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DEFINING DISABILITY: MITIGATING MEASURES AND THE ADA

CYNTHIA F. COHEN

MURRAY E. COHEN

University of South Florida

ABSTRACT

Two years of district court cases involving mitigating measures were analyzed to determine the extent to which the Supreme Court's decision in *Sutton v. United Airlines has* affected ADA claims. Our analysis reveals the determination of impairments in almost half of the cases considered by the district courts over a two-year period were affected by the use of mitigating measures. Common impairments considered were diabetes, high blood pressure, depressive disorders, and back injuries. Moreover, complainants were typically unsuccessful in arguing they "had a record of" or were "regarded as" disabled for purposes of the act. Effects on employees and organizations are discussed.

Discrimination law has greatly changed the employment landscape. While the statutory laws themselves represent important changes in public policy, the judiciary makes significant interpretations that affect the application of the law. From the landmark *Griggs v. Duke Power* case, in which the Supreme Court developed the legal principle of adverse impact discrimination to the various cases that began to define sexual harassment as a form of sexual discrimination, the judiciary has refined and changed our understanding of discrimination. This has been particularly true of the role of the judiciary in interpreting the Americans with Disabilities Act (ADA).

Several significant Supreme Court decisions have concerned the definition of the disabled protected category. Of specific interest to this study is the Supreme

Court decision in *Sutton v. United Airlines* that used the concept of "mitigating measures" to determine whether individuals could be categorized as disabled under the act [1]. A mitigating measure is one that reduces or completely eliminates the effects of a particular mental or physical impairment. Following the *Sutton* ruling, significant concerns were raised regarding the potentially grave consequences of utilizing mitigating measures analysis [2]. Yet, in the years following *Sutton*, very little systematic analysis has been conducted of these effects. To understand the ramifications of this crucial decision, we examined post-*Sutton* cases to see how the protected category status of employees seeking protection under the ADA was affected by the *Sutton* standard. We wished to study the types of conditions that have been evaluated for mitigation and the determination of whether this mitigation resulted in losing protected class coverage.

We had the following research questions:

1. What types of impairments are most likely to have mitigating measures issues?
2. What types of mitigating measures are most commonly examined?
3. What types of impairments are most likely to be mitigated and therefore not included in the protected group?
4. When it is determined that an impairment is mitigated, how likely is a complainant to prevail on the standards of "regarded as" disabled or "a record of" a disability?
5. What are the effects of these decisions on employees who are seeking relief under the ADA?
6. How does this affect employers as they work to comply with the ADA?

DEFINING DISABILITY

The passage of the ADA in 1990 added an important protected category to discrimination law in the United States. It was estimated that more than 40 million individuals would be covered by the protection of the act. Unlike its discrimination law predecessors, such as the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, passage of the ADA posed a more complicated question: how to define the protected category. The ADA defines a disability as a "physical or mental impairment that substantially limits one or more major life activities, a record of such impairment or being regarded as having such an impairment" [3]. In addition, one must also establish that s/he is "otherwise qualified" for the position in question. Others have discussed the inherent friction between the burden of proving one has a disability while simultaneously proving one is qualified for the job [4].

From the outset, there were questions concerning which impairments would qualify as disabilities under the act and which would not. Nonetheless, rather

quickly, the ADA became a major factor in discrimination law. The Equal Employment Opportunity Commission (EEOC) charge statistics indicate that a little over 17 percent of all charges filed in 1993 (a year after the EEOC began enforcing the ADA) were ADA cases. In 2003, disability discrimination charges accounted for 18.9 percent of all charges filed [5]. However, despite the robust number of charges filed, employees have found it difficult to prevail. An ABA study determined that employers won more than 90 percent of disability cases that went to court [6].

One of the reasons for the low "win rate" by complainants is the difficulty of meeting the burden of proof. The burden of persuasion is on the complaining party (the employee or the job applicant) to prove the threshold issue that s/he is a member of the protected group. It is not enough to demonstrate an impairment exists; one must also prove the impairment affects one or more major life activities. The question of what constitutes a major life activity has been the focus of a number of significant cases.

One of the particular quandaries is the extent to which the inability to perform some aspects of a job is sufficient to meet the major life activity threshold. In *Toyota Motor Manufacturing v. Williams*, an assembly line employee with carpal tunnel syndrome was seeking protection under the ADA [7]. The district court ruled her condition did not qualify because it did not substantially affect one or more major life activities. The court of appeals reversed, ruling her impairment affected the major life activity of performing manual tasks [8]. The Supreme Court reversed the court of appeals, saying the focus on manual activities was too limited. The Supreme Court ruled that "the central inquiry must be whether or not the [person] is unable to perform the variety of tasks central to most people's daily lives" [7, at 200-201]. Thus, persons with impairments that have limited effects, even if job-related, do not necessarily gain protection under the act. The narrowing focus of *Toyota* also affects the mitigating measures analysis from *Sutton*.

If an individual cannot prove the existence of an impairment as defined under the act, s/he cannot make a legal claim unless it can be proved that a record of impairment influenced employer actions or that the individual was regarded by the employer as having an impairment. Establishing a record of impairment generally requires documentation of a qualified disability in the past and further proof that the employer treated the employee as disabled based on this record. The statutory definition of "regarded as" disabled encompasses two possibilities: 1) the employer mistakenly believes an individual has an impairment that substantially limits one or more major life activities or 2) the employer mistakenly believes that a nonlimiting impairment does substantially limit one or more major life activities. The regulations imply the "regarded as" prong should be analyzed only "if an individual cannot satisfy the first two portions of the definition" [9]. Finally, the fact that an employer is aware of an employee's impairment is not sufficient to establish that it regarded the employee as disabled for purposes of the act. Instead,

the complainant must demonstrate that the employer "perceived his impairment as substantially limiting the exercise of a major life activity" [10].

MITIGATING MEASURES

One of the controversial areas of defining whether one qualifies as disabled under the ADA is the consequence of considering "mitigating measures" when making the determination. Mitigating measures are defined as steps one can take to obviate or alleviate the effects of potentially disabling conditions. Originally, the EEOC determined that mitigating measures were not relevant in the determination of disability under the ADA. Both the EEOC and the Department of Justice (DOJ) issued interpretive rulings that excluded mitigating measures from the analysis. The EEOC Interpretive Guidance provided "the 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" [11]. However, in 1999, the Supreme Court made three significant rulings on the concept of mitigation under the ADA. This trilogy of cases includes *Sutton et al. v. United Airlines* [1], *Murphy v. United Parcel Service* [12], and *Albertson's v. Kirkingburg* [13]. *Sutton* was decided first and set the precedent for mitigating measures and developed the framework that was applied to the other two cases. In *Sutton*, the issue was whether two sisters who had uncorrected vision of 20/200 or worse, yet whose visual acuity was correctable to 20/20 or better with the mitigating measures of eyeglasses or contact lenses had a disability under the act [1]. In *Albertson's* the issue was the extent to which monocular vision was a disability [13]. Finally, in *Murphy*, the issue was whether high blood pressure that could be mitigated by medication was a disability [12].

In making its decision in *Sutton*, the Supreme Court focused on the individualistic determination of the protected class under the ADA. They ruled, in part, "The guidelines' directive that persons be judged in their uncorrected or unmitigated state runs directly counter to this mandated individualized inquiry. The former would create a system in which persons would often be treated as members of a group having similar impairments, rather than as individuals. It could also lead to the anomalous result that courts and employers could not consider any negative side effects suffered by the individual resulting from the use of mitigating measures, even when these side effects are very severe. Finally, and critically, the Congressional finding that 43 million Americans have one or more physical or mental disabilities requires the conclusion that Congress did not intend to bring under the ADA's protection all those whose uncorrected conditions amount to disabilities. That group would include more than 160 million people" [1, at 474]. Doubt has been cast on the efficacy of this approach, since the estimate of 43 million persons, according to some, was not derived on the basis of careful research [14].

Following *Sutton*, in *Murphy*, the Supreme Court affirmed that Murphy's high blood pressure controlled by medication was not a disability under the act [12]. In *Albertson's* the Supreme Court ruled that the circuit court erred when it failed to consider the mitigation resulting from Kirkingburg's "subconscious adjustments to the manner in which he sensed depth and perceived peripheral objects" [13, at 565]. In this decision, the court refused to make a distinction between artificial aids that could mitigate potential disabilities and "measures undertaken, whether consciously or not, with the body's own systems" [13, at 566].

The chief result of these three cases was to reverse the interpretation of both the EEOC and the DOJ and to require the issue of mitigating measures to be included in the multiphase analysis of protected group status. This has caused concern about a number of negative effects on individuals whose conditions could be classified as mitigated yet still pose certain hardships on them [15]. It also raises the question of whether employees or job applicants have a duty to mitigate their conditions and, once a condition is mitigated, whether employers can take adverse employment actions on the basis of the mitigated condition [16].

DATA COLLECTION AND ANALYSIS

A LexisNexis® search of district court cases for the previous two years using the search words "Americans with Disabilities Act" with a narrowing search term of "mitigating measures" was undertaken. The search protocol permits either a two-year or a five-year search. Given that *Sutton* was decided in 1999, and the search was performed in early 2004, the two-year time frame was chosen to ensure that the cases would be analyzed using sufficiently constructed post-*Sutton* standards. Because the ADA is a federal law, we examined federal district court cases. This search returned forty-six cases. Although forty-six is not a large number, we feel it is sufficient to begin to see, on a case-by-case basis, the effects of *Sutton* on individuals seeking protection under the ADA. Each case was content analyzed to determine 1) the nature of the underlying impairment, 2) the type of mitigating measure involved, 3) the extent to which the impairment was ascertained to be mitigated or not mitigated, 4) whether the impairment was found to be a covered disability under the act, 5) whether a "record of" disability was established, notwithstanding the determination of mitigation, and 6) whether the employer "regarded" the employee as disabled, notwithstanding the determination of mitigation.

Twenty-six different impairments formed the basis for the disability claims in these cases. While most of these accounted for less than 3 percent of the cases we analyzed, the most common impairments were diabetes (21.7%), depressive disorders (15.2%), high blood pressure (8.7%), and back injuries (8.6%). As Table 1 indicates, the most common ruling was that the disability was mitigated by medications or other measures. The second most common ruling was that the individual was not substantially limited in daily life activities, even though the impairment was not fully mitigated.

Almost half of the cases we analyzed resulted in a determination that the impairment was mitigated. Table 2 provides the results for mitigation for the most commonly found conditions. Of the most frequently occurring conditions, diabetes was the most likely to be mitigated (90% of cases), followed by high blood pressure, depressive disorders, and back injuries.

As Table 3 indicates, medications were the most frequent mitigating measure, followed by devices and other aids, such as the use of a cane to assist with walking [17]. The other mitigating measures, as posited by the Supreme Court in *Sutton*, comprise many types, including the extent to which individuals engage in coping behaviors that ameliorate the effects of the impairments. These coping behaviors include learning to perform physical tasks despite impairments, following a schedule, establishing a routine, and avoiding stress [18]. When examining mitigating measures, the courts also consider three other factors: activities that worsen

Table 1. Mitigating Measure Analysis Outcomes

Outcome	Frequency	Percent
Impairment was fully mitigated	22	47.83
Impairment was not mitigated	3	6.52
Impairment was not substantially limiting regardless of mitigation	14	30.43
Mitigation not the issue	7	15.22
Total	46	100

Table 2. Conditions by Mitigation

Condition	Percent of cases mitigated	Percent of cases not mitigated
Diabetes	90	10
High blood pressure	75	25
Depressive disorder	42.9	57.1
Back injury	25	75

Table 3. Types of Mitigating Measure

Mitigating measure	Frequency	Percent
Medication	29	63
Devices and aids (canes, prosthetics, etc.)	9	19.6
Physical coping	7	15.2
Treatments (counseling, therapy, etc.)	6	13.6
Diet	4	8.7
Following a schedule	4	8.7
Monitoring	2	4.3

the condition, failure to take available mitigating measures, and the negative consequences of mitigating measures.

In some cases, the complainant may face the allegation that s/he engaged in behaviors contrary to physician advice and/or that could worsen the impairment. These behaviors also reveal that the complainant is less limited in the ability to perform major life activities than s/he claims. For example, in *Tumlison v. Tyson Foods*, the plaintiff performed some activities when off-duty against the advice of his physician [19]. The plaintiff argued, although he did undertake such activities from time to time (such as picking up hay on his property and climbing on ladders), to do them at work on a continuing basis would be too risky. Although this is a much different issue from the one presented in *Sutton*, the courts may consider such information when making the determination of impairment under the ADA.

The courts have also weighed in on failure to take available mitigating measures. The District Court for the Northern District of Ohio, ruling in *White v. Coyne International Enterprises Corp*., wrote: "plaintiff admits he failed to take medication for his diabetes or control his diet. It would go against the holding of *Sutton* to label plaintiff 'disabled', even though he did not take available mitigating measures" [20]. Similarly, in *Johnson v. Maynard*, the District Court for the Southern District of New York ruled: "since plaintiff had medication available to her, and knew that she could function normally if she took it, she cannot be said to have been substantially impaired if she neglected to avail herself of such corrective measures. . . . Plaintiff's failure to take advantage of mitigating measures does not make her a qualified individual under the Act" [21].

Courts are also required to consider potential negative side effects of the use of mitigating measures. In *Sussle v. Sirina Protection Systems*, the District Court

for the Southern District of New York examined a claim that the side effects for treatment for Hepatitis C produced impairing effects [22]. Negative effects of mitigating measures are examined in the same way that the effects of impairments themselves are examined. As a result, the plaintiff must prove that the negative side effects of treatment substantially limit the ability to perform a major life activity. In *Sussle*, the court ruled that the effects of treatment were not of sufficient duration to substantially limit major life activities [22, at 311].

Table 4 examines the types of mitigating measures reported for the most frequently occurring conditions. Diabetes had a number of mitigating measures that were analyzed, including medications (100%), diet (40%), and monitoring (20%). Mitigating measures analyzed for high blood pressure were medications (100%) and other treatments (25%). Depressive disorders were analyzed for mitigating measures of medications (85.7%) and other treatments (57.1%), and back injuries were examined for physical coping (22.2%).

As Table 5 shows, in 19.6 percent of the cases, "having a record" of an impairment was examined by the court. In none of these cases was protected category status established by proving that the employer relied on the employee's record of a disability. The charge of discrimination on the basis of being "regarded as" having a disability was evaluated in 58.7 percent of the cases with a success rate of 15.8 percent.

DISCUSSION

Clearly, the Supreme Court's ruling in *Sutton* has produced a profound effect on the determination of who is and who is not in the protected category under the ADA. The congressional intent in passing the ADA included a variety of factors in the "Findings and Purposes" of the act; among these was the aforementioned estimate of "43,000,000 Americans" having one or more disabilities. However, the statute also reads, "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent

Table 4. Mitigating Measures by Impairment

Impairment	Medication	Other treatment	Diet	Schedule	Monitoring	Coping
Diabetes	100%		40%	10%	20%	
Hypertension	100%	25%				
Depressive disorders	85.7%	57.1%		12.5%		
Back injuries						22.2%

Table 5. "Having a Record of" and "Regarded As"

Issue	Percent of cases analyzed	Success rate
Record of	19.6	0%
Regarded as	58.7	15.8%

living, and economic self-sufficiency for such individuals" [3, at 12101(a)(8)]. It is difficult to imagine that the framers of this landmark legislation had contemplated that persons with diseases such as diabetes or depression would not be covered in their estimate. Justices Stevens and Bryer, in the dissenting opinion in *Sutton*, stated: "if we apply customary tools of statutory construction, it is quite clear that the threshold question whether an individual is "disabled" within the meaning of the Act—and, therefore, is entitled to the basic assurances that the Act affords—focuses on her past or present physical condition without regard to mitigation that has resulted from rehabilitation, self-improvement, prosthetic devices, or medication" [1, at 495]. Now, large classes of individuals who previously had presumptive disabilities face great scrutiny. This may surprise many individuals who have been diagnosed with serious conditions such as diabetes, autoimmune diseases, or depressive disorders. Although they take medications and are under medical supervision, they are not necessarily considered disabled under the ADA. Our study shows that the use of mitigating measures analysis results in a significant number of impairments lacking coverage that otherwise would be protected under the act.

Effects of *Sutton* on Employees

As has been previously observed, the determination of whether one is disabled is "the ball game" [14, at n. 158]. The lack of ADA coverage due to mitigating measures has many effects on employees and others seeking relief under the act. First, and foremost, the protection of the ADA ceases to exist for many individuals. Moreover, *Sutton* pronounces that an employer may decide "that physical characteristics or medical conditions that do not rise to the level of an impairment are preferable to others, just as it is free to decide that some limiting, but not substantially limiting, impairments make individuals less ideally suited for a job" [1, at 490-491]. This certainly opens up the possibility that persons with mitigated disabilities may suffer adverse employment consequences that will not be found in violation of the ADA. Some have argued that the logic in *Sutton* permits employers to fire employees who have mitigated disabilities. Because these employees lack standing under the ADA, such actions might not

violate the act [23]. However, this overlooks the ability of the employee to argue that such an action was taken because the employer regarded the employee as disabled. Blatant discrimination on the basis of mitigated impairments still violates the ADA.

On the other hand, more subtle situations may be difficult to prove. Our analysis reveals that when mitigating measures analysis indicates that the complainant is not disabled, it is not easy to demonstrate a "record of a disability" or being "regarded as" disabled to maintain protected category status. Very few plaintiffs were able to prove this to the courts' satisfaction. To do so, they must show that the employer regards the individual as limited in a major life activity [24]. Most typically this inquiry centers on whether the employer treats the employee as limited in the major life activity of working. An employer's awareness of an employee's impairment is not sufficient to establish that the employer regards the employee as disabled [25]. Neither does the fact that an employer made a reasonable accommodation at the request of the employee prove that the employer regards the employee as disabled. As the Ninth Circuit has ruled: "When an employer takes steps to accommodate an employee's restrictions, it is not thereby conceding that the employee is disabled under the ADA or that it regards the employee as disabled. A contrary rule would discourage the amicable resolution of numerous employment disputes and needlessly force parties into expensive and time-consuming litigation" [26, at 798].

A second result of *Sutton* is that some individuals who feel they need a particular work accommodation will not have a legal right to receive it. As has been previously discussed, employers can, of course, accommodate any individual request regardless of the status of the individual under the ADA. However, this may be cold comfort to employees when employers choose not to provide an accommodation when it is not legally required.

Third, the failure to gain protection under the ADA means that the issues underlying cases that do not meet the new threshold requirement will not be considered further. Accordingly, we will not see rulings on important issues related to reasonable accommodation or discrimination. Instead, many cases will focus on mitigating measures analysis and, where mitigation is found, look no further into the merits of the case. As *Sutton*, *Toyota*, and other significant cases have demonstrated, case law has been particularly crucial to the development of public policy in disability discrimination.

Fourth, the wide definition of mitigating measures has some rather perverse outcomes. Because mitigating measures include the extent to which one can manage to perform tasks despite an impairment, if one copes well with a given impairment, this coping behavior can deprive one of legal standing under the act, while another person with less coping ability may receive coverage. This type of mitigating measure analysis fails to consider the psychological burdens persons with impairments bear, even when they appear to cope well with their disabilities. For example, one may use a cane to assist with walking, yet this

does not mitigate the subtle social dynamics that often affect individuals at work who have "mitigated" impairments. This can also produce the anomalous result that someone could be considered disabled for some purposes where mitigating measures are not evaluated (e.g., Social Security, private insurance), yet not be considered disabled under the ADA.

Fifth, although there is an individualized inquiry to determine whether one is sufficiently impaired to gain protection under the ADA, it is clear that some impairments are greatly affected by *Sutton's* mitigating measures analysis. For example, diabetes has been the focus of a number of decisions concerning the meaning of disability. In the *Nawrot* case, the court of appeals ruled that in and of itself diabetes is not a disability [27]. Our analysis also highlights high blood pressure and depressive disorders as impairments that are likely to be mitigated. There may also be many other conditions that have similar outcomes under mitigation analysis. Although there will be individuals who have these conditions and who can demonstrate sufficient impairments under the act, it is likely that many more will not be able to do so. This will exclude many individuals who presumably were included in the original "43 million" estimate without the protection of the ADA.

Sixth, although some scholars have argued otherwise, it appears that many courts do indeed require mitigation, or, at least, evaluate impairments in light of possible mitigation when employees choose not to take it. Our case analysis revealed several situations where the lack of mitigation was an important factor in the determination of disability status. Although employees do have some protection from being required to undertake mitigating measures that have adverse consequences, in the absence of such consequences, courts do evaluate potential mitigation. This may become an area for a future Supreme Court decision.

Finally, the discrepancies between the ADA and parallel state laws are exacerbated by the *Sutton* decision. It is worth noting that some states have rejected the use of the mitigating measures concept in determining disabled status under state law. For example, the California Fair Employment Practice Act (FEHA) does not recognize mitigating measures. The act was amended in 2001 to read, in part: "whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the [ADA]" [28]. Employees in states that reject *Sutton* will certainly choose to pursue state forums if this enhances their chance to prevail.

Effect of *Sutton* on Employers

The effect of *Sutton* on employers is also significant, although in a much different sense. Employers may find that fewer employees are able to meet the threshold test of whether they are disabled. Employers may be able to reject some individuals who have mitigated impairments without running afoul of the ADA.

Neither are they required to give work accommodations to these individuals. If the goal of the ADA was to put employees with impairments to work, *Sutton* appears to work against that premise.

However, because each situation that arises must be analyzed based on the particular facts related to the individual in question, employers cannot be sure in advance whether the mitigation is sufficient to render the employee or prospective employee exempt from covered status. This precludes employers from having blanket exclusions for refusing to hire persons with certain conditions for certain jobs. Prior to *Sutton*, courts had upheld some blanket exclusions that allowed employers to prohibit persons with particular conditions from engaging in specific jobs if they posed a "direct threat" to themselves or others. Examples of previously legal blanket exclusions include insulin-dependent bus drivers and police officers. Post-*Sutton*, employers may not have blanket exclusions and must assess each individual's ability, with or without accommodation, to perform the essential functions of the job.

Another effect on employers is the reasonable accommodation requirement. Case law indicates that employers are not required to accommodate individuals whose impairments can be mitigated. On the other hand, if employers do offer reasonable accommodation, even for employees who cannot establish impairments for ADA purposes, this does not establish that they regard the individual as disabled under the act. Furthermore, *Sutton* suggests that reasonable accommodations may themselves mitigate a potential impairment [1, at 499]. Employers should consider making accommodations when they make sense in the context of the individual and the job. Obviously, employers do not want to respond to trivial and insubstantial complaints, but neither should they wish to place employees who have legitimate impairments in a position to fail. There appears to be very little risk and much to gain by making accommodations on a case-by-case basis.

Employers should also take care not to treat employees with stereotypical attitudes about their impairments, mitigated or not. Decisions made using these beliefs could result in evidence that the employer regarded the employee as disabled and used this belief to make adverse employment decisions. Although these cases are difficult to prove, the actions of employers can provide sufficient proof of this form of employment discrimination. For example, in *Knutson v. AG Processing*, it was found that the employer "relying on stereotypes and [the] unsubstantiated belief that Mr. Knutson's condition was deteriorating [and] by assigning [him] to work well below the threshold physical requirements that his work restrictions permitted him to do . . . AGP's actions demonstrate that it perceived Mr. Knutson's impairments to be substantially limiting" [29, at 990].

Although *Sutton* appears to increase the employer's win rate in ADA cases, this does not suggest that employers should ignore the legitimate requests of employees for impairment-related accommodations at work or refuse to hire qualified employees who have mitigated conditions. Obviously, litigating cases

can be expensive, even when employers prevail. Additionally, employers must also evaluate state disability discrimination law to determine whether mitigating measures analysis is applicable.

As a result of a narrowing definition of disabled under the ADA, employers may have less risk associated with mitigated impairment situations. Nonetheless, because of the individualized inquiry, a lot of ambiguity still exists about the employer's legal responsibility. This could encourage employers to explore a number of informal nonlegal methods for handling situations that arise when making case-by-case determinations. For example, a variety of disability-related programs can provide training and/or problem resolution support [30]. This can improve work environment, promote social justice, enhance morale and job satisfaction, and even improve job performance. *Sutton* provides the floor on legal responsibilities for employers, but it does not have to create a ceiling for organizational justice.

ENDNOTES

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Direct reprint requests to:

Cynthia F. Cohen, Ph.D.
Professor of Management and Organization
College of Business Administration
University of South Florida
4202 East Fowler Avenue
BSN 3403
Tampa, FL 33620-5500
e-mail: www.coba-usf.edu