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HAS THE AMERICANS WITH DISABILITIES ACT FALLEN ON DEAF EARS? A POST-SUTTON ANALYSIS OF MITIGATING MEASURES IN THE SEVENTH CIRCUIT

MOLLY M. JOYCE*

INTRODUCTION

When Congress passed the Americans with Disabilities Act1 ("ADA") in 1990, it was lauded as a statute that would bring long-overdue equal protection to some forty-three million2 disabled Americans. Yet as the ADA recently enjoyed its tenth anniversary, commentators question whether the statute is meeting all of its intended goals.4 Although most agree that the ADA has fostered great progress for the disabled in the areas of public accommodations and public services,5 many observers question whether Title I of the ADA,6 the provision prohibiting employment discrimination, ade-

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2. 42 U.S.C. § 12101(a)(1); see also Sutton v. United Airlines, Inc., 527 U.S. 471, 484-88 (1999) (finding that Congress most likely settled on this figure by first relying on a 1988 study conducted by the National Counsel on Disability that found 37.3 million Americans had "functional limitations," and then adding the additional 5.7 million to include those who probably were excluded from the initial study).
3. See Statement on Signing the Americans with Disabilities Act of 1990, PUB. PAPERS (JULY 26, 1990), in which President George H.W. Bush stated that the ADA would “open up all aspects of American life to individuals with disabilities.”
5. 42 U.S.C. § 12181-12189. According to Title III of the ADA, “[n]o individual shall be discriminated against on the basis of a disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” § 12182(a). For example, “failure to remove architectural barriers... communication barriers that are structural in nature... and transportation barriers” are considered discriminatory. § 12182(2)(a). See also Thomas W. Snyder, Ten Year Analysis: Is the ADA Meeting Its Goals?, 14 CBA REC. 36 (2000).
quately protects all of those whom Congress originally intended to cover.⁷

One of the biggest hurdles that employment discrimination plaintiffs face is initially proving that they qualify as "disabled" under the statute. Courts have so narrowly interpreted the term "disability," which is defined by the ADA as "a physical or mental impairment that substantially limits one or more of the major life activities,"⁹ that employment discrimination plaintiffs are left with a success rate as bleak as plaintiffs struggling for prisoner's rights.¹⁰ For example, the Seventh Circuit¹¹ has found that cirrhosis of the liver caused by chronic Hepatitis B is not a disability,¹² asthma, osteoporosis and a weakened immune system are not disabilities,¹³ and, in one case, an amputated leg failed to qualify as a disability.¹⁴ Statistically speaking, one researcher found that of the 117 cases brought before the Seventh Circuit in 2000 claiming employment discrimination under the ADA, only three plaintiffs prevailed on the merits of their cases.¹⁵

Arguably the most devastating blow to plaintiffs claiming that they are substantially limited in a major life activity, and thus disabled under the ADA, is the Supreme Court's 1999 decision in Sutton v. United Airlines, Inc.¹⁶ The Court held in Sutton that when determining whether a plaintiff is disabled, courts must take into consideration the mitigating or corrective measures that a plaintiff relies upon to alleviate the symptoms of his or her impairment, such as medications,

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⁷ See Parmet, supra note 4.
⁸ See 42 U.S.C. § 12102(2).
⁹ 42 U.S.C. § 12102(A). Disability is also defined as "a record of such an impairment" under § 12102(2)(B) and "being regarded as having such an impairment" under § 12102(2)(C).
¹⁰ See Colker, supra note 4 at 100.
¹¹ This Note focuses exclusively on the effects of Sutton in the Seventh Circuit because the sheer volume of ADA case law would be intractable in the space of a note.
¹⁴ Moore v. County of Cook, No. 99-4202, 2000 WL 989618, at *3 (7th Cir. 2000). In Moore, the jury found that the plaintiff was not disabled. When the plaintiff challenged the jury instructions on appeal as being vague, the court found that the instructions did not lead to a "miscarriage of justice."
¹⁵ Amy L. Allbright, 2000 Employment Decisions Under the ADA Title I—Survey Update, 25 MENTAL AND PHYSICAL DISABILITY L. REP. 508, 510 (2001). When all thirteen federal circuits were analyzed together, 96.4 percent of the cases resulted in employer wins and 3.6 percent in employee wins. Id. at 509.
¹⁶ 527 U.S. 471.
assistive devices or prostheses. For example, after Sutton, most courts have found that diabetics who are able to control their impairments through the use of insulin, a corrective measure, are not disabled under the ADA. What the Sutton Court failed to consider was that plaintiffs claiming that their employer interfered with or discriminated against them on the basis of the actual mitigating measure itself, are not protected under the ADA. At first glance, it would seem that if an employer refuses to allow a diabetic employee to take short insulin breaks on the job to control the impairment, the employee would have a legitimate discrimination claim under the ADA. Yet, under Sutton, before determining the discrimination claim, the court would be forced to find that, with the help of the insulin, the diabetic is not disabled and thus, not protected under the ADA. Certainly Congress did not intend such a disparate result when it enacted the statute that promised to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." This Note proposes that the protection of the ADA should be extended to plaintiffs whose employers interfere with or discriminate on the basis of their using mitigating measures, without which they would be considered disabled. Part I of this Note will investigate the language of the ADA and discuss the Supreme Court's process, which courts follow to determine whether a plaintiff is disabled, namely through the Bragdon v. Abbott and Sutton v. United Airlines, Inc. opinions. Part II of this Note will consider how the Seventh Circuit

17. Id. at 475. On the same day that Sutton was decided, two other related decisions were announced. See Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999). In Murphy, the plaintiff claimed that he was disabled because he had hypertension that, when untreated, significantly restricted his major life activity of working. 527 U.S. at 521. The Court, noting that the issue was settled by Sutton, affirmed the appellate court's holding that the plaintiff was not disabled. Id.

In Kirkingburg, the plaintiff, who had monocular vision, was fired from his job as a truck driver once the employer learned of his impairment. 527 U.S. 555. The Court, in applying the mitigating-measures test laid out in Sutton, overturned the Ninth Circuit's decision that the plaintiff was substantially limited in the major life activity of seeing. Id. at 565. The Court determined that because the plaintiff's brain had developed a subconscious mechanism for coping with his monocular vision, a mitigating measure in a sense, he was not disabled for the purposes of the ADA. Id.


19. Id.


22. 527 U.S. 471.
has applied the Supreme Court's analysis of the ADA to plaintiffs who claim that they are disabled; it will especially focus on the sometimes inconsistent effect that the Supreme Court's decision in *Sutton*\(^23\) has had on cases in the Seventh Circuit. Finally, in Part III the author argues that, in the wake of society's ever-increasing reliance upon medication and assistive devices, courts should first consider whether the employer interfered with the plaintiff's corrective measures or discriminated against the plaintiff due to plaintiff's use of corrective measures. If the court finds that there is a reasonable likelihood that the employer is discriminating on the basis of the plaintiff's use of a corrective measure or is refusing to allow the plaintiff to use a corrective measure on the job, the court should disregard the mitigating measure when determining whether the plaintiff is disabled in order to successfully reach the merits of the discrimination claim.

I. THE LEGISLATIVE HISTORY OF THE ADA AND HOW THE SUPREME COURT HAS INTERPRETED ITS LANGUAGE

An investigation of the legislative history and congressional intent behind the statute is necessary to fully appreciate the disparities that have arisen in the Seventh Circuit's treatment of Title I ADA plaintiffs. Also crucial is the Supreme Court's analysis of the statutory language, most notably in the dispositive cases of *Bragdon*\(^24\) and *Sutton*.\(^25\) Undoubtedly, the legislative history and the Supreme Court's interpretation of the ADA's language have paved the narrow road which courts have been forced to travel when determining disability.

A. The Legislative History and Purpose of the ADA

Congress enacted the ADA to protect millions of disabled Americans\(^26\) from widespread discrimination, which it identified as a "serious and pervasive social problem."\(^27\) Congress recognized the disabled "as a group [that] occup[ies] an inferior status socially, economically, vocationally, and educationally."\(^28\) In terms of employ-

\(^{23}\) *Id.*
\(^{24}\) *Bragdon*, 524 U.S. 516.
\(^{25}\) *Sutton*, 527 U.S. 471.
\(^{26}\) 42 U.S.C. § 12101(a)(2). Congress recognized that some forty-three million Americans were disabled.
\(^{27}\) 42 U.S.C. § 12101(a)(2).
ment, the legislature found that about 8.2 million disabled people wanted to work but were simply unable to find jobs, often because employers refused to hire them based on irrational myths and stereotypes about the disabled.\textsuperscript{29} Congress acknowledged that individuals with disabilities who did work encountered discrimination in the workplace. For example, Congress, relying on a 1989 US Census Bureau study, found that men with disabilities earned 36 percent less than nondisabled men, and women with disabilities earned 38 percent less than their nondisabled counterparts.\textsuperscript{30} In addition to the disparity in pay, a congressional subcommittee found that employers discriminated against the disabled by intentionally setting job standards that were impossible for many disabled persons to attain and by refusing to make reasonable accommodations for the disabled.\textsuperscript{31} In light of these findings, Congress recognized the necessity of a comprehensive statute that would encourage the disabled to pursue meaningful employment while also challenging employers to debunk irrational stereotypes that prevented them from employing the disabled.\textsuperscript{32}

The ADA was not the first Congressional effort to combat discrimination against the disabled. Section 504 of the Rehabilitation Act of 1973\textsuperscript{33} prohibits federally funded organizations from discriminating against the disabled.\textsuperscript{34} It became apparent by the early 1990's, however, that the scope of the Rehabilitation Act was too narrow and that discrimination was still rampant. Congress responded by enacting the ADA, which was designed to include not only private but also

\textsuperscript{29} Id. at 314 (citing The ICID Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream, at 47-50); see also Lisa Eichhorn, Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act, 77 N.C. L. REV. 1405, 1414 (1999) (arguing that "the disadvantaged social and economic status of many disabled people has resulted not from their disabilities themselves—which are merely artificial constructs—but rather from societal discrimination against those viewed disabled").


\textsuperscript{31} Id. at 315 (citing testimony presented to the Subcommittees by Arlene Mayerson of the Disabilities Rights Education and Defense Fund).

\textsuperscript{32} See 42 U.S.C. § 12101(a)(7). Congress found that "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations [and] subjected to a history of purposeful unequal treatment...resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society."


\textsuperscript{34} Id.
public employers, and to prohibit discrimination against qualified individuals with a disability. When enacting the ADA, Congress noted that the "ADA incorporates many of the standards of discrimination set out in regulations implementing section 504 of the Rehabilitation Act."

When drafting Title I of the ADA, Congress was careful to balance the interests of disabled persons in achieving equality in the workplace against the interests of private employers in maintaining an effective workforce. Under Title I of the ADA, employers with fifteen or more employees are proscribed from discriminating "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions and privileges of employment." But on the other hand, the statute only protects those workers who are "qualified individuals with a disability," in other words, those who "with or without reasonable accommodation can perform the essential functions of the employment position." Under this scheme, employers are not required to make accommodations for disabled employees unless they are "reasonable" and do not place undue financial hardship on the employer. In general, courts have not overlooked employers' needs under the ADA. Chief Judge Posner of the Seventh Circuit exhibited concern for the interests of the employer when he determined that when "an impairment interferes with the individual's ability to per-

35. 42 U.S.C. § 12111(2) defines a covered entity as "an employer, employment agency, labor organization, or joint labor-management committee."

36. 42 U.S.C. § 12111(8). A "qualified individual with a disability" is identified as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."


38. Id. at 337. When describing the purpose of requiring an employee to be able to perform the "essential functions" of the employment position, Congress noted, "The point of including this phrase... is to ensure that employers can continue to require that all applicants and employees, including those with disabilities, are able to perform the essential, i.e., the non-marginal functions of the job in question."


40. 42 U.S.C. § 12111(8).

41. See 42 U.S.C. § 12111(9). The term "reasonable accommodation" may include "a) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and b) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities."

42. See § 12111(10)(a), defining "undue hardship" as "an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B)." Some of the factors set forth in (B) include the nature and cost of the accommodation, financial resources of the facility, the size of the entity and the entity's type of operation.
form up to the standards of the workplace, or increases the cost of employing him, hiring and firing decisions based upon the impairment are not ‘discriminatory’ in a sense closely analogous to employment discrimination on racial grounds.”

To establish a prima facie case of discrimination under the ADA, a plaintiff must prove that they are a qualified individual with a disability, that they are otherwise qualified to perform the essential functions of the job, and that they were discriminated against on the basis of their disability. The ADA defines an individual with a disability as one who: “(A) has a physical or mental impairment that substantially limits one or more of that individual’s major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.” This Note will focus exclusively on subsection (A) because a large majority of the disability controversy centers on this definition. The Supreme Court in Bragdon discussed in detail how courts should analyze whether a plaintiff is disabled under subsection (A).

B. The Bragdon Disability Framework

Although the definition of disability under the ADA is simple to articulate, courts have struggled with applying the language of the statute, particularly in determining what constitutes a “major life activity” and to what extent a plaintiff is considered “substantially limited.” During this struggle, the Supreme Court held in Bragdon that reproduction is a major life activity and set forth a three-step analysis that courts should utilize in determining whether an individual has “a physical or mental impairment that substantially limits one or more of that individual’s major life activities,” and is thus disabled for the purposes of the ADA. First, the trier of fact must consider whether the plaintiff’s alleged disability is a physical or mental impairment. Second, the court must determine whether the impairment substantially limits the plaintiff in performing a major life activity, which re-

43. Vande Zande v. State of Wis. Dept. of Admin., 44 F.3d 538, 541 (7th Cir. 1995).
44. See Moore v. J.B. Hunt Transp., Inc., 221 F.3d 944, 950 (7th Cir. 2000).
46. 524 U.S. 624.
47. Id.
49. Bragdon, 524 U.S. at 631 (reasoning that “[f]irst, we consider whether respondent’s HIV infection was a physical impairment”).
quires the court to further decide what qualifies as a major life activity and must define substantial limits.\textsuperscript{50}

The \textit{Bragdon} Court began its analysis by investigating whether the plaintiff was, in fact, physically or mentally impaired.\textsuperscript{51} The Court deferred to regulations issued by the Department of Health and Human Services to define a physical or mental impairment as:

\begin{quote}
(A) 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

(B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.\textsuperscript{52}
\end{quote}

The commentary accompanying these regulations contained a nonexhaustive list of conditions that constituted physical impairments, including cerebral palsy, epilepsy, multiple sclerosis, cancer, heart disease and alcoholism.\textsuperscript{53} Although the plaintiff's claimed impairment, HIV-positive status, was not on the Department of Health's list, the Court held that "HIV infection satisfies the statutory and regulatory definition of a physical impairment during every stage of the disease."\textsuperscript{54}

The \textit{Bragdon} Court then moved to the next step, which is determining whether the impairment affects a major life activity.\textsuperscript{55} The plaintiff in \textit{Bragdon} claimed that because she was HIV-positive, she was limited in the major life activity of reproduction.\textsuperscript{56} The Court deferred to the Rehabilitation Act regulation's list of major life activities, which includes "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."\textsuperscript{57} The Court, insisting that the list was illustrative, not exhaustive, found that "the plain meaning of the word

\textsuperscript{50} \textit{Id.} (explaining that "we identify the life activity upon which respondent relies... and determine whether it constitutes a major life activity under the ADA," and then, "tying the two statutory phrases together, we ask whether the impairment substantially limited the major life activity").

\textsuperscript{51} \textit{Id.} at 632.

\textsuperscript{52} \textit{Id.} at 632-33 (citing 45 C.F.R. § 84.3(j)(2)(i) (1997)).

\textsuperscript{53} \textit{Id.} at 633.

\textsuperscript{54} \textit{Id.} at 637.

\textsuperscript{55} \textit{Id.} at 633.

\textsuperscript{56} \textit{Id.} at 638.

\textsuperscript{57} \textit{Id.} at 638-39 (quoting 45 C.F.R. § 84.3(j)(2)(ii) (1997); 28 C.F.R. § 41.31(b)(2) (1997)).
HAS THE ADA FALLEN ON DEAF EARS?

The final prong of the Bragdon disability analysis is determining whether the plaintiff's physical or mental impairment substantially limits the major life activity that the plaintiff asserts. The Court held that the plaintiff was substantially limited in reproduction because she posed a risk of infection to the man who would impregnate her as well as to the child she might conceive. While the Bragdon Court found with relative ease that the HIV-positive plaintiff was substantially limited in the major life activity of reproduction, it left lower courts still struggling to determine whether less life-threatening impairments cause substantial limitations in major life activities. Indeed, the definition of a major life activity is still evolving.

The Court in Bragdon solidified the analysis for determining whether a plaintiff is disabled under the ADA. Bragdon demonstrated that the court should break down into a three-step inquiry the definition of disability under subsection (A)—a physical or mental impairment that substantially limits a major life activity. The plaintiff must establish each step before continuing on to consider the merits of the plaintiff's discrimination claim.

C. Sutton's Consideration of Mitigating Measures

Arguably the most devastating blow to plaintiffs trying to show that they are disabled under the ADA was the Court's 1999 decision in Sutton. In Sutton, the Court ruled that in determining whether a plaintiff is substantially limited in a major life activity, a court must consider the plaintiff's use of mitigating measures that alleviate or

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58. Id. at 638.
59. Id. at 638-39.
60. Id. at 639.
61. Id. at 639-41.
62. See id. at 639-44 for a discussion of "substantially limited."
63. Most recently, the Supreme Court in Toyota Motor Manufacturing v. Williams insisted that "'major life activities' refers to those activities that are of central importance to daily life." 534 U.S. 184 (2002). The Court held that "[w]hen addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job." Id.
64. 42 U.S.C. § 12102(2)(A).
correct the impairment. Ruling on an issue that had once deeply divided the circuit courts, the Supreme Court in *Sutton* changed the landscape of ADA analysis.

In *Sutton*, the plaintiffs were twin sisters who applied for jobs as airline pilots with United Airlines. Even though their vision could be corrected to 20/20 with contact lenses, United refused to hire the plaintiffs because they had uncorrected vision of 20/200 in their right eyes and 20/400 in their left eyes. In its analysis, the Court refused to follow the EEOC’s “Interpretive Guidance,” which provided that determination of whether an individual is disabled should be made without consideration of mitigating measures, such as medicines, or assistive or prosthetic devices. Instead, the Court held that mitigating measures, “both positive and negative—must be taken into account when judging whether that person is ‘substantially limited’ in a major life activity and thus ‘disabled’ under the Act.”

The Court first reasoned that the determination of whether a plaintiff is disabled under the ADA is an individualized inquiry; thus, if corrective measures were not regarded in this analysis, courts would be forced to make determinations based on generalized information and hypothetical estimations concerning the uncorrected impairment. The Court illustrated this by explaining that diabetics are certainly disabled if they do not take insulin; however, the court will determine whether a disability exists based on the diabetic plaintiff in her medicated state. When plaintiffs are not considered in their individual capacity, the Court opined, it “is contrary to both the letter and the spirit of the ADA.” The Court also noted that corrective

67. *Id.* at 482. The Supreme Court has also recently held in *Williams* that “to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.” 534 U.S. 184.

68. Timothy S. Bland & Thomas J. Walsh, Jr., *U.S. Supreme Court Resolves Mitigating Measures Issue Under the ADA*, 30 U. MEM. L. REV. 1, 10–13 (1999). The Sixth and Tenth Circuits, and, in dictum, the Fifth Circuit, held that mitigating measures must be considered when determining disability. The First, Eighth, Ninth, and Eleventh Circuits held that mitigating measures should not be considered when determining disability.


70. *Id.*

71. *Id.* at 479. “No agency, however, has been given authority to issue regulations implementing the generally applicable provisions of the ADA . . . .”

72. See *id.* at 480 (citing 29 C.F.R. pt. 1630, App. § 1630.2(j) (1998)).

73. *Id.* at 482.

74. *Id.* at 483–84.

75. *Id.*

76. *Id.* at 484.
measures, namely drugs, often produce severe negative side effects, which should be considered by courts when determining when a plaintiff is disabled. Finally, the Court noted that if Congress intended to include those who are disabled without mitigating or corrective devices, the number of individuals covered by the ADA would be far higher than the forty-three million noted in the statute.

Justice Stevens, joined by Justice Breyer, wrote a spirited dissent and argued that mitigating measures should not be considered when determining if a plaintiff is disabled under the ADA. The dissent pointed to the possible disparities that could befall plaintiffs who employ mitigating measures, yet are discriminated against as a result of their use of these measures. Justice Stevens noted that many individuals who are aided by prostheses, through dedication and hard work, are able to "perform all of their major life activities just as efficiently as an average couch potato." Yet, employers may nonetheless be tempted to discriminate against them on the basis of the corrective measures, in which case, according to the dissent, "that employer has unquestionably discriminated against the individual in violation of the Act." The dissent argued that by disallowing these plaintiffs a cause of action under the ADA, the majority opinion leads to the "counterintuitive conclusion that the ADA's safeguards vanish when individuals make themselves more employable by ascertaining ways to overcome their physical or mental limitations."

II. THE SEVENTH CIRCUIT'S APPLICATION OF THE ADA AFTER BRAGDON AND SUTTON

While Bragdon provided lower courts with a process for determining whether a plaintiff is disabled under the ADA, and Sutton added the consideration of mitigating factors, the circuit courts still

77. Id. (listing anti-psychotic drugs, drugs for Parkinson's disease, and anti-epileptic drugs as examples of corrective measures that produce negative side effects).
78. Id. at 484-88 (claiming that "had Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings"). The Court noted that over 100 million Americans wear corrective lenses alone. Id. at 487.
79. Id. at 495 (Stevens, J., dissenting).
80. Id. at 497.
81. Id.
82. Id. at 498.
83. Id. at 499.
84. 524 U.S. 631.
85. 527 U.S. 475.
struggle to correctly apply these holdings to a variety of individual cases. Following the Bragdon paradigm, plaintiffs in the Seventh Circuit claiming discrimination under Title I of the ADA have had little trouble initially convincing the courts that they have a physical or mental impairment.86 The real challenge to plaintiffs is proving that they are substantially limited in a major life activity, and are, therefore, disabled.87 Sutton has made this step even more difficult for plaintiffs by requiring courts to also consider corrective measures.88 This additional mandatory consideration has led to counterintuitive results.

A. The Seventh Circuit's Treatment of "Impairment" under the ADA

While the Bragdon Court went into a detailed determination of whether the plaintiff in the case met the impairment requirement,89 the Seventh Circuit's focus is now on whether the impairment substantially limits a major life activity rather than on whether a plaintiff has a physical or mental impairment.90 In fact, many defendants in Title I cases concede that the plaintiff has a physical impairment, while still arguing that the plaintiff is not disabled. In recent Seventh Circuit cases, defendants have conceded that a variety of conditions constituted a physical impairment, including a heart condition and diabetes,91 arthritis,92 and, in one case, a plaintiff's fear of driving.93 The existence of an impairment is rarely at issue because the ADA "is not a general protection of being medically afflicted.... If the employer discriminates against [plaintiffs] on account of their being ill, even permanently ill, but not disabled, there is no violation."94

86. See Lisa Eichhorn, Applying the ADA to Mitigating Measures Cases: A Choice of Statutory Evils, 31 ARIZ. ST. L.J. 1071, 1085–86 (1999) (claiming that "litigants rarely disagree over the 'physical or mental impairment' element... the 'major life activity' and 'substantially limits' elements tend to constitute the battleground").
87. Id.
88. 527 U.S. at 475.
89. See 524 U.S. at 632–637.
90. See Webb, 230 F.3d at 998 (discussing immediately, when determining whether plaintiff was disabled, substantial limitation of a major life activity); Schneiker v. Fortis Ins. Co., 200 F.3d 1055, 1060 (7th Cir. 2000) (asks immediately, when determining disability, whether impairment substantially limits plaintiff's ability to work).
92. Moore, 221 F.3d at 952–53.


B. The Seventh Circuit's Treatment of "Major Life Activity"

The Supreme Court held in *Bragdon* that when a court determines what constitutes a disability, it must consider the life activity that the plaintiff describes as being limited and "determine whether it constitutes a major life activity." While the Court hesitated to enunciate a general principle when determining what constitutes a major life activity, it endorsed a list established by the Rehabilitation Act regulations which includes "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." The Court was quick to point out, however, that the list was merely "illustrative, not exhaustive."

Since *Bragdon*, Seventh Circuit plaintiffs have met with little success in arguing that certain activities that are not included in the EEOC's list should be considered "major life activities." When analyzing whether an unlisted activity constitutes a major life activity, the trier of fact must consider "whether the unlisted activity has equal 'significance'" to that of the listed activities within the meaning of the ADA. Recently, the Seventh Circuit held that the inability to bowl, camp, restore cars, and mow the lawn as a result of arthritis were not major life activities. The Seventh Circuit has also held that while getting to and from work is a subspecies of "'working' or 'driving,'" commuting is nonetheless not a major life activity. Additionally, the Seventh Circuit recently found that although a plaintiff was limited in his "communication skills and interpersonal relationships," these did not qualify as major life activities. Finally, in *Furnish v. SVI Systems, Inc.*, the Seventh Circuit held that an employee with cirrhosis of the liver caused by chronic Hepatitis B was not disabled because "[a]lthough liver function is 'integral to one's daily existence' in that one needs a healthy liver to remove toxins from the blood, liver function is not 'integral to one's daily existence' under *Bragdon* and..."
it’s progeny.”103 In other words, the court determined that the functioning of a major organ is not a major life activity.104

C. The Seventh Circuit’s Treatment of “Substantially Limited”

Those plaintiffs who successfully claim that their impairments limit a legitimate major life activity must face the second, more difficult hurdle of proving that their disability leaves them “substantially limited” in that major life activity.105 Since Bragdon, the Seventh Circuit has held that to be substantially limited under the ADA, the plaintiff must show that they are either unable to perform the major life activity or are “significantly restricted as to the condition, manner or duration under which the individual can perform a major life activity as compared to an average person in the general population.”106 The Sutton Court added the requirement that courts must also consider the plaintiff’s medicated or mitigated state.107 Most recently, in Toyota Motor Mfg. Kentucky, Inc. v. Williams, the Court held that the word substantial suggests “considerable” or “to a large degree,”108

103. Furnish, 270 F.3d at 449–50 (citing Bragdon, 524 U.S. at 635).
104. Id. at 450.
105. See Eichhorn, supra note 29, at 1430 (claiming that the additional inquiry to determine whether an impairment “substantially limits” a major life activity “indicates a desire to restrict the ADA’s coverage to the ‘truly disabled’”).
106. Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 506 (7th Cir. 1998). While the ADA does not strictly require plaintiffs who are claiming discrimination based on their disability to necessarily show that they are limited in the major life activity of working, many of the plaintiffs in Title I cases do claim that they are substantially limited in working. To show that a plaintiff is substantially limited in his or her ability to work, the plaintiff must show that the impairment significantly restricts “the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.” Thus, a plaintiff is not substantially limited if they are precluded from working one particular job or if “he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent”; instead, employment must be impaired generally.

As a result of the narrow interpretation of what is substantially limiting, a plaintiff’s inability to perform the job of their choice, or a specialized class of jobs, is simply not enough to satisfy the disability requirement under the ADA. For example, the Seventh Circuit has held that an employee who suffered from depression, anxiety, and TMJ disorder as a result of working for a particular supervisor was not disabled under the ADA because “if she can do the same job for another supervisor, she can do the job.” Weiler v. Household Fin. Corp., 101 F.3d 519, 525 (7th Cir. 1996). Likewise, the Seventh Circuit has found that a plaintiff who suffered from severe asthma, osteoporosis, and a weakened immune system was not substantially limited in the major life activity of working because he was not limited as a psychologist generally, but only as a psychologist who works with patients “coping with intense developmental problems.” Webb, 230 F.3d at 998–99.
107. Sutton, 527 U.S. at 482.
108. Williams, 122 S. Ct. at 691 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2280 (1976)).
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Thus precluding "impairments that interfere in only a minor way with the performance of manual tasks from qualifying as disabilities."109

While the full effect of the *Sutton* decision still remains unclear, Seventh Circuit case law indicates that plaintiffs searching for protection under the ADA will encounter a heightened standard that may lead to disparate results. For example, an employee who is treated differently by an employer because the employee takes medication that alleviates a potential disability has no cause of action under the ADA.110 In the recent case of *Krocka v. City of Chicago*, the Seventh Circuit held that a plaintiff who suffered from depression but was able to function normally while taking the drug Prozac was not protected under the ADA.111 The plaintiff, a police officer, was allowed to work only if he participated in the department's Personnel Concerns Program, which closely monitored certain officers, usually those with disciplinary problems.112 The employer conceded that the plaintiff was placed in the program solely because he took the drug Prozac.113 While, at least arguably, most courts would consider the employer's placing the plaintiff in a disciplinary program solely because of his medication to be discriminatory,114 the Seventh Circuit was unable to reach the merits of the case. Instead, the court was forced to hold that because Prozac alleviated his severe depression, the plaintiff was not disabled in the first place, and therefore, had no cause of action under the ADA.115 However, if the plaintiff did not take the medication, he would surely be considered disabled by the court.116

Other Seventh Circuit decisions have struggled with the counterintuitive effect that *Sutton* has on claims by plaintiffs who are not

109. *Id.*
110. *See Krocka v. City of Chicago*, 203 F.3d 507, 513 (7th Cir. 2000).
111. *Id.* at 513.
112. *Id.*
113. *Id.* (finding that "Krocka would remain in the [disciplinary program] for as long as he was taking Prozac. It was the opinion of Krocka's doctors that he would be on Prozac for the rest of his life.").
114. *See 42 U.S.C. § 12112(b)(1).* The word "discriminate" includes "limiting, segregating or classifying a[n] ... employee in a way adversely that affects the opportunities or status of such ... employee because of the disability of such ... employee."
116. *Id.* at 511. Herein lies the possible Catch-22: on the one hand, if the plaintiff did not take his medication, he would quite possibly not be considered "otherwise qualified" under the Act because he would not be able to perform the essential functions of his job. Yet, on the other hand, because he is able to correct his disability with medication, the very reason for which his employer treats him differently, he still is not considered disabled under the Act.
allowed to employ their corrective measures on the job. For example, in *Nawrot v. CPC International*, the district court found that because the diabetic plaintiff was largely able to control his impairment through insulin shots and eating snacks, he was not disabled under the ADA. The plaintiff's claim was that his employer, who refused to allow him to take breaks to tend to his diabetic condition, did not reasonably accommodate his disability. Essentially, his employer prevented him from taking the very medicine that disqualified him from being considered disabled under the ADA. The frustrated court commented on how applying *Sutton* distortedly requires a court to first consider the mitigating measure when determining whether the plaintiff is disabled and entitled to protection under the ADA.

The lower court in *Nawrot* noted:

> Here, a question of material fact exists as to whether [the employer] prohibited [the employee] from controlling his diabetic condition. Yet according to *Sutton*, this court cannot reach the question of discrimination because [the employee] is not deemed disabled when viewed in his corrected state, and as such, is not included within the purview of the ADA.

In finding that the plaintiff was not actually disabled, the court concluded that "[i]n the aftermath of *Sutton*, ADA plaintiffs are placed in a legal bind: the employer strips the plaintiff of all ameliorative measures, but in court, the judge pretends that the plaintiff is always clothed in those measures."

The plaintiff in *Nawrot* appealed his case to the Seventh Circuit. Although the Seventh Circuit eventually found that Mr. Nawrot was disabled, the court ignored the crucial issue that frustrated the lower court. Instead of focusing on the employer's refusal to allow the insulin shots, the court reasoned that even with the help of insulin, Nawrot was disabled because the mitigating measures that Nawrot relied upon, "[d]espite the most diligent care ... [could] not completely control his blood sugar level."

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119. *Id.* at 1.
120. *Id.* at 6–7.
121. *Id.* at 7.
122. *Id.* at 7.
123. *Id.* at 8.
124. *Nawrot*, 277 F.3d at 904–05.
125. *Id.* at 905.
to hold that the employer's proffered reasons for terminating the plaintiff were not pretextual.126

District courts within the Seventh Circuit that have applied the Sutton mitigating-measures analysis to ADA cases have also reached results that clearly contradict Congress's intent to bring widespread relief to the disabled.127 In Denney v. Mosey Mfg. Inc., the court commented that it would be unimaginable for an employee who was prevented by his employer from using corrective measures on the job to be beyond the purview of the ADA.128 In Denney, a diabetic brought an employment discrimination claim against his employer, arguing that the employer interfered with his use of corrective measures on the job, such as eating snacks, which were essential to his ability to do the job and to his overall well-being.129 In its motion for summary judgment, the employer argued that the ADA does not stop an employer from "refusing arbitrarily even the most modest accommodation" to a diabetic plaintiff because the plaintiff is not considered disabled when the impairment is corrected by insulin.130 The court disagreed and remarked, "[I]t is inconceivable that such actions by an employer would be entirely beyond the reach of the ADA on the theory that the employee does not have a disability under the ADA."131 Yet the court refused to decide the "abstract legal issue" because it found that the plaintiff had not come forward with enough evidence to show that the defendant had truly interfered with his efforts to control his diabetes.132

The decisions in Krocka,133 Nawrot134 and Denney135 all signal that the Sutton mitigating-measures analysis can sometimes lead to frustrating consequences for plaintiffs who have a legitimate claim of discrimination. These cases illustrate that in order to fully effectuate the integrity and the purpose of the ADA, mitigating measures should not always be considered by the courts.

126. Id. at 906-07.
128. Id.
129. Id. at 8.
130. Id. at 10.
131. Id.
132. Id.
133. Krocka, 203 F.3d 507.
III. A MODIFICATION TO THE SUTTON ANALYSIS: WHY IN SOME CASES COURTS SHOULD NOT CONSIDER MITIGATING MEASURES

The Sutton mitigating-measures requirement has put courts in the untenable position of having to find that a plaintiff who is being discriminated against because of his or her mitigating measures is not disabled, and thus, not protected under the ADA. What the Sutton decision has failed to allow the courts to consider is that employers, depending upon their willingness to accommodate the plaintiff's particular desires, requests and physical needs, can play a crucial role in the determination of whether the plaintiff is considered disabled. Courts should not be required to consider the plaintiff's mitigated state before reaching the merits in limited cases, such as when an employer discriminates on the basis of a mitigating measure or refuses to allow a plaintiff to employ a mitigating measure. A better rule would be for the courts to first determine, on a case-by-case basis, whether there is a reasonable possibility that the employer is discriminating on the basis of the mitigating measure. After determining that a reasonable possibility exists that such discrimination is occurring, the court could determine whether the plaintiff is disabled without performing the mitigating-measure analysis. Finally, if the plaintiff is disabled without the corrective measure, the court could then reach the discrimination issue.

A. When the Seventh Circuit Should Not Consider Mitigating Measures

In certain instances, courts should be able to disregard corrective measures when determining whether a plaintiff is disabled. Courts should initially consider whether there is a reasonable likelihood that the employer is discriminating against the plaintiff on the basis of their use of a corrective measure. Consider, for example, the case of Krocka, where the employer discriminated against the plaintiff solely because he took psychiatric medication. Before the district court could consider the discrimination issue, it was forced to first determine that the plaintiff was not disabled because he was able to greatly alleviate his severe depression by taking Prozac. The court had no choice but to dismiss the case prior to considering the discrimination

136. Krocka, 203 F.3d 507.
137. Id. at 513.
issue, leaving the employer free to discriminate with impunity.\textsuperscript{138} If the \textit{Krocka} court instead first considered whether there was a reasonable likelihood that the plaintiff was being discriminated against by his employer because of his use of psychiatric medication, then the court could have reached the merits of the case. Because the employer freely admitted that the plaintiff was being heavily supervised solely because of his use of Prozac,\textsuperscript{39} the reasonable likelihood prong of the proposed test would be easily met. Then the court would determine whether the plaintiff is disabled \textit{without} considering his medication. If his symptoms were severe enough, which they arguably were, the court would find that the plaintiff is disabled and then the court would be free to determine the discrimination issue.

Also when evaluating whether the plaintiff is substantially limited in the activity of working, the court must be able to consider whether the employer prohibits or interferes with the plaintiff's use of mitigating measures on the job. If a court is going to consider mitigating measures in its disability analysis, it should be a prerequisite that those corrective measures are allowed on the job. If not, a court may be forced to come to the counterintuitive result that a diabetic is not disabled because she can maintain her condition by employing simple corrective measures, like taking insulin and maintaining a balanced diet, even though she is not afforded the opportunity to do so on her job. Or consider, as a more dramatic illustration, Justice Stevens's example in \textit{Sutton} of a plaintiff who, with her prosthetic leg, is not substantially limited in any major life activity.\textsuperscript{140} If an employer refused to let the plaintiff wear her prosthetic leg at work, and the plaintiff then filed a claim against her employer, the court could arguably dismiss the case, finding that with the mitigating measure, the plaintiff is not disabled and has no cause of action under the ADA.\textsuperscript{141}

Such inequitable results could be avoided if courts disregarded the mitigating measure in the preliminary disability consideration. In the case of diabetic persons, courts should first look to whether there is a reasonable likelihood that the employer prevented the plaintiff

\textsuperscript{138} \textit{Id.}
\textsuperscript{139} \textit{Id.} at 511.
\textsuperscript{140} \textit{Sutton}, 527 U.S. at 497-98 (Stevens, J., dissenting).
\textsuperscript{141} \textit{See id.}, (Stevens, J., dissenting) (arguing that "\textit{t}he fact that a prosthetic device, such as an artificial leg, has restored one's ability to perform major life activities surely cannot mean that . . . the definition is inapplicable."); \textit{but see id.} at 488 (majority claiming that "individuals who use prosthetic limbs . . . may be mobile . . . but still disabled because of a substantial limitation on their ability to walk or run.").
from taking snack and insulin breaks. If it seems reasonably likely, then the court would determine that the plaintiff is disabled because without insulin and maintaining a strict diet serious illness or death could occur. The court would then be free to determine the dispositive issue of whether the employer discriminated against the plaintiff.

B. The Supreme Court's Reasoning in Sutton Supports the Proposed Approach

Although the Supreme Court insisted in Sutton that mitigating measures must always be considered when determining disability under the ADA, the Court failed to consider that employers sometimes discriminate on the basis of those corrective measures. A court could leave the Sutton reasoning intact and still skip the mitigating-measures analysis where it determines that an employer is discriminating on the basis of those measures. The Sutton Court reasoned that mitigating measures must be considered because, if not, the disability inquiry would become a generalized, de-individualized endeavor, and because Congress's recognition of forty-three million disabled Americans certainly was not meant to include all of those plaintiffs whose measures were correctable. The Court also legitimately feared an influx of claims against employers. Yet, if the courts were to disregard mitigating measures only in situations where an employer refuses to allow, or discriminates on the basis of, a mitigating measure, the inquiry would remain individualized, the number of disabled plaintiffs would only increase slightly, and the interests of employers would still be protected.

1. The Inquiry Would Remain Individualized

First, the Court in Sutton stressed that the determination of whether a plaintiff is disabled is a highly individualized inquiry. The Court reasoned that courts should not be forced to speculate and make generalized decisions about what a plaintiff's condition might

142. Sutton, 527 U.S. at 482.
143. Id. at 483–84.
144. Id. at 484–88.
145. See id. at 487. The Court noted that "[h]ad Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings."
146. Id. at 483–84.
be without his or her mitigating measures. However, such an approach, the Court opined, would encourage courts to treat plaintiffs as “members of a group of people with similar impairments, rather than individuals.”

However, when plaintiffs argue that they are being discriminated against because of their mitigating measure or that they are not allowed to use their mitigating measure on the job, the Sutton ruling has forced courts to do just what the Court feared—treat the plaintiff as member of a group, a class of people whose disabilities are always determined by considering corrective measures. If courts consider instead the possibility that in some cases the employer could be discriminating on the basis of the mitigating measure, then the determination would remain consistent with the Court’s interpretation of the ADA. In addition, Congress’s original intent of designing a statute to protect disabled individuals would be furthered.

2. Plaintiffs Whose Mitigating Measures Are Not Considered Will Still Be a Discrete Few

The Sutton Court was persuaded by Congress’s estimation that roughly forty-three million Americans were disabled when it held that mitigating measures must be considered in the determination of whether a plaintiff is disabled. The Court, pointing out that the number of Americans who need corrective lenses alone is 100 million, reasoned that the estimate under the ADA reflected Congressional intent not to include every single person whose impairment could be corrected by mitigating measures. The Court was arguably concerned with interpreting the ADA in a manner that would afford overly broad protection to individuals and result in a rash of lawsuits against employers. Yet, if an exception is made in highly limited situations, such as when an employer discriminates on the basis of a mitigating measure or when the employer refuses to allow an employee to use a corrective measure, only a select group of plaintiffs would be able to surpass the threshold disability requirement.

147. Id.
148. Id.
149. See 42 U.S.C. § 12101(b)(1) & (2). “It is the purpose of this chapter to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.” Id. (emphasis added).
151. Id. at 487.
152. Id. at 484–88.
The number of those who Congress intended to include under the purview of the ADA would not be dramatically altered if courts were able to occasionally disregard mitigating measures because certain employment positions legitimately allow employers to refuse to permit employees from relying on their mitigating measures. As a result, these cases would not exempt the court from considering the plaintiff's mitigating measures. For example, in Sutton, the plaintiffs, who were airline pilot applicants, were evaluated without being allowed to wear their corrective lenses, which were considered mitigating measures. Yet, the Court in Sutton most likely recognized that obliging a pilot to have 20/20 vision is a valid job requirement, and thus, denial of employment based upon the plaintiffs' need to wear corrective lenses was acceptable. Compare the employer in Sutton, however, to an employer who arbitrarily denies a plaintiff from using a mitigating measure based strictly on stereotypes or animus. If, for example, an employer refuses to allow a plaintiff who uses a hearing aid to wear the device while working because the employer feels it is unattractive or makes the plaintiff appear unapproachable, the plaintiff in the case surely should be protected under the ADA. The employer in that case has no legitimate reason to deny the plaintiff use of the mitigating measure, without which she would be disabled.

3. Employers Interests Are Not Threatened by the Modification

Critics of this proposed modification to the Sutton analysis may argue that it will result in a windfall for ADA plaintiffs while greatly disadvantaging and burdening employers. However, this position fails to consider that the ADA is a balance between employer and plaintiff interests. By allowing courts to ignore the mitigating measures upon which plaintiffs rely in a very limited number of cases, the deserving plaintiffs' rights to protection under the ADA are better balanced against the interests of the employer. In short, the employ-

153. See id. at 493–94 ("An otherwise valid job requirement, such as a height requirement, does not become invalid simply because it would limit a person's employment opportunities in a substantial way if it were adopted by a substantial number of employers.").
154. Id. at 475–76.
155. See 42 U.S.C. §12113(a) ("It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation.").
ers' interests would still be protected by a number of other statutory safeguards. For example, the ADA does not protect an employee who, because of his physical or mental impairment, cannot adequately perform his job. Instead, the statute only protects a plaintiff who is a "qualified individual," that is, a plaintiff who "can perform the essential functions of the employment position." Even if a plaintiff surpasses the threshold disability requirement under the ADA, the defendant only has the duty to find a "reasonable accommodation" for the qualified individual with a disability, which "can take various forms, such as making the workplace accessible to a person who is wheelchair-bound, or... "reassignment [of the disabled person] to a vacant position." Thus, under the proposed approach, a diabetic plaintiff would be considered disabled by the court, yet the employer would still only be required to grant the employees insulin breaks if those accommodations were considered reasonable by the court. Furthermore, the employer need not grant the plaintiff an accommodation if the accommodation would cause an undue financial burden upon the employer. Thus, the proposed modification does not advocate that employers be required to make more extensive or costly accommodations for the disabled; the approach simply suggests that more plaintiffs should surpass the disability threshold so that courts are free to determine the discrimination issue.

CONCLUSION

When enacting the ADA, Congress recognized that "individuals with disabilities continually encounter various forms of discrimina-
tion”162 in the workplace. Recent Seventh Circuit case law has shown that discrimination can take the form of an employer refusing to allow an employee to use corrective measures on the job163 or an employer treating an employee differently solely because of the employee’s use of a mitigating measure.164 While Congress surely meant to include these individuals under the umbrella of ADA protection, the Court’s required mitigating-measures analysis has left the courts in the untenable position of finding that these plaintiffs do not qualify as disabled under the statute.165 Such a counterintuitive result could be avoided, however, if courts did not consider the plaintiffs mitigated state where an employer is discriminating based on the mitigating measure itself. If courts adopted this modified approach to Sutton, Congress’s original intention of eliminating discrimination against individuals with disabilities166 would be further realized.

164. See Krocka, 203 F.3d 507.
165. Sutton, 527 U.S. at 482.
166. 42 U.S.C. § 12101(b)(1) (“It is the purpose of this chapter to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”).