifth Circuit continued to explain the following:

> Whether an individual must be evaluated without regard to mitigating measures depends on both the nature of the impairment and the mitigating measures employed by the individual. Thus, these issues must be considered on a case[-]by[-]case basis to determine whether the individual disease and the accompanying mitigation fall within the scope of the EEOC Guidelines and the legislative history. Some conditions, such as diabetes, will clearly have to be considered *without* regard to mitigating measures; others, such as hip replacements, will have to be evaluated *with* regard to mitigating measures. But most cases will not be as clear and we leave these for another day. For example, a correctable vision impairment, may or may not be sufficiently similar to the ailments enumerated in the EEOC Guidelines and legislative history, and as such we cannot say whether mitigating measures such as eyeglasses or laser surgery should be considered in assessing whether an individual is disabled.[107]

It was clear from the Fifth Circuit's opinion that this determination was to be made on a case-by-case basis[108] and that the court was not entirely comfortable with its ultimate decision.

Fortunately for the United States courts of appeals that were struggling with this issue, the Supreme Court would soon hear the *Sutton*, *Murphy*, and *Alberton's* cases and give some direction in how to treat mitigating measures under the ADA. However, for ADA plaintiffs, the Supreme Court's decisions in *Sutton*, *Murphy*, and *Albertson's* would greatly limit the scope of the Act that was once highly praised as a landmark piece of legislation enacted to help

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106. *Washington*, 152 F.3d at 470-71 (footnote omitted).

107. *Id.* at 471.

108. With the facts presented, the Fifth Circuit concluded that mitigating measures should not be taken into consideration in *Washington* and therefore ruled in favor of the plaintiff on this issue. *Id.* Because the plaintiff's condition was analogous to the conditions specifically listed in the legislative history of the ADA and the EEOC Guidelines, and because his condition was serious enough to require medication on a daily basis, the court concluded that the plaintiff's condition was serious enough to warrant an examination of his condition without taking into account corrective measures. *Id.*

individuals who needed it most.[109] Additionally, instead of clearing up the issue of whether mitigating measures must be evaluated when plaintiffs are *not* using them, the Court's opinions only laid the groundwork for more confusion over this issue.

IV. THE *SUTTON* TRILOGY

A. The Sutton *Opinion*[110]

Finally, after the various circuits in the United States courts of appeals had reached different conclusions with respect to whether mitigating measures must be evaluated when determining whether an individual suffers from a disability under the Act, the Supreme Court decided to resolve this critical issue.[111]

As discussed above, two sisters with severe myopia sued United Air Lines after their applications for employment were rejected because of their inability to meet United's minimum vision requirements.[112] After exhausting their administrative remedies, the sisters sued United in the United States District Court for the District of Colorado, alleging violations of the ADA.[113] The district court granted United's Rule 12(b)(6) motion to dismiss, holding that because the plaintiffs were able to fully correct their visual impairments, they were not substantially limited in any major life activity and thus not disabled under the Act.[114] The district court also determined that the sisters' allegations were insufficient to satisfy their claim that they were "regarded as"[115] having an impairment which substantially limited a major life activity.[116] Specifically, the district court found the allegation that they were regarded as being substantially limited in their ability to perform the requirements of a particular job was insufficient to establish that they were regarded as being substantially limited in the major life activity of working.[117]

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109. At the signing of the ADA, President Bush observed the following: "With today's signing of the landmark Americans for [sic] Disabilities Act, every man, woman, and child with a disability can now pass through once-closed doors, into a bright new era of equality, independence and freedom." President George H. Bush, Remarks of President George Bush at the Signing of the Americans with Disabilities Act (July 26, 1990), http://www.eeoc.gov/ada/bushspeech.html.

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

111. *Id.* at 477.

112. *Id.* at 475-76.

113. *Id.* at 476.

114. *Id.* The district court opinion can be found at *Sutton v. United Air Lines, Inc.*, Civ. A. No. 96-S-121, 1996 WL 588917 (D. Colo. Aug. 28, 1996).

115. In addition to establishing that she has a physical or mental impairment, an individual may also gain protection under the ADA by establishing (1) that there is a "record of such an impairment" or (2) that she is "regarded as having such an impairment." 42 U.S.C. § 12102(2)(B)-(C) (2000).

116. *Sutton*, 527 U.S. at 476.

117. *Id.* at 476-77.

The United States Court of Appeals for the Tenth Circuit affirmed, using similar reasoning.[118] Because the Tenth Circuit's conclusion was at odds with opinions from the United States Courts of Appeals from the First,[119] Second,[120] Third,[121] Fifth,[122] Seventh,[123] Eighth,[124] and Ninth[125] Circuits, the Supreme Court granted certiorari to resolve the conflict.[126]

As expected, the Court first turned to the Act's definition of "disability" in deciding whether mitigating measures should be taken into consideration when making this determination.[127] Then, after observing that various federal agencies had the responsibility of promulgating regulations for the various titles of the Act,[128] the Court observed that *no* agency had the authority to issue regulations implementing the generally applicable provisions of the Act, including the definition of the term disability.[129] However, the Court noted that the EEOC and the Attorney General had indeed issued Interpretive Guidelines, resolving the issue in favor of ignoring mitigating measures when determining whether an individual has a disability.[130]

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118. *Id.* at 477. The Tenth Circuit's opinion can be found at *Sutton v. United Air Lines, Inc.*, 130 F.3d 893 (10th Cir. 1997).

119. Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 866 (1st Cir. 1998) (holding that the determination of whether an individual has a disability under the ADA should be made without consideration of mitigating measures and ameliorative treatments).

120. Bartlett v. N.Y. State Bd. of Law Exam'rs, 156 F.3d 321, 329 (2d Cir. 1998) (holding that the assessment of whether an individual has a disability under the ADA should be made without regard to self-accommodating measures).

121. Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937-38 (3d Cir. 1997) (holding that the determination of whether an individual has a disability under the ADA should be made without reference to mitigating measures).

122. Washington v. HCA Health Servs. of Tex., Inc., 152 F.3d 464, 471 (5th Cir. 1998) (holding that some, but not all, impairments are to be considered in their unmitigated states).

123. Baert v. Euclid Beverage Ltd., 149 F.3d 626, 629 (7th Cir. 1998) (holding that the court should assess whether an individual has a disability under the ADA without regard to mitigating measures).

124. Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir. 1997) (holding that even when an individual is employing self-accommodations to compensate for his disability, he is not precluded from gaining possible protection under the ADA).

125. Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996) (holding that mitigating measures should not be considered when assessing whether an individual has a disability under the ADA).

126. Sutton v. United Air Lines, Inc., 527 U.S. 471, 477 (1999).

127. *Id.* at 478.

128. *Id.* at 478-79. As noted previously, the EEOC and the Attorney General had been given authority to promulgate regulations that were to apply to the various portions of the Act. *See supra* notes 7-8. The EEOC was responsible for promulgating regulations applicable to the employment-related aspects of the Act, 42 U.S.C. § 12116 (2000), while the Attorney General was responsible for promulgating regulations applicable to the public services portions of the Act. *See* § 12134.

129. *Sutton*, 527 U.S. at 479.

130. *Id.* at 480. Specifically, the Court pointed out that according to the EEOC Interpretive Guidelines applicable to 29 C.F.R. § 1630.2(j) (1998), "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices."

The sisters argued that because the Act did not directly address the issue of whether to consider mitigating measures, reliance on agency interpretation was appropriate.[131] However, United argued that no deference was due to the agency interpretations because the Act's plain language conflicted with those interpretations.[132] The Court was persuaded that the plain language of the Act did indeed conflict with the agency interpretation and that mitigating measures must therefore be taken into consideration when determining whether an individual suffers from a disability.[133]

The Court relied on three separate provisions of the Act to reach this conclusion.[134] First, the Court looked at the phrase "substantially limits" and concluded that because that phrase was drafted in the present indicative verb form, it was intended to cover people who are presently, and not potentially or hypothetically, substantially limited.[135] The Court also evaluated the Act's language requiring the definition of disability to be evaluated "with respect to an individual."[136] The Court concluded that by focusing on the individual, and not merely on a specific diagnosis, the Act required the evaluation of the *effect* of mitigating measures on the ADA plaintiff.[137] Finally, the Court looked to the Congressional finding that "some 43,000,000 Americans" suffer from disabilities and concluded that if Congress did not intend for mitigating measures to be taken into account, the number of Americans with disabilities Congress referenced would have been much higher.[138] Therefore, the Court concluded that the sisters were not disabled under the Act.[139]

The Court then addressed the "regarded as" prong of the definition of disability and concluded that the sisters were not regarded as being

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Sutton, 527 U.S. at 480 (alteration in original) (quoting 29 C.F.R. § 1630.2(j) app. at 348 (1998)). The Court also observed that the Department of Justice had issued a similar opinion on the issue of mitigating measures in its Interpretive Guidelines. *Id.* at 480.

131. *Sutton*, 527 U.S. at 481.

132. *Id.* at 481-82.

133. *Id.* at 482.

134. *Id.*

135. *Id.* at 482-83.

136. *Id.* at 483.

137. *Sutton*, 527 U.S. at 483 (citing 29 C.F.R. § 1630.2(j) app. at 348 (1998)).

138. *Id.* at 484-88 (citing 42 U.S.C. § 12101(a) (2000)). The Court could not specify the source of the figure; however, it did mention a few possibilities. Specifically, the Court noted that the corresponding finding in the 1988 forerunner to the ADA was drawn from a report by the National Council on Disability. *Id.* at 484 (citing Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 434 n.117 (1991)). In addition, the Court noted that in 1988, the Council issued an updated report wherein a similar number of individuals was listed as suffering from a "functional limitation." *Sutton*, 527 U.S. at 485 (citing NAT'L COUNCIL ON DISABILITY, ON THE THRESHOLD OF INDEPENDENCE 17 (1998), *available at* http://www.ncd.gov/newsroom/publications/threshold.html).

139. *Sutton*, 527 U.S. at 488-89.

substantially limited in the major life activity of working.[140] This conclusion was partly based on the high burden a plaintiff must meet to demonstrate that she is substantially limited in the major life activity of working.[141] Justices Stevens and Breyer dissented.[142]

B. Five Critical Statements and Facts from the Sutton *Opinion*

Although many courts have interpreted *Sutton* as requiring courts to evaluate *un*corrected plaintiffs as though they were indeed employing mitigating measures, five critical passages or facts from the *Sutton* opinion support the approach this Article suggests. Because of these five statements and facts, courts should be willing to evaluate plaintiffs in their unmitigated condition if they are not using such mitigating or corrective measures, and these courts should not be concerned that they are disregarding the Supreme Court's pronouncements in *Sutton* that mitigating measures must be taken into consideration when making the disability determination.[143]

The five statements and facts are (1) the "if" language from *Sutton*;[144] (2) the "might," "could," or "would" passage from *Sutton*;[145] (3) the "individualized inquiry" language from *Sutton*;[146] (4) the "actually faces" language from *Sutton*;[147] and (5) the fact that all plaintiffs in the *Sutton* trilogy did indeed use mitigating measures.[148] Because of these five aspects of *Sutton*,

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140. *Id.* at 489-94. Interestingly, the plaintiffs may have lost this case because of attorney strategy. Specifically, the Court noted that the petitioners only alleged that they were regarded as being substantially limited in the major life activity of *working* and did not argue that they were regarded as being substantially limited in the major life activity of *seeing*. *Id.* at 490. While the Court noted that the petitioners did not make this "obvious argument," it did not comment on the probability of success of such an argument. *Id.*

141. *Id.* at 491-94.

142. *Id.* at 495. In his dissenting opinion, Justice Stevens argued that the plaintiffs in *Sutton* did indeed have disabilities. 527 U.S. at 513. He reached this conclusion, in part, because of the legislative history behind the Act and the fact that the executive agencies that had been charged with interpreting the Act had agreed that mitigating measures should not be looked at when making the disability determination. *Id.* at 499-503.

143. In addition to the statements and facts that will be addressed in this section, plaintiffs in this situation can also make the same "plain language of the statute" argument that the Court applied in *Sutton*. Specifically, because a plaintiff who is *not* using available mitigating measures has a physical or mental impairment that *substantially limits* (present indicative verb form) one or more of the plaintiff's major life activities, the plain language of the statute permits him to fall within the statutory definition of having a disability. As was addressed previously, this type of plain language argument was applied by the Court in *Sutton* when it concluded that someone who *does* use mitigating measures to correct an impairment does not have an impairment that substantially limits a major life activity. *See supra* text accompanying notes 132-37.

144. 527 U.S. at 482.

145. *Id.* at 482-83.

146. *Id.* at 483.

147. *Id.* at 488.

148. *Id.* at 475; Murphy v. United Parcel Serv., Inc., 527 U.S. 471, 519 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565 (1999).

courts should not be concerned that evaluating plaintiffs in an unmitigated state if they do not use mitigating measures will contradict the Supreme Court's holding in *Sutton*.[149]

1. The "If" Language from the Sutton *Opinion*

Although not *directly* commenting on the issue involved in this Article, the Court did touch on the issue of whether plaintiffs should be evaluated in a mitigated or corrected state, even if they are not presently using mitigating or corrective measures. Specifically, although some post-*Sutton* cases seem to have missed (or have decided to selectively ignore) this part of the opinion, the Court indicated that mitigating measures should be taken into consideration *if* they are being used.[150] When reaching its ultimate conclusion in this case, the Court stated that

> it is apparent that *if* a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is "substantially limited" in a major life activity and thus "disabled" under the Act.[151]

Of course, in *Sutton*, as well as in the two other cases in the *Sutton* trilogy, the plaintiffs were indeed using the available mitigating measures.[152]

Despite this "if" language, as will be addressed later in this Article, many courts since the *Sutton* decision have either required plaintiffs to use available mitigating measures or have essentially punished them for not doing so.[153] Thus, instead of giving meaning to the "if" language in *Sutton*, some courts read that word out of the Court's opinion.

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149. In their article, Professors Burke and Abel also concluded that some of these excerpts of the *Sutton* opinion might permit a pro-employee outcome when the employee does not use mitigating measures. *See* Burke & Abel, *supra* note 22, at 811.

150. 527 U.S. at 482.

151. *Id.* at 482 (emphasis added). For an analysis of how the "side effects" language from *Sutton* might apply to ADA cases, see Lauren J. McGarity, Note, *Disabling Corrections and Correctable Disabilities: Why Side Effects Might be the Saving Grace of* Sutton, 109 YALE L.J. 1161 (2000).

152. *Sutton*, 527 U.S. at 475; *Murphy*, 527 U.S. at 519; *Albertson's*, 527 U.S. at 565.

153. *See* Hewitt v. Alcan Aluminum Corp., 185 F. Supp. 2d 183, 189 (N.D.N.Y. 2001) (concluding that a plaintiff who suffered from post traumatic stress disorder did not have a disability within the meaning of the Act because, with medication, which the plaintiff did not take, he was not substantially limited in any major life activities); Tangires v. Johns Hopkins Hosp., 79 F. Supp. 2d 587, 596 (D. Md. 2000), *aff'd*, 230 F.3d 1354 (4th Cir. 2000) (holding that plaintiff was not disabled because, had she used the available medication, her asthma would not have substantially limited her in any major life activity).

2. *The "Might," "Could," or "Would" Language from* Sutton

The second portion of the *Sutton* opinion allowing for the approach suggested in this Article is the "might," "could," or "would" language from the opinion.[154] Specifically, when addressing the fact that the term "substantially limits" was in the present indicative form of the verb, the Court noted:

> [W]e think the language is properly read as requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability. A "disability" exists only where an impairment "substantially limits" a major life activity, not where it "might," "could," or "would" be substantially limiting if mitigating measures were not taken. A person whose physical or mental impairment *is corrected* by medication or other measures does not have an impairment that presently "substantially limits" a major life activity.[155]

This passage from *Sutton* contains several key points. First, the Court did not want the Act to cover individuals with "hypothetical" or "potential" disabilities.[156] This concern is inapplicable to plaintiffs who do not avail themselves of mitigating measures and therefore suffer the full effects of their mental or physical impairments. Specifically, in cases where individuals are not using a mitigating measure, they are not "hypothetically" or "potentially" substantially limited; they are *actually* substantially limited.

Second, the Court noted that an impairment is not covered under the Act if the impairment "might," "could," or "would" be substantially limiting *if* mitigating measures were not taken.[157] Again, the use of the word "if" should allow courts to evaluate uncorrected or unmitigated plaintiffs in their uncorrected or unmitigated state. Finally, and perhaps most importantly, the Court used the present indicative of the form of the verb "to be" when writing that "a person whose physical or mental impairment *is* corrected by mitigating measures" does not have a disability.[158] Because the plaintiffs who do not use medication or any other mitigating measure do have conditions that are *not* currently corrected by medication, once again, courts should not feel compelled to apply *Sutton* to these cases. Despite these distinguishing features of the *Sutton* opinion, many courts are still relying on that opinion to rule in favor of

154. 527 U.S. at 482.
155. *Id.* at 482-83 (emphasis added).
156. *Id.*
157. *Id.* at 482.
158. *Id.* at 483 (emphasis added).

employers when plaintiffs decide not to avail themselves of available mitigating measures.[159]

3. *The Individualized Inquiry Language from* Sutton

In *Sutton* the Court provided another passage that should allow courts to follow the approach suggested in this Article. Specifically, relying on its previous discussion in *Bragdon v. Abbott*,[160] the Court observed that "[t]he definition of disability also requires that disabilities be evaluated 'with respect to an individual' and be determined based on whether an impairment substantially limits the 'major life activities of such individual.'"[161]

This language provides yet another reason why courts should not feel constrained to evaluate plaintiffs in their mitigated or corrected condition if they are not using mitigating measures. Specifically, if courts were to look at individualized plaintiffs who were *not* using mitigating measures, it would be clear that those particular *individuals* were substantially limited in the major life activity at issue. Admittedly, this suggested approach could result in two people with the same condition receiving different treatment under the Act; however, courts have expressed on numerous occasions that such an individualized inquiry is precisely what the Act requires.[162]

4. *The "Actually Faces"*[163] *Language from* Sutton

Another aspect of the *Sutton* opinion suggests that courts can decide to evaluate plaintiffs in an unmitigated condition when the plaintiffs are not availing themselves of mitigating measures. Specifically, in response to a point made in the dissenting opinion, the Court observed that "[t]he use or nonuse of a corrective device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual with an impairment *actually faces* are in fact substantially limiting."[164]

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159. *See* Hein v. All America Plywood Co., 232 F.3d 482, 487 (6th Cir. 2000) (concluding that the plaintiff did not have a disability because he was at fault for not using medication to help his hypertension); Hewitt v. Alcan Aluminum Corp., 185 F. Supp. 2d 183, 189 (N.D.N.Y. 2001) (following *Tangires* and concluding that plaintiff who suffered from post traumatic stress disorder did not have a disability within the meaning of the Act because with medication, which the plaintiff did not take, he was not substantially limited in any major life activities); Tangires v. Johns Hopkins Hosp., 79 F. Supp. 2d 587, 596 (D. Md. 2000), *aff'd*, 230 F.3d 1354 (4th Cir. 2000) (holding that plaintiff was not disabled because, had she used the available medication, her asthma would not have substantially limited her in any major life activity).

160. 524 U.S. 624 (1998) (addressing whether an HIV-positive individual has a disability under the Act even if that person did not have any symptoms of AIDS).

161. *Sutton*, 527 U.S. at 483 (quoting 42 U.S.C. § 12102(2) (2000)).

162. For cases that have indicated that a case-by-case approach is appropriate in ADA cases, see *supra* note 23.

163. *Sutton*, 527 U.S. at 488.

164. *Id.* (second emphasis added).

Applying this language to cases where plaintiffs do *not* use mitigating measures and suffer the effects of that decision, it should be clear that those individuals do "actually face" limitations on their major life activities. For example, if the plaintiffs in *Sutton* did not use their corrective lenses, they certainly would have *actually faced* a substantial limitation in their ability to see.[165] Likewise, other plaintiffs who elect *not* to use mitigating measures *actually face* substantial limitations in their major life activities. Therefore, although many courts are reading *Sutton* to require an evaluation of a plaintiff in a mitigated condition even when he is not in such a condition, this passage is yet another one from *Sutton* that should allow courts to feel justified in refusing to apply *Sutton* to unmitigated plaintiffs.

5. *The Plaintiffs in the* Sutton *Trilogy All Employed Mitigating Measures*

In addition to the four passages discussed above, which provide a *legal* basis for reading *Sutton* in a way that would allow courts to evaluate uncorrected or unmitigated plaintiffs in their uncorrected or unmitigated state, there is also a *factual* reason why courts should not be concerned that evaluating an uncorrected or unmitigated plaintiff in his uncorrected or unmitigated condition would go against the Court's holdings in the *Sutton* trilogy. In the three cases making up the *Sutton* trilogy, all plaintiffs availed themselves of mitigating measures, thereby making those cases *distinguishable* from the situation addressed by this Article. Specifically, the plaintiffs in *Sutton* wore corrective lenses;[166] the plaintiff in *Murphy* used medication to control his high blood pressure;[167] and the plaintiff in *Albertson's* used a coping mechanism his brain developed to compensate for his impairment.[168] Because all plaintiffs in the *Sutton* trilogy availed themselves of mitigating measures, this fact should be sufficient to allow courts to distinguish those cases from the ones in which the plaintiffs did not avail themselves of the available mitigating measures.[169] Therefore, if a court is uncomfortable going against the "broad" interpretation of *Sutton*, there are certainly ample legal and factual justifications that would allow courts to do so without running afoul of the Court's holdings in the *Sutton* trilogy.

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165. *See id.*

166. *Id.* at 475.

167. *Murphy*, 527 U.S. at 519. This case will be discussed in greater detail, *see infra* Part IV.C.

168. 527 U.S. at 565. This case will be discussed in greater detail, *see infra* Part IV.D.

169. For a court making this point, see *Finical v. Collections Unlimited, Inc.*, 65 F. Supp. 2d 1032, 1037-38 (D. Ariz. 1999) (holding that plaintiff who did not avail herself of mitigating measures had a disability under the ADA because, in her actual, unmitigated state, she was substantially limited in a major life activity).

C. *The* Murphy *Opinion*

On the same day it decided *Sutton*, the Court also decided *Murphy v. United Parcel Service, Inc.*[170] In *Murphy*, as in *Sutton*, the Court ruled in favor of the defendant-employer and concluded that courts must take into account a plaintiff's mitigating measures when determining whether that individual has an impairment that substantially limits a major life activity.[171]

The employee in *Murphy* was a mechanic who suffered from high blood pressure.[172] However, when taking proper medication, he was able to participate in activities in which other individuals could engage without any significant restrictions.[173] Although his blood pressure exceeded DOT standards for the position in question, Murphy was erroneously granted certification and United Parcel Service hired him.[174] Eventually, after United Parcel Service realized Murphy's blood pressure was above DOT regulations, it terminated his employment.[175]

Murphy filed suit under the Act, alleging that United Parcel Service violated the Act when it terminated him.[176] The United States District Court for the District of Kansas granted summary judgment in favor of United Parcel Service, holding that Murphy did not have a disability because with his medication he was only limited in his ability to lift heavy objects.[177] The district court also rejected his "regarded as" argument.[178] The Court of Appeals for the Tenth Circuit affirmed, also concluding that in his medicated state, Murphy was not substantially limited in performing any major life activities.[179] As was the case in *Sutton*, the plaintiff in *Murphy* also availed himself of the mitigating measure available to correct his physical impairment.[180]

The Supreme Court then issued its opinion in the case. Based on its reasoning in *Sutton*, the Court affirmed the Tenth Circuit's judgment and held that mitigating measures must be taken into account when determining whether an individual has a disability under the Act.[181] Specifically, the Court observed the following:

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170. 527 U.S. 516 (1999).
171. *Id.* at 518-19.
172. *Id.* at 519.
173. *Id.*
174. *Id.* at 519-20.
175. *Id.* at 520.
176. *Murphy*, 527 U.S. at 520.
177. *Id.* The district court's opinion can be found in *Murphy v. United Parcel Service, Inc.*, 946 F. Supp. 872 (D. Kan. 1996).
178. *Murphy*, 527 U.S. at 520.
179. *Id.* The Tenth Circuit opinion can be found in *Murphy v. United Parcel Service, Inc.*, 141 F.3d 1185 (10th Cir. 1999).
180. *Murphy*, 527 U.S. at 519.
181. *Id.* at 521.

> The first question presented in this case is whether the determination of petitioner's disability is made with reference to mitigating measures *he employs*. We have answered that question in *Sutton* in the affirmative. Given that holding, the result in this case is clear. The Court of Appeals concluded that, when medicated, petitioner's high blood pressure does not substantially limit him in any major life activity. . . . Consequently, we conclude that the Court of Appeals correctly affirmed the grant of summary judgment in respondent's favor on the claim that petitioner is substantially limited in one or more major life activities and thus disabled under the ADA.[182]

As was the case in *Sutton*, this portion of the *Murphy* opinion can also be used to support the proposition that plaintiffs who do *not* use mitigating measures should *not* be evaluated as if they *did* use such measures. Specifically, the Court used the present indicative form of the verb "employ," allowing for the argument that if an individual is *not employing* mitigating measures, the mitigating measures should *not* be taken into consideration in the determination of whether that individual does indeed have a disability under the Act.[183] Despite this possible interpretation, very few courts have followed this reasoning.

The Court also rejected Murphy's argument that he was "regarded as" substantially limited in his ability to work.[184] As was the case in *Sutton*, Justices Stevens and Breyer dissented.[185]

Both *Sutton* and *Murphy* reached the same conclusion: because the plaintiffs were availing themselves of measures that corrected their impairments, they were not entitled to protection under the ADA.[186] Since these cases and *Albertson's*, which will be discussed in the next section of this Article, courts have broadened these opinions to preclude individuals from gaining protection of the Act even if they are *not* availing themselves of available mitigating measures and are suffering from the effects of their impairments—an issue that was not *directly* addressed by the Court in either *Sutton*, *Murphy*, or *Albertson's*.

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182. *Id.* (emphasis added).

183. *Id.*

184. *Id.* at 521-25.

185. *Id.* at 525. The dissenting opinion was very brief and only indicated that the two Justices were dissenting for the same reasons they did in *Sutton*. *Murphy*, 527 U.S. at 525 (Stevens, J., dissenting). In fact, the Justices believed this was an easier case than *Sutton* because of their belief that the plaintiff's impairment, severe hypertension, "easily falls within the ADA's nucleus of covered impairments." *Id.*

186. *See Sutton*, 527 U.S. at 475; *Murphy*, 527 U.S. at 519.

D. The Albertson's *Opinion*

The final case in the *Sutton* trilogy is *Albertson's, Inc. v. Kirkingburg*.[187] In *Albertson's* the Court addressed several ADA-related questions, one of which involved the issue of whether an individual whose body had developed a mechanism for dealing with and correcting a physical impairment meets the definition of having a disability under the Act.[188]

The plaintiff, Kirkingburg, had applied for a truck-driving position with the employer, Albertson's, and, despite not meeting the federal standard for sight for that particular position, he was hired.[189] After an injury and subsequent vision examination, the plaintiff was not allowed to come back to work because the examining physician correctly concluded that Kirkingburg's eyesight did not meet the federal standard.[190] Although he was eligible for a waiver of this requirement and eventually received one, Albertson's refused to rehire him.[191]

Kirkingburg sued Albertson's under the ADA.[192] In its motion for summary judgment, Albertson's argued that Kirkingburg was not otherwise qualified to perform his truck-driving responsibilities.[193] The district court granted the motion for summary judgment, ruling that Albertson's reasonably concluded that Kirkingburg could not meet the federal visual acuity standards.[194] The district court ruled that Albertson's was not required to allow Kirkingburg time to get the waiver as a reasonable accommodation.[195] The Ninth Circuit reversed.[196]

When the case reached the Supreme Court, the Court first addressed the issue of whether Kirkingburg did indeed suffer from a disability within the meaning of the Act.[197] The Court concluded that the Ninth Circuit made three errors when it analyzed the issue of whether the plaintiff suffered from a disability.[198] After acknowledging that Kirkingburg did suffer from an impairment (a vision impairment)[199] and that the impairment affected a major

187. 527 U.S. 555 (1999).
188. *Id.* at 565-66.
189. *Id.* at 558-59.
190. *Id.* at 559.
191. *Id.* at 559-60.
192. *Id.* at 560.
193. *Albertson's*, 527 U.S. at 560-61.
194. *Id.* at 561.
195. *Id.*
196. *Id.* The Ninth Circuit's opinion can be found at *Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228 (9th Cir. 1998). The Ninth Circuit "conclud[ed] that because Kirkingburg had presented 'uncontroverted evidence' that his vision was effectively monocular, he had demonstrated that 'the *manner* in which he sees differs significantly from the *manner* in which most people see.' That difference in manner . . . was sufficient to establish disability." *Albertson's*, 527 U.S. at 561 (quoting *Kirkingburg*, 143 F.3d at 1232).
197. *Albertson's*, 527 U.S. at 562.
198. *Id.* at 564-67.
199. *Id.* at 563.

life activity (seeing),[200] the Court then addressed whether the impairment *substantially limited* his major life activity of seeing.[201]

The Court noted that "the Ninth Circuit was too quick to find a disability."[202] The Court thought the Ninth Circuit equated the phrase "significant restriction" with "mere difference" and was therefore too quick in concluding that Kirkingburg had a disability.[203] Specifically, the Court emphasized that merely because an individual might not be able to perform a major life activity as well as other people, that difference does not equate to a disability under the Act.[204] Furthermore, the Court indicated that the limitation on the individual's major life activity must be substantial and not merely a slight inability.[205]

Second, and most relevant to the issue involved in this Article, the Court criticized the Ninth Circuit's decision to disregard an individual's ability to compensate for the impairment.[206] Specifically, because Kirkingburg's brain had developed a method to compensate for his visual impairment, the lower court should have used that fact to determine whether he was substantially limited in his ability to see.[207] The Court reasoned that under *Sutton*, mitigating measures should be taken into consideration when determining whether an individual has a disability; there should be no distinction between "artificial" mitigating measures, such as glasses or prostheses, and mitigating measures one's own body uses or creates to correct a physical impairment.[208] Finally, the Court reasoned that the Ninth Circuit was too quick to conclude Kirkingburg had a disability because the court did not evaluate him as an individual, on a case-by-case basis, as required by the Act.[209]

The *Albertson's* opinion is the final piece in the *Sutton* trilogy. In pertinent part, it stands for the proposition that mitigating measures, particularly those that are "natural" devices created and utilized by an individual's body, must also be evaluated when looking at whether an individual satisfies the Act's definition of a disability.[210] However, the Court did not address the specific issue of whether employers (and courts) can evaluate plaintiffs in a corrected or mitigated state even if they are not in one. Both before and after *Sutton*, various courts attempted to answer this question, and there have been different

200. *Id.*
201. *Id.*
202. *Id.* at 564.
203. *Albertson's*, 527 U.S. at 564-65.
204. *Id.* at 563-66.
205. *Id.* at 565.
206. *Id.* at 565-66.
207. *Id.*
208. *Id.*
209. *Albertson's*, 527 U.S. at 566-67.
210. *Id.* at 565-66.

outcomes to this situation.[211] It is this confusion that leaves plaintiffs in medical and legal limbo, not knowing what legal and professional consequences their medical decisions will have.

V. ILLUSTRATIVE CASES

*A. Pre-*Sutton *Cases Where Courts Required Plaintiffs to Use Mitigating Measures*

Even before the Supreme Court handed down its decisions in the *Sutton* trilogy, various lower courts had been dealing with cases where ADA plaintiffs sued their employers after deciding *not* to use available measures that would have corrected or alleviated their impairments.[212] Many of these courts took the pro-employer stance and evaluated these plaintiffs in a corrected state, even though it was not the state in which the plaintiffs actually existed.[213]

One such pro-employer case that addressed the specific issue of whether to evaluate a plaintiff in a mitigated condition even if he is not actually using available mitigating measures was *Pangalos v. Prudential Insurance Company of America*.[214] *Pangalos* involved an individual with severe ulcerative colitis who sued his former employer under the Act.[215] The plaintiff's medical

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211. *Compare* Hein v. All America Plywood Co., 232 F.3d 482, 487 (6th Cir. 2000) (concluding that the plaintiff did not have a disability because he was at fault for not using medication to help his hypertension), Hewitt v. Alcan Aluminum Corp., 185 F. Supp. 2d 183, 189 (N.D.N.Y. 2001) (following *Tangires*, *infra*, and concluding that plaintiff who suffered from post traumatic stress disorder did not have a disability within the meaning of the Act because with medication, which the plaintiff did not take, he was not substantially limited in any major life activities), Tangires v. Johns Hopkins Hosp., 79 F. Supp. 2d 587, 596 (D. Md. 2000) (holding that plaintiff was not disabled because, had she used the available medication, her asthma would not have substantially limited her in any major life activity), *aff'd*, 230 F.3d 1354 (4th Cir. 2000), Bowers v. Multimedia Cablevision, Inc., No. 96-1298-JTM, 1998 U.S. Dist. LEXIS 19319, at *11 (D. Kan. Nov. 3, 1998) (concluding that a plaintiff who suffered from depression but who did not take prescribed medication did not have a disability within the meaning of the Act), *and* Pangalos v. Prudential Ins. Co., No. 96-0167, 1996 U.S. Dist. LEXIS 15749, at *8 (E.D. Pa. Oct. 15, 1996) (holding that plaintiff who did not avail himself of mitigating measures did not have a viable claim under the ADA), *with* Finical v. Collections Unlimited, Inc., 65 F. Supp. 2d 1032, 1036-44 (D. Ariz. 1999) (holding that even though plaintiff refused to employ mitigating measures, she had a disability under the ADA because, in her unmitigated condition, she was substantially limited in her major life activity).

212. *See Bowers*, 1998 U.S. Dist. LEXIS 19319, at *11 (concluding that a plaintiff who suffered from depression but who did not take prescribed medication did not have a disability within the meaning of the Act); Haworth v. Procter & Gamble Mfg. Co., 1998 U.S. Dist. LEXIS 6625, at *17-18 (D. Kan. April 30, 1998) (noting that because the plaintiff was not actually employing mitigating measures, the Tenth Circuit's opinion in *Sutton* was not directly applicable); *Pangalos*, 1996 U.S. Dist. LEXIS 15749, at *8 (E.D. Pa. 1996) (holding that plaintiff who did not avail himself of mitigating measures did not have a viable claim under the ADA).

213. *See Bowers*, 1998 U.S. Dist. LEXIS 19319 , at *8; *Pangalos*, 1996 U.S. Dist. LEXIS 15749, at *8.

214. 1996 U.S. Dist LEXIS 15749, at *8.

215. *Id.* at *1-2.

condition caused him to suffer from severe attacks of uncontrollable diarrhea, hemorrhoids, and bloody stools.[216] The only permanent solution to this problem was the surgical removal of the colon.[217] Because of the radical nature of such a "cure,"[218] the plaintiff did not want to take this "drastic alternative."[219] According to the plaintiff, his employer violated the Act because it failed to make a reasonable accommodation for his condition.[220]

After addressing the symptoms of the plaintiff's condition and the accommodations he requested (such as providing him with a specially-equipped vehicle or transferring him to a position that did not require travel),[221] the court in *Pangalos* addressed the issue of whether the plaintiff did indeed suffer from a disability within the meaning of the Act.[222] Although not *directly* reaching an answer to this question, the court acknowledged that the plaintiff could have alleviated his impairment through surgery.[223] Additionally, the court chastised the plaintiff for not "seriously considering" the use of a diaper or other device that would have helped alleviate any emergency resulting from a sudden attack of diarrhea.[224] In its ultimate conclusion, the court determined that *either* the plaintiff was not disabled "because the disabling condition he allege[d] could readily be remedied surgically,"[225] or that the plaintiff was not a qualified individual with a disability.[226] However, the court did note that the plaintiff was the only one who could decide whether he would undergo the surgery.[227] Of course, the court implied that if the plaintiff was unwilling to opt for this surgery, he would lose protection of the Act.[228] This pre-*Sutton*, extremely pro-employer case was just one decision that held ADA plaintiffs to

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216. *Id.* at *1. For more information about this medical condition, see HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 1633-1645 (Anthony S. Fauci et al. eds., 14th ed. 1998) (1958) [hereinafter HARRISON'S].

217. *Pangalos*, 1996 U.S. Dist. LEXIS 15749 at *3. Patients are then required to wear a colostomy bag and remove waste through a surgically opened hole in the patient's abdomen. For more information about this surgical alternative, see HARRISON'S, *supra* note 216, at 1644.

218. *See* HARRISON'S, *supra* note 216, at 1644.

219. *Pangalos*, 1996 U.S. Dist LEXIS 15749, at *3.

220. *Id.* at *2.

221. *Id.* at *3-4. The court also addressed the accommodations that the employer had offered to the plaintiff, such as offering to provide him with a portable toilet, offering the plaintiff the opportunity to interview for other positions within the company in the Kentucky area, and looking for other positions within the company that did not require travel. *Id.* at *4-5.

222. *Id.* at *5-6.

223. *Id.* at *6.

224. *Pangalos*, 1996 U.S. Dist. LEXIS 15749, at *8. The plaintiff contended that he did not want to use an adult diaper to help his problem because the use of such a device would be too uncomfortable because it would require him to sit in his own excrement, which would result in rashes. *Id.*

225. *Id.* at *8.

226. *Id.*

227. *Id.* at *7.

228. *Id.* at *7-8.

this high standard and looked at plaintiffs in corrected or mitigated conditions even when they were not in such a condition.

Another pre-*Sutton* case in which a plaintiff did not avail himself of available mitigating measures was *Bowers v. Multimedia Cablevision, Inc.*[229] In *Bowers* the court was asked to determine whether an individual suffering from major depression, but who voluntarily refused to take medication to control his depression, suffered from a disability within the meaning of the Act.[230] Relying on the Tenth Circuit's opinion in *Sutton,* the court concluded the plaintiff did *not* satisfy the Act's definition of disability.[231] The court also indicated that it was ruling in favor of the employer because even if the plaintiff was able to prove that he had a disability under the Act, the employer properly terminated him.[232]

As expected, when addressing the issue of whether the plaintiff had a disability under the Act, the court in *Bowers* first looked at the definition of disability under the Act and the most recent case law interpreting that definition.[233] The plaintiff had argued that he suffered from a mental impairment that substantially limited his ability to function in social settings and to move around in public.[234] The court then concluded, for purposes of the pending motion, that those activities were major life activities and that the plaintiff's condition, *if left untreated,* substantially limited him in those activities.[235] However, the plaintiff's case failed once the court looked at the Tenth Circuit's opinion in *Sutton.*[236]

Specifically, the court looked at the Tenth Circuit's language from *Sutton* that "a plaintiff must prove his condition substantially limits a major life activity even after medication or other corrective or mitigating measures that the plaintiff uses are taken into account."[237] The court then noted the following:

> In this case, it is undisputed that plaintiff's condition does not substantially limit him in his major life activities when he takes his medication as prescribed. In fact, his one panic attack occurred after he had quit taking his medication without so informing his doctor. The plaintiff cannot gain

229. No. 96-1298-JTM, 1998 U.S. Dist. LEXIS 19319 (D. Kan. Nov. 3, 1998).
230. *Id.* at *11-12.
231. *Id.*
232. *Id.* at *12.
233. *Id.* at *9-12.
234. *Id.* at *10-11.
235. *Bowers*, 1998 U.S. Dist. LEXIS 19319, at *10-11.
236. *Id.* at *11.
237. *Id.* (citing Sutton v. United Air Lines, Inc., 130 F.3d 893, 902 (10th Cir. 1997)). Although this was obviously not from the Supreme Court's opinion in *Sutton*, the Tenth Circuit's opinion also uses the present indicative form of the verb "uses," which could be read as suggesting that plaintiffs who do *not* use mitigating measures should *not* be covered by the holdings from cases in which the plaintiffs did indeed use mitigating or corrective measures. *See Sutton*, 130 F.3d at 902.

> ADA protection by unilaterally deciding, without justification, not to use prescribed medication which corrects or alleviates his condition.[238]

Therefore, the court was placing a burden on an ADA plaintiff to take affirmative steps to remove himself from the protection of the Act.[239] As a result of placing this burden on potential ADA plaintiffs, plaintiffs are much less likely to prevail on their ADA claims.

Unlike the Eastern District of Pennsylvania in *Pangalos* and the District of Kansas in *Bowers*, a pre-*Sutton* court that appeared willing to take a more sympathetic, pro-plaintiff approach to this specific issue was the United States District Court for the District of Kansas in *Haworth v. Procter & Gamble Manufacturing Co.*[240] In *Haworth* an individual suffering from cervical radiculopathy[241] brought suit against his former employer, alleging violations of the Act.[242] Specifically, the plaintiff alleged his employer treated him differently, eventually terminated him, and refused to make a reasonable accommodation for him because of his disability.[243] After some discussion, the district court granted summary judgment in the defendant's favor.[244]

However, the court did not base its decision on the mitigating measures issue, but rather reached its conclusion after evaluating other flaws in the

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238. *Bowers*, 1998 U.S. Dist. LEXIS 19319, at *11. The above passage does provide some hope for future plaintiffs in this predicament. Specifically, because the court indicated that the plaintiff did not have justification for not using mitigating measures, perhaps a future court will interpret that statement to mean that if there is an adequate justification for refusing mitigating measures, then that person might be protected under the Act.

239. In another pre-*Sutton* case, the court in *Testerman v. Chrysler Corp.*, No. 95-240 MMS, 1997 U.S. Dist. LEXIS 21392, at *27-54 (D. Del. Dec. 30, 1997), addressed whether the plaintiff, who suffered from a back injury, depression, diabetes, and alcoholism, satisfied the definition of "disability" under the Act. After analyzing whether mitigating measures should be evaluated when determining whether a plaintiff can satisfy this definition, the court then looked at the the plaintiff's own failure to closely monitor his diabetes. *Id.* at *33-37. The court noted that the defendant "has raised a genuine dispute as to whether [plaintiff's] diabetes would have been substantially limiting if it had been more diligently treated." *Id.* at *49. This statement suggests that the plaintiff might lose protection under the Act if the defendant were able to show that if the plaintiff used the mitigating measures correctly, his condition would not have substantially limited any major life activity. However, the court did acknowledge that, had the reason for the plaintiff's failure to carefully treat his diabetes been based on another impairment, he would still be covered under the Act. *Id.*

240. No. 97-2149-EEO, 1998 U.S. Dist. LEXIS 6625 (D. Kan. Apr. 30, 1998).

241. Cervical radiculopathy is a disorder in which the patient experiences sharp back pain that radiates from the spine to the leg. The patient commonly experiences muscle spasms producing this sharp pain during common activities such as standing and ambulation. The muscle spasms also limit the patient's ability to bend forward. *See* HARRISON'S, *supra* note 216, at 74-76.

242. *Haworth*, 1998 U.S. Dist. LEXIS 6625, at *9, 13. The plaintiff also alleged his employer terminated him in response to his filing of a workers' compensation claim. *Id.* at *26.

243. *Id.* at *20-23.

244. *Id.* at *31-32.

plaintiff's case.[245] Specifically, the court ruled in favor of the defendant-employer because the plaintiff was not able to demonstrate that he was substantially limited in the major life activity of working.[246] In addition, the court concluded that the plaintiff was unable to prove that he was substantially limited in the major life activity of sleeping.[247] Finally, the court also rejected the plaintiff's claim because he was unable to establish a causal connection between his disability and the alleged acts of disability-based discrimination.[248]

When addressing the mitigating measures issue, the court recognized that the plaintiff could have used medications and other measures to mitigate his condition.[249] Based on the Tenth Circuit's opinion in *Sutton*, the employer argued that because the plaintiff's condition could have been treated with pain killers and epidural shots, he did not suffer from a disability.[250] On the other hand, the plaintiff argued that he did suffer from a disability under the Act because his physical impairment caused him to be substantially limited in his ability to work and sleep.[251]

Reading the Tenth Circuit's *Sutton* opinion in a more narrow way than that urged by the defendant,[252] the court in *Haworth* noted that the plaintiff did *not* utilize the available mitigating measures; therefore, the Tenth Circuit's opinion in *Sutton* was not *directly* on point.[253] The court also made a point of indicating that the plaintiff was not taking the available mitigating measures because of financial reasons.[254] Specifically, the court observed:

> It is an undisputed fact, for purposes of summary judgment, that plaintiff, due to lack of income and health insurance, has often gone months without adequate medication, and has put off additional doctor's treatments such as epidural blocks. Thus, the facts do not support the

245. *See id.* at *17-18.

246. *Id.* at *18-19.

247. *Haworth*, 1998 U.S. Dist. LEXIS 6625, at *19.

248. *Id.* at *19-20.

249. *Id.* at *9, 17-18.

250. *Id.* at *17. Interestingly, the defendant used the following language from the Tenth Circuit's opinion in *Sutton*:

> The determination of whether an individual's impairment substantially limits a major life activity should take into consideration mitigating or corrective measures *utilized by the individual*. In making disability determinations, we are concerned with whether the impairment affects the individual in fact, not whether it would hypothetically affect the individual without the use of corrective measures.

Id. (quoting *Sutton*, 130 F.3d at 902) (emphasis added).

251. *Id.* at *9, 17.

252. The defendant attempted to convince the court that the Tenth Circuit's ruling in *Sutton* required courts to evaluate the plaintiff with the use of mitigating measures, even if those measures were not being utilized by the plaintiff. *Haworth*, 1998 U.S. Dist. LEXIS 6625, at *17.

253. *Id.* at *18.

254. *Id.*

> conclusion that plaintiff "utilized" corrective measures. *Sutton* does not directly address the situation presented here. We hesitate to read *Sutton* as broadly as defendant, and therefore cannot conclude, as defendant does, that the holding in *Sutton* "conclusively establishes" that plaintiff does not have a disability.[255]

Therefore, although the court in *Haworth* did not ultimately rule in favor of the plaintiff, it did indeed express some sympathy toward the plaintiff and his inability to use mitigating measures.[256] Unlike *Pangalos* and *Bowers*, where the courts looked at mitigating measures even though the plaintiff was not using them, the *Haworth* court took a more restrictive view of the Tenth Circuit's opinion in *Sutton*. It distinguished a case when, although available, the plaintiff was not using the mitigating measure and therefore was suffering from the effects of his impairment; however, the *Haworth* court did not seem to require the plaintiff to use the mitigating measures in order to obtain the Act's protection, nor was it ready to penalize the plaintiff for making the decision not to use them.[257]

Therefore, as the conflicting opinions in *Pangalos*, *Bowers*, and *Haworth* indicate, before the *Sutton* trilogy, there was a question as to how to treat these ADA plaintiffs when they did not use available mitigating measures. Although the Court likely assumed that its decisions in *Sutton*, *Murphy*, and *Albertson's* would clear up this confusion, such certainty has not occurred in the three years since these opinions were handed down.[258]

*B. Post-*Sutton *Cases*

Although the Supreme Court made it clear that the mitigating measures employees *actually use* must be taken into consideration when determining whether the individuals suffer from a disability under the Act,[259] the Court did not address the precise situation that is the focus of this Article. Nonetheless, some courts have read the *Sutton* trilogy quite broadly and have concluded that regardless of whether the individual is utilizing the available mitigating

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255. *Id.* at *17-18.

256. *See id.*

257. *See id.*

258. As will be discussed later in this Article, not all courts agree as to how the *Sutton* trilogy applies to this particular situation. *Compare* Tangires v. Johns Hopkins Hosp., 79 F. Supp. 2d 587, 596 (D. Md. 2000) (holding that plaintiff did not have a disability under the ADA because, had she used the available medication, her condition would not have substantially limited her in any of her major life activities), *aff'd*, 230 F.3d 1354 (4th Cir. 2000), *with* Finical v. Collections Unlimited, Inc., 65 F. Supp. 2d 1032, 1036-44 (D. Ariz. 1999) (holding that even though plaintiff refused to employ mitigating measures, she had a disability under the ADA because in her unmitigated condition she was substantially limited in her major life activities).

259. *Sutton*, 527 U.S. at 488.

measure, it must be looked at when determining disability status.[260] Although not all courts have reached this pro-employer conclusion,[261] many courts have answered this question in this manner since *Sutton*. As a result, the pro-employer momentum of the *Sutton* trilogy seems to be picking up speed and could cause many plaintiffs who have current, actual disabilities (as opposed to potential or hypothetical disabilities) to lose protection of the Act. The approach proposed in this Article would put the brakes on the pro-employer *Sutton* momentum and would strike a reasonable balance between the needs of employers and employees.

1. Courts Adopting a Broad Interpretation of Sutton

One of the first post-*Sutton* cases to reach a United States court of appeals on the issue of whether mitigating measures should be used in the determination of whether an individual has a disability under the Act, even when the individual is not using such measures, was *Tangires v. Johns Hopkins Hospital*.[262] In *Tangires* the plaintiff was a long-time asthma sufferer who was suing under the Act and alleging that her employer failed to provide her with a reasonable accommodation, refused to promote her, and eventually terminated her as a result of her disability.[263] In addition to suffering from asthma, the plaintiff also had a pituitary adenoma, which was a type of tumor.[264] The plaintiff's doctors had prescribed two types of treatment for her asthma: inhaled steroids and bronchodialators.[265] Despite the fact that her doctors prescribed the steroids, the plaintiff was reluctant to use them out of

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260. *See* Hein v. All America Plywood Co., 232 F.3d 482, 487 (6th Cir. 2000) (concluding that the plaintiff did not have a disability because he was at fault for not using medication to help his hypertension); Hewitt v. Alcan Aluminum Corp., 185 F. Supp. 2d 183, 189 (N.D.N.Y. 2001) (following *Tangires* and concluding that plaintiff who suffered from post traumatic stress disorder did not have a disability within the meaning of the Act because with medication, which the plaintiff did not take, he was not substantially limited in any major life activities); Tangires v. Johns Hopkins Hosp., 79 F. Supp. 2d 587, 596 (D. Md. 2000) (holding that plaintiff was not disabled because, had she used the available medication, her asthma would not have substantially limited her in any major life activity), *aff'd*, 230 F.3d 1354 (4th Cir. 2000).

261. *See* Finical v. Collections Unlimited, Inc., 65 F. Supp. 2d 1032, 1036-44 (D. Ariz. 1999).

262. 79 F. Supp. 2d 587 (D. Md. 2000), *aff'd*, 230 F.3d 1354 (4th Cir. 2000). Because the opinion of the United States Court of Appeals for the Fourth Circuit contains very few facts and no legal analysis, the facts and reasoning of this case are coming from the information contained in the district court's opinion. In addition to the Fourth Circuit in *Tangires*, the Sixth Circuit faced a similar situation and ruled, based on *Murphy* and *Sutton*, that an individual who did not avail himself of available medication did not come within the protection of the Act. *See* Hein v. All America Plywood Co., 232 F.3d 482, 487 (6th Cir. 2000) (concluding that the plaintiff did not have a disability because he was at fault for not using medication to help his hypertension).

263. *Tangires*, 79 F. Supp. 2d at 589.

264. *Id.*

265. *Id.* at 595.

fear that such use would affect her pituitary adenoma.[266] There was testimonial evidence from the plaintiff's treating physician that inhaled steroids are the "gold standard" for the treatment of asthma and that the plaintiff would have benefitted from such treatment.[267]

When addressing the threshold issue of whether the plaintiff suffered from a disability under the Act, the court relied on *Sutton* and *Murphy* and concluded that the plaintiff must be evaluated in her medicated state, even though she was not using the steroids to control her impairment.[268] Ironically (and curiously), the court indicated that the determination must be made with reference to mitigating measures that the plaintiff *employs*.[269] The court then looked at medical testimony that asthma could be controlled by medications (steroids) and that the plaintiff was a difficult patient who at times refused to take the medications.[270]

The court then concluded that the plaintiff's refusal to take the steroids was based on a "subjective and unsubstantiated belief" that taking such medication would adversely affect her other ailment.[271] In its ultimate conclusion on the issue of whether the plaintiff suffered from a disability, the court decided that because the plaintiff voluntarily refused to take the medication that could have corrected her asthma, her asthma did not substantially limit her in any major life activity.[272] Therefore, the district court concluded that she did not have a disability under the Act.[273] Specifically, the court observed:

> On the record here, this Court concludes that plaintiff's asthma was treatable and that during her employment she intentionally failed to follow her physicians' recommendations that she take steroid medication. Since plaintiff's asthma is correctable by medication and since she voluntarily refused the recommended medication, her asthma did not substantially limit her in any major life activity.[274]

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266. *Id.* at 595-96.

267. *Id.* at 596.

268. *Id.* at 595-96.

269. *Tangires*, 79 F. Supp. 2d at 595. Of course, this is ironic because, unlike the plaintiffs in *Sutton* and *Murphy*, the plaintiff in *Tangires* was not employing the mitigating measure. *Id.* at 595-96. Once again, the use of the word "employs" suggests that the critical inquiry should be whether the plaintiff *actually uses* the mitigating measure. Nonetheless, the court ruled in favor of the employer and concluded that the unmitigated plaintiff must be evaluated as if she did indeed use mitigating measures. *Id.* at 595-96.

270. *Id.* at 595-96.

271. *Id.* at 596.

272. *Id.*

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

274. *Id.* at 596. Although the court was not clear on this issue, one could possibly read this case as not requiring a look at mitigating measures in *all* cases where plaintiffs do not avail themselves of the mitigating measures. Specifically, because the court in *Tangires* commented that the plaintiff was ignoring her doctor's advice and that she had an "unsubstantiated" fear of

The *Tangires* court's conclusion that the plaintiff was not substantially limited in any major life activity conflicted with various portions of *Sutton*. Specifically, the court did not take into account the "if" language from *Sutton*;[275] it did not take into account the "might," "could," or "would" language from *Sutton*;[276] it did not use the individualized approach required by *Bragdon* and *Sutton*;[277] it did not apply the "actually faces" language from *Sutton*;[278] and it also failed to distinguish the case from the *Sutton* trilogy on the basis that the plaintiffs in those cases availed themselves of the mitigating measures,[279] while the plaintiff in *Tangires* did not use the mitigating measure.[280] If the court had evaluated the plaintiff in her *actual* condition, rather than in the condition in which she *would have been* had she followed her doctor's advice, it would have most likely concluded that the plaintiff was indeed substantially limited in a major life activity. In essence, the court was speculating as to the condition in which the plaintiff *would have been* had she taken the medication, which is the type of speculation the Supreme Court in *Sutton* did not want courts to undertake.[281]

In addition to ruling in favor of the employer on this issue, the *Tangires* court also noted that an individual who does not avail herself of proper treatment is not a "qualified individual" under the Act.[282] Therefore, the district court granted summary judgment in favor of the employer.[283] The United States

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potential side effects of the recommended medication, perhaps in cases where a patient's fears are not unsubstantiated or in a situation where there is some other legitimate justification for not using the available mitigating measures, the court should not look at the mitigating measures. *See id.*

275. 527 U.S. at 482-83. *See* discussion *supra* Part IV.B.1.

276. *Id.* *See* discussion *supra* Part IV.B.2.

277. *Id.* at 483. *See* discussion *supra* Part IV.B.3.

278. *Id.* at 488. *See* discussion *supra* Part IV.B.4.

279. *See* discussion *supra* Part IV.B.5.

280. 79 F. Supp. 2d at 595-96.

281. *See Sutton*, 527 U.S. at 482-83.

282. 79 F. Supp. 2d at 596. Interestingly, the opinion on which the *Tangires* court relied for this proposition was *Roberts v. County of Fairfax*, 937 F. Supp. 541, 549 (E.D. Va. 1996). However, the federal regulation at issue in that case addressed an individual who refuses a reasonable accommodation offered by an employer, not an individual who refuses a medical option. In pertinent part, the C.F.R. section states:

> A qualified individual with a disability is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability.

29 C.F.R. § 1630.9(d), *quoted in Roberts*, 937 F. Supp. at 547-48.

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

Court of Appeals for the Fourth Circuit affirmed the district court's judgment.[284]

Another pro-employer, post-*Sutton* case addressing a plaintiff who decided not to take the required medicine for his condition was *Spradley v. Custom Campers, Inc.*[285] In *Spradley* the plaintiff suffered from a disorder that caused him to faint on numerous occasions while at work.[286] One of the questions before the court was whether this impairment[287] constituted a disability within the meaning of the Act.[288]

The court first concluded that the plaintiff's seizure disorder was indeed a physical impairment under the Act.[289] The court then indicated that it was going to address whether the plaintiff identified any major life activity that was substantially limited, but the court stopped short of doing so because it concluded that when evaluating the plaintiff with respect to the available mitigating measures, he would not have been substantially limited in his ability to perform major life activities.[290] Specifically, the court acknowledged that on both occasions when he passed out at work, the plaintiff was not taking Dilantin, the medicine prescribed by his physician to reduce the likelihood of having a seizure.[291]

Relying on *Murphy*, the companion case to *Sutton*, the court noted in dicta that the mitigating measures that were available to the plaintiff, even though he did not use them, would be taken into account when determining whether the plaintiff did indeed have a disability within the meaning of the Act.[292] Specifically, the court noted that "if a disorder can be controlled by medication or other corrective measures, it does not substantially limit a major life activity."[293] Based on this reasoning, the court indicated that the plaintiff might not have a disability under the Act.[294] Ironically, the court pointed out that the plaintiff's taking of Dilantin would not have necessarily eliminated the seizures, but would have made them a less likely occurrence.[295] Therefore, the court was speculating as to how the plaintiff's condition would have been affected by the medication.

Once again, as did the court in *Tangires*, the court in this case was apparently ignoring the Supreme Court's statements in, and the facts from, the

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284. Tangires v. Johns Hopkins Hosp., 230 F.3d 1354 (4th Cir. 2000).

285. 68 F. Supp. 2d 1225 (D. Kan. 1999).

286. *Id.* at 1228.

287. Later in the opinion, the court concluded that the plaintiff's disorder did indeed constitute a physical impairment under the regulations promulgated pursuant to the Act. *Id.* at 1232.

288. *Id.* at 1231.

289. *Id.* at 1232.

290. *Id.* at 1232-33.

291. *Spradley*, 68 F. Supp. 2d at 1232.

292. *Id.* at 1232-33.

293. *Id.* at 1232 (quoting Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 520-21 (1999)).

294. *Id.* at 1232-33.

295. *Id.* at 1233.

cases in the *Sutton* trilogy. Specifically, the court did not take into account the "if" language from *Sutton*;[296] it did not take into account the "might," "could," or "would" language from *Sutton*;[297] it did not use the individualized approach required by *Bragdon* and *Sutton*;[298] it did not apply the "actually faces" language from *Sutton*;[299] and it also failed to distinguish the case from the *Sutton* trilogy on the basis that the plaintiffs in those cases availed themselves of the mitigating measures,[300] while the plaintiff in this case did not use the mitigating measure.[301] The *Spradley* court's reasoning further opens the door to allowing courts to speculate about how an ADA plaintiff's body would respond to various mitigating measures, something courts should not be in the business of doing.

The most recent pro-employer, post-*Sutton* case that addressed this issue was *Hewitt v. Alcan Aluminum Corp.*[302] In *Hewitt* the plaintiff suffered from post traumatic stress disorder and alleged that he was fired because of this condition.[303] The court first needed to address the question of whether the plaintiff did indeed suffer from a disability and, thus, whether he was protected by the Act.[304]

The court first determined that there was "little doubt" that post traumatic stress disorder could indeed constitute an impairment.[305] The court looked at the symptoms of the disorder (depression, apprehension, paranoia, overreacting to difficult situations, inability to sleep, and high blood pressure), and although the plaintiff did not provide a medically substantiated diagnosis, the court concluded for purposes of the defendant's motion for summary judgment, the plaintiff indeed proved he suffered from an impairment.[306]

The court next addressed the issue of whether that impairment reached the level of a disability under the Act.[307] The plaintiff alleged that his unmedicated post traumatic stress disorder was an impairment that substantially limited his ability to work.[308] The defendant argued that the plaintiff did not have a disability under the Act, and even if he did have a disability under the Act, he was discharged from his employment for a legitimate reason.[309]

Specifically referencing *Sutton*, the court indicated that "[a] disability exists only where an impairment substantially limits a major life activity not

296. 527 U.S. at 482-83. *See* discussion *supra* Part IV.B.1.
297. *Id. See* discussion *supra* Part IV.B.2.
298. *Id.* at 483. *See* discussion *supra* Part IV.B.3.
299. *Id.* at 488. *See* discussion *supra* Part IV.B.4.
300. *See* discussion *supra* Part IV.B.5.
301. Spradley v. Custom Campers, Inc., 68 F. Supp. 2d 1225, 1232 (D. Kan. 1999).
302. 185 F. Supp. 2d 183 (N.D.N.Y. 2001).
303. *Id.* at 186.
304. *Id.* at 188.
305. *Id.*
306. *Id.*
307. *Id.*
308. *Hewitt*, 185 F. Supp. 2d at 189.
309. *Id.* at 188.

where it might, could or would be substantially limiting if mitigating measures were *not* taken."[310] The court continued, stating that "[a] person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently substantially limits a major life activity."[311] The court then noted that even with medication, an individual could still have a disability if the individual is substantially limited with the use of the medication or corrective device.[312]

The court then addressed the plaintiff's major problem in this case: the fact that in his allegations, he maintained that he was substantially limited only when his condition was left untreated.[313] In concluding that the plaintiff did not have a disability under these circumstances, the court noted that because the plaintiff would have been able to perform his major life activities with his prescribed medication, and he voluntarily chose not to take his medication, his post traumatic stress disorder did not substantially limit any major life activity.[314]

Relying on *Tangires*, the court noted, "[a] plaintiff who does not avail himself of corrective medication is not a qualified individual under the ADA."[315] The court then noted that the plaintiff's own statements that he could control his impairment with medication were "admissions that his medication successfully countered any debilitating effects of his asserted PTSD [post traumatic stress disorder] such that it did not substantially interfere with the specific major life activity of working."[316] Of course, this led the court to conclude that he did not have a disability under the Act.[317]

Once again, as did the courts in *Tangires* and *Spradley*, the court in *Hewitt* took a very broad interpretation of *Sutton* and looked at an individual who was not availing himself of an available mitigating measure as if he were doing so. This went against the Supreme Court's statements in *Sutton.* Specifically, the court did *not* take into account the "if" language from *Sutton*;[318] it did not take into account the "might," "could," or "would" language from *Sutton*;[319] it did not use the individualized approach required by *Bragdon* and *Sutton*;[320] it did not apply the "actually faces" language from *Sutton*;[321] and it also failed to distinguish the case from the *Sutton* trilogy on the basis that the plaintiffs in those cases availed themselves of the mitigating measures,[322] while the plaintiff

310. *Id.* (emphasis added).
311. *Id.*
312. *Id.* at 189.
313. *Id.*
314. *Hewitt*, 185 F. Supp. 2d at 189.
315. *Id.*
316. *Id.*
317. *Id.*
318. *Id.* at 482-83. *See* discussion *supra* Part IV.B.1.
319. 527 U.S. at 482-83. *See* discussion *supra* Part IV.B.2.
320. 527 U.S. at 483. *See* discussion *supra* Part IV.B.3.
321. 527 U.S. at 488. *See* discussion *supra* Part IV.B.4.
322. *See* discussion *supra* Part IV.B.5.

in this case did not use the mitigating measure.[323] Had it done so, the *Hewitt* court would have possibly reached the opposite conclusion with respect to the disability determination issue. Additionally, the *Hewitt* decision further allows courts to speculate about an individual's response to particular mitigating measures. As the Court in *Sutton* noted, courts must look at the *actual* limitations that a plaintiff faces, and in this case, as in *Tangires* and *Spradley*, the plaintiff did experience *actual* limitations as a result of his impairment.[324] Despite this, the courts in all three cases decided to take an overly expansive view of *Sutton* and concluded that none of the plaintiffs was eligible for ADA protection.[325]

2. *One Court That Has Limited the* Sutton *Opinion*

Despite the expansive view of the *Sutton* trilogy taken by most courts, at least one court has limited the reach of those opinions. Unlike the courts in *Tangires, Spradley,* and *Hewitt*, a post-*Sutton* opinion that took a more sympathetic, pro-plaintiff approach was *Finical v. Collections Unlimited, Inc.*[326] In *Finical* the plaintiff suffered from a hearing impairment, but after first attempting to use a hearing aid, she later refused to use it to correct her impairment.[327] The plaintiff was eventually terminated from her position, and she subsequently sued her employer under the Act.[328]

The reason the plaintiff gave in her deposition for not wearing the hearing aid was that when she used the device, the background noise the device picked up was "annoying."[329] Despite this somewhat unpersuasive reason for not using such a mitigating measure, the court ultimately decided that the plaintiff must be evaluated in her *uncorrected* state.[330] The defendant argued that the plaintiff must be evaluated with her hearing aids because medical testimony indicated that had she worn the devices, she would have benefitted from them.[331] The court rejected this argument and concluded that it was "flawed" because, despite the fact that hearing aids would have helped the plaintiff, she did not, in fact, use them.[332]

The court in *Finical* first addressed all three cases in the *Sutton* trilogy and observed that in each case, the plaintiffs did indeed use the available mitigating

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323. Hewitt v. Alcan Aluminum Corp., 185 F. Supp. 2d 183, 189 (N.D.N.Y. 2001).

324. *See id.*

325. Simply because a plaintiff proves that he has a disability under the Act does not mean that the plaintiff will necessarily win the case. He must still prove that he was a "qualified individual with a disability." *See* 42 U.S.C. § 12111(8) (2000).

326. 65 F. Supp. 2d 1032 (D. Ariz. 1999).

327. *Id.* at 1037.

328. *Id.* at 1035.

329. *Id.* at 1037.

330. *Id.* at 1037-38.

331. *Id.*

332. *Finical*, 65 F. Supp. 2d at 1037.

measures.[333] The court then addressed the three reasons the Supreme Court in *Sutton* used for its justification of why mitigating measures must be used in determining whether an individual has a disability within the meaning of the Act.[334] After addressing these issues, the court in *Finical* moved on to a discussion of the facts in the present case.[335]

Specifically, and relying on *Sutton*, the court first concluded that the individual, case-by-case analysis supported by the *Sutton* decision required the court to look at whether the plaintiff *actually used* the available mitigating measures.[336] The court determined that the proper inquiry evaluates the mitigating measures the plaintiff *actually* employs, and if the plaintiff does not employ any mitigating measures, she must be evaluated in that state.[337] Specifically, the court observed:

> As explained above, an individualized inquiry into the limitations faced by a claimant who uses corrective devices is inconsistent with an evaluation focusing on the limitations the claimant would face in an uncorrected state. Likewise, an individualized inquiry into the limitations faced by a claimant who does not use corrective devices is inconsistent with an evaluation focusing on the limitations the claimant would face in a corrected state. Both approaches frequently require speculation – with respect to the latter, speculation about the limitations a plaintiff would face if she used a corrective measure she presently does not use, and, with respect to the former, speculation about the limitations a plaintiff would face if she stopped using a corrective measure she presently uses. Neither approach assesses the limitations the individual actually faces in the present.[338]

As the quoted passage indicates, the court in *Finical* was most concerned with the *actual* limitations a plaintiff faced and did not want to speculate as to how a plaintiff would be if that plaintiff did take advantage of the available mitigating measure. Additionally, the court in *Finical* was interested in using the case-by-case approach required by *Bragdon* and *Sutton*.[339] Unlike the courts in *Tangires*, *Spradley*, and *Hewitt*, the court in *Finical* heeded the other statements in *Sutton*. Specifically, the court did take into account the "if" language from *Sutton*;[340] it took into account the "might," "could," or "would"

333. *Id.* at 1036-37.
334. *Id.* at 1037.
335. *Id.* at 1037-38.
336. *Id.*
337. *Id.* at 1038.
338. *Finical*, 65 F. Supp. 2d at 1038 (citations omitted).
339. *Id.*
340. *Id.* (citing *Sutton*, 527 U.S. at 482). *See* discussion *supra* Part IV.B.1.

language from *Sutton*;[341] it utilized the individual inquiry approach required by *Sutton* and *Bragdon*;[342] it applied the "actually faces" language from *Sutton*;[343] and it also distinguished the case from the *Sutton* trilogy on the basis that while the plaintiffs in those cases availed themselves of the mitigating measures, the plaintiff in *Finical* did not use the mitigating measure.[344] By doing so, it acknowledged the *actual* limitations the plaintiff faced and came to a conclusion that was not inconsistent with the *Sutton* trilogy. This narrow reading of *Sutton* is certainly the type of approach ADA plaintiffs (and their attorneys) are hoping more courts will follow.

However, the *Finical* court did not elaborate upon whether some reasons for not using available mitigating measures were better than other reasons.[345] For example, the court allowed the plaintiff's determination that hearing aids were "annoying" to release her from her duty to attempt to mitigate or alleviate her impairment.[346] This is the minority approach and a much more lenient approach than the ones used by the courts in the previously-discussed opinions in *Tangires, Spradley, Panaglos, Hewitt*, and *Bowers*, where the courts did not seem to care why the plaintiffs were not using mitigating measures to correct their impairments.

VI. MY SUGGESTED APPROACH AND HYPOTHETICAL EXAMPLES UNDER THAT APPROACH

As expressed earlier in this Article, my suggested approach to resolve this dilemma is *always* to evaluate plaintiffs who do not mitigate their impairments in their uncorrected or unmitigated condition; however, the reasons for a plaintiff's failure to mitigate will then be analyzed when determining what constitutes a reasonable accommodation and undue hardship.

The factors that the courts should consider include the cost of the mitigating measure, its effectiveness, its level of invasiveness, its level of risk, its potential side effects, any cosmetic issues associated with it, and any other factors that the employee evaluates when deciding not to use the mitigating measure. The more expensive, invasive, cosmetically unappealing, and risky the available mitigating measure becomes, then the more the employer must do to accommodate the employee. On the other hand, if the mitigating measure is inexpensive, effective, non-invasive, and relatively risk-free, the employer would not be required to do as much for the employee seeking the accommodation. Therefore, this "sliding scale" approach would require courts to look at the reasons behind the employee's decision not to use the available

341. *Id.* (citing *Sutton*, 527 U.S. at 482). *See* discussion *supra* Part IV.B.2.
342. *Id. See* discussion *supra* Part IV.B.3.
343. *Id. See* discussion *supra* Part IV.B.4.
344. *Finical*, 65 F. Supp. 2d at 1036-38. *See* discussion *supra* Part IV.B.5.
345. *See Finical*, 65 F. Supp. 2d at 1041.
346. *Id.* at 1037.

measure and then determine whether the accommodation is reasonable and whether it would place an undue hardship on the employer.

To apply this sliding scale approach, consider two individuals who suffer from severe impairments, but who, with some type of mitigating measure, would not satisfy the definition of disability under the Act. Assume in these cases that the individual with the "disability" asked for a reasonable accommodation under the Act, and the employer refused the request based on the belief that the employer is not required to accommodate the individual because the employee is not considered disabled under the Act.[347]

A. Crohn's Disease Hypothetical[348]

First, consider David, a thirty-five-year-old male who suffers from Crohn's Disease,[349] a gastrointestinal condition similar to the plaintiff's ulcerative colitis in the *Pangalos* case. David's symptoms include difficulty eating, chronic diarrhea, weight loss, and severe inflammation of parts of the intestines.[350] There are various treatment options for this condition, none of which will cure the condition. The medications available to David can indeed treat the condition to a point where he will not be substantially limited in any major life activity (such as eating), but they will not cure David of his disease. Some of the medications that have been used to treat this condition are Prednisone (a steroid) and 6-mp (a chemotherapy drug sometimes used by cancer patients).[351] Another possible way to treat this disease is through surgery; however, in most patients, the symptoms of Crohn's Disease reappear within a few years, and the surgery could also result in the need for a colostomy for the remainder of David's life.[352]

Due to concerns about potential side effects of Prednisone and 6-mp,[353] David does not want to start taking these medications. Additionally, because he does not want to endure the surgery and live with a colostomy, he does not want to explore that alternative either. The one accommodation he has requested is that his employer allow him to move his office next to the men's lavatory, which would allow him to quickly access the facility if and when his

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347. Admittedly, most employers would be willing to accommodate an employee in these situations. However, these examples are simply being used to demonstrate how my approach would work in a situation when an employer would not make such an accommodation.

348. This hypothetical is patterned somewhat after *Pangalos v. Prudential Insurance Co. of America*, No. 96-0167, 1996 U.S. Dist. LEXIS 15749 (E.D. Pa. Oct. 15, 1996).

349. For more information on Crohn's Disease, see HARRISON'S, *supra* note 216.

350. *See* HARRISON'S, *supra* note 216, at 1636-37.

351. For this and other information about this disease and the medications used to treat it, see Crohn's & Colitis Foundation of America, Crohn's Disease and Ulcerative Colitis: Medications, *at* http://www.ccfa.org (last modified Apr. 30, 2002) [hereinafter Crohn's Foundation].

352. HARRISON'S, *supra* note 216, at 1644-45.

353. For more information about the side effects of these and other medications, see Crohn's Foundation, *supra* note 351.

condition forces him to use it. Despite the fact that this accommodation would cost nothing to the employer (except perhaps the minimal expenses associated with moving an office), the employer decides to deny the request, believing that David is not disabled and therefore will not have a cause of action under the ADA.

Under the pro-employer interpretation of *Sutton*, as expressed in *Hewitt*, *Tangires*, and *Spradley*, David would most likely be unsuccessful in his ADA case. Requiring him to be evaluated in his medicated or corrected state, even though he did not use medication or elect to have surgery, would most likely result in a determination that he does not have a disability. In turn, this would result in the conclusion that the company would not be required to make any type of accommodation.

In addition to being inconsistent with both the Supreme Court's warnings in *Sutton* and the goals behind the ADA, this conclusion violates the underlying principle of fairness. First, this outcome is inconsistent with various portions of *Sutton*. The Court in *Sutton* specifically indicated that mitigating measures should be evaluated *if* the plaintiff is indeed using them.[354] As was indicated previously, in *Sutton*, as well as in *Murphy* and *Albertson's*, the plaintiffs were indeed utilizing mitigating measures.[355] In the current hypothetical, a broad interpretation of *Sutton* should not apply because David is *not* using the available mitigating measures. Therefore, although the courts following the *Tangires, Spradley,* and *Hewitt* approach would rule in favor of the company in this hypothetical, such a result is not required under *Sutton*.

The second warning from the *Sutton* opinion with which this outcome would be inconsistent is *Sutton's* requirement of an individualized, case-by-case approach that looks at the *actual*, rather than hypothetical or potential, limitation on any major life activities.[356] This approach was expressed in the *Bragdon* opinion, but was clearly made a part of the mitigating measures issue in *Sutton*.[357] In the present case, if David refuses to utilize the available mitigating measures, and if the disease is severe enough to substantially limit his ability to eat or substantially limit any other of David's major life activities, his impairment would presently, and not potentially or hypothetically, substantially limit a major life activity.[358] To follow the *Tangires*, *Spradley*, and *Hewitt* approach would violate this principle from *Sutton*.

The third reason why such a pro-employer interpretation of *Sutton* is inappropriate relates to the issue of speculation—the "might," "could," or

354. 527 U.S. at 482.

355. *Id.* at 475; *Murphy*, 527 U.S. at 519; *Albertson's*, 527 U.S. at 565.

356. 527 U.S. at 482-83, 488.

357. *Id.* (citing Bragdon v. Abbott, 524 U.S. 624, 641-42 (1998)).

358. This would also go against the warning in the *Sutton* opinion that "[t]he use or nonuse of a corrective device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual with an impairment *actually faces* are in fact substantially limiting." *Id.* at 488 (second emphasis added).

"would" language from the *Sutton* opinion[359] and the "actually faces" language from the *Sutton* opinion.[360] This is very similar to the "hypothetical" or "potential" disability issue that the Court warned about in *Sutton*.[361] Specifically, the issue of speculation addresses the point that if courts look at mitigating measures a plaintiff is not utilizing, then courts are in effect required to become medical experts who decide how the plaintiff's body would react if the plaintiff took advantage of drugs or other mitigating measures. While this might not be extremely difficult with respect to eyeglasses or a prosthetic limb, it would most certainly not be an easy calculation when determining how a plaintiff's body would react to any type of medication. In essence, looking at the plaintiff with respect to mitigating measures such as medicine, even if the plaintiff is not using them, will require courts to guess how a body will react and will allow courts to second-guess the impaired individual.[362] The court in *Finical* specifically used this reasoning as one justification for not applying *Sutton* to cases where a plaintiff is not availing himself of an available mitigating measure.[363]

In addition to being inconsistent with the statements in *Sutton*, evaluating David with respect to mitigating measures also defeats the underlying purpose behind the Act and allows employers, to a certain extent, to control their employees' healthcare decisions. With respect to the underlying goal of the Act, one such purpose is to require employers to reasonably accommodate individuals who need some type of accommodation.[364] In the present hypothetical, where David's employer could have provided a simple accommodation at little or no cost, not providing the accommodation would not violate the Act because, after considering mitigating measures, David does not have a disability and is therefore not entitled to an accommodation. This unjust result cannot be what Congress intended.

Second, with respect to the issue of allowing employers to exercise some control over their employees' healthcare decisions, adopting the pro-employer approach of *Tangires, Spradley,* and *Hewitt* would, to a certain extent, force employees to choose between potential protection under the Act and their jobs. Specifically, these cases force employees to use available mitigating measures even if they are concerned about the possible medical ramifications. It would require plaintiffs to decide between taking potentially harmful drugs and keeping their jobs. Again, this violates the broad remedial purpose behind the Act. Accordingly, courts should not be evaluating plaintiffs who do not use mitigating measures as if they were using such measures.

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359. *Id.* at 482.
360. *Id.* at 488.
361. *Id.* at 482-83.
362. *See* Finical v. Collections Unlimited, Inc., 65 F. Supp. 2d 1032, 1038 (D. Ariz. 1999).
363. *Id.*
364. *See* 42 U.S.C. § 12112(b)(5)(A) (2000).

Unlike applying the pro-employer approach followed by most courts, applying this Article's proposed approach to the previous hypothetical results in an outcome that appears to be reasonable to most observers. Specifically, because David was not taking any mitigating measures, the determination of whether he had a disability would be made without looking at any mitigating measures. Thus, he would be considered disabled under the Act. The issues then become whether, in light of the reasons why David is not taking the medication or undergoing surgery, the requested accommodation is reasonable and whether it would impose an undue hardship. Because the cost of the accommodation is minimal, and because the reasons for David's decision not to use mitigating measures are reasonable (fear of side effects and desire to avoid surgery), David's employer would be required to allow him to move his office. This outcome can hardly be considered objectionable.

Finally, such a result would be consistent with the relevant portions of *Sutton*. Specifically, such an approach takes into account the "if" language from *Sutton*;[365] it takes into account the "might," "could," or "would" language from *Sutton*;[366] it uses the individualized approach required by *Bragdon* and *Sutton*;[367] and it applies the "actually faces" language from *Sutton*.[368] The approach also recognizes that the facts from the cases in the *Sutton* trilogy are different because in those cases all plaintiffs used mitigating measures.[369] Therefore, the result reached is just and consistent with the Supreme Court's interpretation of the Act.

Now consider a slight modification of the facts of the previous hypothetical. Instead of having the available treatment options being Prednisone, 6-mp, or surgery, assume that David's Crohn's Disease could be controlled with an effective, inexpensive, and perfectly safe drug. However, because David does not want to bother being placed on a regimen of having to take two of these pills every day, he decides not to use the medication. He has asked his employer for the accommodation of having his office relocated next to the men's room or, in the alternative, having a private bathroom installed in his private office. Believing that David does not have a disability, his employer refuses both requests.

Under the pro-employer *Sutton* approach, because the medication would help him, David would most likely not be protected under the Act. However, unlike the previous hypothetical, David's case is not particularly sympathetic. Despite his situation's lack of sympathy, under this Article's proposed approach, David would still be evaluated in his unmitigated condition and most likely be found to have a disability. However, this does not mean that he would

365. 527 U.S. at 482. *See* discussion *supra* Part IV.B.1.

366. *Id. See* discussion *supra* Part IV.B.2.

367. *Id.* at 483. *See* discussion *supra* Part IV.B.3.

368. *Id.* at 488. *See* discussion *supra* Part IV.B.4.

369. *Id.* at 475; Murphy v. United Parcel Service, 527 U.S. 516, 519 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565 (1999). *See* discussion *supra* Part IV.B.5.

prevail in his ADA claim. Specifically, even though David would be considered disabled under the Act, when the court evaluates the reasonable accommodation and undue hardship aspects of the case, the court will be able to consider David's reason for not availing himself of the available mitigating measure. And, because his reason is not particularly persuasive, the court should require from David's employer little, if any, effort or cost to accommodate him. Thus, the court would reach a just result and would not shut the doors on other plaintiffs who have legitimate reasons for not availing themselves of available mitigating measures.

Additionally, such a result would be consistent with the relevant portions of *Sutton*. Specifically, such an approach takes into account the "if" language from *Sutton*;[370] it takes into account the "might," "could," or "would" language from *Sutton*;[371] it uses the individualized approach required by *Bragdon* and *Sutton*;[372] and it applies the "actually faces" language from *Sutton*.[373] The approach also recognizes that the facts from the cases in the *Sutton* trilogy are different because in those cases, all plaintiffs used mitigating measures.[374] Therefore, the result reached is a just one and is consistent with the Supreme Court's interpretation of the Act.

B. Vision Impairment Hypothetical[375]

Consider another application of this Article's proposed approach. Michelle is a twenty-five-year-old woman who has a vision impairment. Without the use of corrective lenses, her vision is substantially limited. However, if she were to use corrective lenses, such as eyeglasses or contact lenses, her vision would improve to a level where she would not be substantially limited in her ability to see. In this case, the only factor preventing Michelle from correcting her impairment is her dislike of the way she looks in glasses, and she does not like the way contact lenses feel in her eyes. She has requested that her employer provide her with a moderately priced device to use on her computer monitor that would enlarge the characters on her screen. Her employer has denied her request, believing that she is not disabled under the Act because she could easily correct her impairment by purchasing corrective lenses.

Unlike the situations when the potential plaintiffs did not avail themselves of mitigating measures due to cost, fear of side effects, or fear of invasive surgery, this fact pattern does not create a sense of unfairness to the plaintiff. Using the pro-employer approach of *Tangires*, *Spradley*, and *Hewitt*, Michelle

370. 527 U.S. at 482. *See* discussion *supra* Part IV.B.1.

371. *Id.* *See* discussion *supra* Part IV.B.2.

372. *Id.* at 483. *See* discussion *supra* Part IV.B.3.

373. *Id.* at 488. *See* discussion *supra* Part IV.B.4.

374. *Id.* at 475; *Murphy*, 527 U.S. at 519; and *Albertson's*, 527 U.S. at 565. *See* discussion *supra* Part IV.B.5.

375. This hypothetical is based on *Sutton*, 527 U.S. at 471, and *Finical v. Collections Unlimited, Inc.*, 65 F. Supp. 2d 1032, 1038 (D. Ariz. 1999).

would not be covered under the Act because she could correct her impairment. Of course, because the facts of this case do not give rise to a sense of injustice, the pro-employer *Sutton* approach seems reasonable. However, the approach supported by this Article would also result in the "right" outcome in this case.

Specifically, although Michelle would be considered to have a disability under the Act based on this suggested approach, when the court turns to the reasonable accommodation and undue hardship issues and looks at the rather unconvincing reasons why Michelle will not avail herself of the mitigating measures available to her, the court should reject her reasonable accommodation ADA claim. Because the available remedy is inexpensive, does not have negative side effects, is only being refused due to cosmetic reasons, and will provide very effective results, Michelle's employer will be required to do very little (if anything) to accommodate her request. This approach, while not closing the ADA doors on other potential plaintiffs, does not end in a result that is unreasonable to employers. This is yet one more example of why the approach suggested in this Article is indeed just and reasonable.

Additionally, such a result would be consistent with the relevant portions of *Sutton*. Specifically, such an approach takes into account the "if" language from *Sutton*;[376] it takes into account the "might," "could," or "would" language from *Sutton*;[377] it uses the individualized approach required by *Bragdon* and *Sutton*;[378] and it applies the "actually faces" language from *Sutton*.[379] The approach also recognizes that the facts from the cases in the *Sutton* trilogy are different because in those cases, all plaintiffs used mitigating measures.[380] Therefore, the result reached is just, and one consistent with the Supreme Court's interpretation of the Act.

Although an application of the pro-employer approach to the above-mentioned hypothetical does not strike a sense of unfairness into most people, a slight change in the facts could change this sense. Specifically, assume for a moment that corrective lenses will not help Michelle, but rather she would need eye surgery to correct her vision impairment. Although she knows this surgery would improve her vision to a close-to-normal level, she does not want to undergo the surgery because she is very concerned that the surgery might go wrong and cause other problems or further damage her eyes. Her belief is based to a certain extent on the fact that a former family member has been permanently injured as a result of undergoing similar surgery. Because she does not want to undergo the surgery, she asks for an accommodation at work. However, her employer, believing that she does not have a disability under the

376. 527 U.S. at 482. *See* discussion *supra* Part IV.B.1.

377. *Id.* *See* discussion *supra* Part IV.B.2.

378. *Id.* at 483. *See* discussion *supra* Part IV.B.3.

379. *Id.* at 488. *See* discussion *supra* Part IV.B.4.

380. *Id.* at 475; *Murphy*, 527 U.S. at 519; *Albertson's*, 527 U.S. at 565. *See* discussion *supra* Part IV.B.5.

Act because she could correct her visual impairment with this surgery, denies the request.

This slight change of facts makes the decision as to whether she should be protected under the Act much more difficult. Unlike the previous hypothetical, where Michelle could have simply put on corrective lenses to improve her sight, in this case she must undergo a surgery that could have a negative outcome. Using the pro-employer *Sutton* approach, Michelle would be outside of the Act's protection because she could correct her impairment by surgery. Once again, this would ignore some of the very important parts of the *Sutton* opinion. Specifically, it would ignore the "if" language from *Sutton*;[381] it would ignore the "might," "could," or "would" language from *Sutton*;[382] it would not use the individualized approach required by *Bragdon* and *Sutton*;[383] and it would ignore the "actually faces" language from *Sutton*.[384] Finally, this would also ignore the fact that in *Sutton*, *Murphy*, and *Albertson's*, the plaintiffs did indeed avail themselves of the mitigating measures.[385] Additionally, it would raise the speculation issue that often arises in this situation. Conversely, under the approach articulated and followed in *Finical*, Michelle would be protected under the Act because in her present state, she *is* substantially limited in her ability to see.[386] This would be consistent with the *Sutton* concerns about hypothetical and potential disabilities[387] and would also keep in mind that in the *Sutton* trilogy, all plaintiffs were indeed using the mitigating measures.[388]

Using the approach proposed in this Article would yield the appropriate result—one that will balance the employer's interests and the employee's interests. Specifically, Michelle would be evaluated in her unmitigated state at the initial determination of whether she has a disability. Because, in her unmitigated state, she is substantially limited in her ability to see, she would pass the initial hurdle. Then, when the court gets to the reasonable accommodation and undue hardship parts of the ADA analysis, the court will analyze the reasons behind Michelle's refusal to avail herself of the mitigating measures. The more rational Michelle's justification, then the more the employer will be required to provide as an accommodation. As previously suggested, this type of "sliding scale" approach at the reasonable accommodation stage of an ADA claim would strike a balance between the concerns of employers and employees. Although this approach does not provide as much certainty as the strict, pro-employer interpretation of *Sutton*, the purpose behind the ADA is to help individuals with disabilities, not to make

381. 527 U.S. at 482. *See* discussion *supra* Part IV.B.1.

382. 527 U.S. at 482. *See* discussion *supra* Part IV.B.2.

383. 527 U.S. at 483. *See* discussion *supra* Part IV.B.3.

384. 527 U.S. at 488. *See* discussion *supra* Part IV.B.4.

385. 527 U.S. at 475; *Murphy*, 527 U.S. at 519; *Albertson's*, 527 U.S. at 565. *See* discussion *supra* Part IV.B.5.

386. Finical v. Collections Unlimited, Inc., 65 F. Supp. 2d 1032, 1038 (D. Ariz. 1999).

387. 527 U.S. at 482.

388. *Id.* at 475; *Murphy*, 527 U.S. at 519; *Albertson's*, 527 U.S. at 565.

litigation predictable.[389] The approach suggested in this Article would also put the brakes on the pro-employer momentum of the *Sutton* opinion and would weigh both parties' interests in deciding reasonable accommodation cases brought under the Act. Certainly, this approach is not an unreasonable way of resolving these situations, and it provides ADA protection for those who are in desperate need of it.

VII. CONCLUSION

Since the Supreme Court's decisions in the *Sutton* trilogy, many courts have been looking at ADA plaintiffs in their corrected or mitigated state even if they were not availing themselves of the mitigating measures that would have corrected their impairments. As a result, many ADA plaintiffs are losing the protection of the Act even though they are, in their current unmitigated state, substantially limited in one or more of their major life activities. Because courts have concluded that these people do not come within the class of persons protected by the Act, they are not entitled to any accommodations by their employers. Very few courts have taken the opposite approach—the approach that evaluates plaintiffs in their *actual* condition when they are not using mitigating measures.

As this Article demonstrates, in cases involving requests for reasonable accommodations, courts should evaluate unmitigated plaintiffs in their actual state to determine whether they come within the ADA's definition of disability. Then, when determining what constitutes a reasonable accommodation or undue hardship, courts should look at the reasons behind the plaintiffs' decisions not to correct their impairments. The factors the courts should look at include the cost of the mitigating measure, its effectiveness, its side effects, the degree of invasiveness, the cosmetic ramifications of the mitigating measures, and any other reasons for the plaintiffs' decisions not to use the available mitigating measure. The more risky, the more invasive, and the more expensive the treatment option becomes, then the more of an accommodation the employer should be required to provide. On the other hand, as the treatment option becomes less risky, less invasive, less costly, and more effective, the employer should be required to make a lesser accommodation. This would protect plaintiffs who have legitimate concerns over treatment options and would also protect employers from unreasonable employees who are unwilling to take responsibility for dealing with their physical or mental impairments.

Despite the pro-employer position most courts have taken on this issue, the approach suggested in this Article is certainly an acceptable reading of the *Sutton* trilogy and would certainly further the goals behind the Act.

Because such an approach would be consistent with the Act, the Court's interpretation of the Act, the EEOC's and the Department of Justice's initial

389. *See* 42 U.S.C. § 12101 (2002).

interpretation of the Act, the legislative history behind the Act, and because such an approach would result in the right outcome more often than the approach being used by the courts that have adopted a broad interpretation of *Sutton*, courts should seriously consider looking at the mitigating measures issue at the reasonable accommodation and undue hardship stages of an ADA case rather than at the initial stage of determining whether an individual has a disability. Such an approach would keep the ADA doors open to those who need the ADA's protection and would still protect employers' interests when unreasonable employees who can easily help themselves seek to take advantage of this landmark legislation.