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THE SUTTON TRILOGY: CHANGING THE LANDSCAPE OF THE ADA

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ABSTRACT

The agencies that enforce the Americans with Disabilities Act (ADA) have determined that a person's disability is to be assessed without regard to devices, medication, or other adjustments that may have reduced or eliminated the manifestation of the impairment. An epileptic, for example, whose tendency to seizure is controlled by medication, could still be considered disabled and could have the protection and the benefits of ADA coverage. Until recently, the circuit courts have followed the agencies' lead. In the summer of 1999, however, the U.S. Supreme Court made three decisions that invalidated this approach to determining whether a person is disabled. This article examines, assesses, and criticizes those decisions and suggests an alternative approach.

BACKGROUND ON THE ADA

On July 26, 1990, President George Bush signed the Americans with Disabilities Act (ADA) into law. Its principal purpose was to eliminate discrimination against individuals with physical or mental disabilities. Congress noted when the act was passed that some 43,000,000 Americans[1] had one or more physical or mental

[1]The 1994 Census Bureau estimate is 54 million disabled.

disabilities and that they had long been a "discrete and insular minority," faced with restrictions and limitations and subjected to a "history of purposeful unequal treatment [1-3]. The elements of the ADA that figure into this article are:

1. Title I of the ADA prohibits discrimination against disabled individuals in employment. This title sets out to assure that handicapped individuals have the same opportunity as other workers to take their place beside them and perform the same tasks in the same work environment. The ADA does not set quotas for employing handicapped individuals, but it prohibits employers from failing to hire *qualified* applicants *because* they are handicapped [4, 5].
2. The ADA defines the term "disability" broadly, as did its predecessor, the Rehabilitation Act of 1973 [6]. The ADA states that a person is disabled if s/he: 1) has a physical or mental impairment that substantially limits a major life activity; 2) has a record of such impairment; or 3) is perceived as having such an impairment [1, §12102(2)]. To acquire ADA protection, the impairment must substantially limit the individual's ability to perform that activity.
3. Working is considered to be a major life activity [7]. To determine whether a disorder is to be protected by the act, the key questions focus on the severity of the disorder, its prognosis, its impact on the person's ability to work at a particular job, and the effectiveness of the controlling medication. There are no *per se* interpretive rules. Cases are decided on an individual basis, but claimants must show they are "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes . . . [8, at 625].
4. A person is considered qualified for a position if s/he can perform its essential functions, with or without reasonable accommodation. An essential job function is one that: 1) employees in the position are actually required to perform and where 2) removing that function would fundamentally alter the position [9]. The employer's interpretation of the essential functions of a particular job will bear on the determination [1, §12111(8)(1992); 10].
5. The concept of "reasonable accommodation." This refers to any change in the work, its environment, or the way things are customarily done to enable a disabled individual to qualify for a position. The ADA requires employers to provide reasonable accommodation to disabled employees, as long as the accommodation does not involve undue hardship or cause a violation of a collective bargaining agreement [11]. Accommodations could include job restructuring, new equipment, readers, or interpreters.
6. A mitigated state is the state or condition of an individual who is receiving treatment for an impairment—the diabetic receiving insulin, the amputee who gets around with a prosthetic device, or the sufferer of a mental disorder

that is controlled by medication. Sometimes the mitigation turns what was once a severe limitation to a major life activity into something far less restrictive. The question addressed in this article is whether such an individual can still be considered disabled under the ADA [12].

SUTTON V. UNITED AIRLINES

The central issue in the three ADA cases the Supreme Court decided in the summer of 1999 was whether conditions corrected by devices, medication, or the body's own accommodations can be considered disabling under the ADA. In the lead case, the Sutton petitioners were twin sisters whose uncorrected visual acuity was 20/200 or worse [13]. With corrective measures (eyeglasses), however, their vision fell into the normal range. In 1992, they applied to United Air Lines for employment as commercial airline pilots. Even though they met the airline's requirements with regard to age, education, experience, and FAA certification, they were rejected because they did not meet the carrier's requirement of *uncorrected* visual acuity of 20/100 or better.

The federal district court rejected Suttons' claim. The court held that, despite being virtually blind without their glasses, the sisters were not *actually* disabled because: 1) they could correct their visual impairments, thereby negating their claim under the first prong of the definition of a disability; and 2) they were not *regarded* by the airline as being disabled, causing their case to fail under the third prong. The district court essentially concluded that the petitioners were unable to demonstrate that they were limited in the major life activity of working because their condition had been successfully mitigated. Until the *Sutton* decision, the circuit courts of appeal had largely accepted the *EEOC Guidelines* that required potential disabilities to be considered in their unmitigated (uncorrected) state [14]. The Tenth Circuit Court of Appeals upset this tradition by accepting the district court's logic and affirming its ruling [15].

An Impermissible Interpretation

The Supreme Court agreed. The majority opinion of the U.S. Supreme Court, written by Justice O'Connor, reviewed the legislative charges that had been given the agencies enforcing the ADA. The Court stated that none of the agencies had been given the authority to interpret the term "disability," but the enforcing agency's (EEOC) regulations had the effect of interpreting that term because the regulations had defined such terms as physical and mental impairments, substantially limits, and major life activities [13].

The Court then turned to EEOC instructions which provided that the determination as to whether an individual is substantially limited in a major life activity must be made without regard to "mitigating measures such as medicines, or assistive or prosthetic devices" [13, at 2146]. The Court concluded that "the

approach adopted by the agency guidelines . . . is an impermissible interpretation of the ADA" [13, at 2146]. The effects of measures that correct for or mitigate a physical or mental impairment must be taken into account when judging whether that person is "substantially limited" in a major life activity and, therefore, "disabled" under the act. The Court based this conclusion on a combined reading of three separate ADA provisions.

1. The act defines a disability as a physical or mental impairment that substantially limits one or more major life activities. The phrase, "substantially limits," is in the present indicative verb form. The language, therefore, should be read as requiring that a person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently "substantially limits" a major life activity [13].
2. The *EEOC Guidelines*, furthermore, have contemplated an individualized, case-by-case determination of disability [16]. The EEOC directive that persons be judged in their uncorrected or unmitigated state would require courts to make disability determinations either on general information about a disorder or upon speculation about the effects of an uncorrected impairment [13].
3. Finally, the Court argued that the figure of 43,000,000 Americans with disabilities that was incorporated into the act, is inconsistent with the definition of disability presented by the petitioners. After reviewing census data and other statistical information, the Court concluded that the 43,000,000 figure reflected an understanding that those whose impairments were largely corrected by medication or other devices are not "disabled" within the meaning of the ADA. Had Congress intended to include all persons with corrected physical limitations among those covered by the act, the figure would have been much higher [13].

The Court then addressed the issue of United Air Lines vision requirement. It stated that the ADA allows employers to prefer some physical attributes over others and to establish physical criteria, but

> [a]n employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity. Accordingly, an employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment—such as one's height, build, or singing voice—are preferable to others, just as it is free to decide that some limiting, but not substantially limiting impairments make individuals less than ideally suited for a job [13, at 2150].

The majority opinion closed by stating that when the major life activity is that of working, the statutory phrase "substantially limits" requires the plaintiffs to show they are significantly restricted in the ability to perform either a class of jobs or a

broad range of jobs in various classes. The inability to perform a particular job does not constitute a substantial limitation in the major life activity of working [17]. Thus, in addition to their other problems with the case, the Sutton sisters failed to demonstrate that their poor eyesight limited them from anything more than the single position of global airplane pilot.

The Majority Opinions in the Companion Cases

The basic principles announced in *Sutton* were applied in its two companion cases. In *Murphy v. United Parcel Service,* the plaintiff was an automotive mechanic with high blood pressure whose job required him to drive commercial vehicles [18]. Department of Transportation (DOT) health certification requirements prohibit the operation of a commercial vehicle by individuals whose current clinical diagnosis of high blood pressure is likely to interfere with their ability to operate a commercial vehicle safely [19]. Murphy was discharged when his condition was discovered because it violated this regulation [18].

The third case, *Albertsons, Inc. v. Kirkingburg,* involved a truck driver who was a victim of an uncorrectable condition called amblyopia (lazy eye syndrome) that left his vision almost monocular [20]. Because monocularity limits the individual's depth perception, the DOT requires that commercial truck drivers possess corrected distant visual acuity of at least 20/40 *in each eye.* The physician employed by the company erroneously certified that Kirkingburg met the DOT standards, but in a later physical examination his monocularity was discovered. The doctor suggested he seek a DOT waiver to continue with his job. He began that process, but the company fired him before it was completed because he could not meet the basic DOT vision requirement. Some months after his discharge, he received the waiver but the company refused to reinstate him [20].

Murphy and Kirkingburg appealed their cases to the federal courts, ultimately reaching the Supreme Court. Following the logic expressed in *Sutton,* the Court concluded that neither petitioner was limited substantially in any major life activity because their conditions had been successfully mitigated by medication or the body's adjustments [18, 20].

The 1999 Supreme Court Decisions: The Dissenting View

Justice Breyer joined Justice Stevens in his dissent from the *Sutton* and *Murphy* decisions, and the two justices concurred only partially in *Kirkingburg*. Their dissenting views centered on the concept of mitigation. They expressed the belief that a person's disability is to be determined without considering any mitigation that has resulted from rehabilitation, self-improvement, prosthetic devices, or medication.

After reviewing the three-pronged definition of disability, Justice Stevens concluded that the sweep of the statute's definition makes it "pellucidly clear" that

Congress intended the act to cover people who had successfully mitigated the effects of an otherwise disabling condition. If a disability exists only where a person's *present or actual condition* is substantially impaired, as was argued by the majority, there would be no reason to protect people who were once disabled but are now recovered.

Legislative History

The majority stated that there was no need to delve into the legislative history of the ADA because the statute was clear. However, much of Stevens' dissent is based on that history. The ADA originated in the Senate, and its report stated that the goal of the act was to "ensure that persons with medical conditions that are under control and therefore do not currently limit major life activities are not discriminated against on the basis of their medical conditions" [21, p. 23]. Thus, "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids" [21, p. 24].

The House report repeated the Senate's basic understanding. When determining whether an individual's impairment substantially limits a major life activity, the "impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation" [22, p. 28]. The dissent also found further support in the Report of the House Committee on Labor and Education [23].

The 43,000,000 Argument

The dissent argued further it was "wrong" for the Court to confine the coverage of the act because a broadened interpretation of the term "disability" would expand the number of people in the protected class. It offered two reasons for taking this position. First, the narrow approach would deny coverage to a sizable portion of the original core group of 43 million. The majority opinion would exclude controllable conditions such as diabetes and severe hypertension from the act's protection, and those conditions were expressly understood as limiting impairments in the legislative history.

The second reason was tied into the desirability of interpreting the statute generously—to emphasize inclusion rather than exclusion. The ADA set out to provide a comprehensive national mandate to prevent discrimination against individuals with disabilities. The Court has often dealt with other classes of individuals that have fallen outside the core prohibitions of other antidiscrimination statutes. In those cases, the court has consistently construed the legislation to include comparable evils, even those beyond Congress's immediate concern when it passed the legislation.

Individualized Treatment

The majority argued that an approach that failed to consider individuals in their mitigated state would create a system in which people would be treated as members of a group or class rather than individuals. The dissent argued that the majority's approach similarly reduced the need for individualized treatment because it allowed employers to "dismiss out of hand every person who has uncorrected eyesight worse than 20/100 without regard to the specific qualifications of those individuals or the extent of their abilities to overcome the impairment [13, at 2158]. The dissent also pointed out that the *Sutton* case was not about whether the two sisters were qualified or whether they could perform the job of an airline pilot without putting the public in peril. The case was about an airline's duty to come forward with some legitimate explanation for refusing to hire otherwise qualified applicants because of their uncorrected eyesight or "whether the ADA leaves the airline free to decline to hire petitioners on this basis even if it is acting purely on the basis of irrational fear and stereotype [13, at 2157].

DISCUSSION

The *Sutton* cases have a momentous effect on employees, employers, and on the process of litigation under the ADA. When the Court decided infirmities should be evaluated in their mitigated state, millions of individuals were removed from the ambit of the ADA. *Sutton's* broad language could affect the ability of every individual with a mitigated impairment to qualify for positions, for reasonable accommodations, for entrance into job-training programs, and for entitlement to a number of other disability-based terms, conditions, or privileges of employment.

In addition, when the Court so broadly protected the right of employers to set employment standards, employers were given far greater freedom in screening applicants and employees than had been granted under any other civil rights statute. The *Sutton* decisions, in turn, could have a large impact on insurance costs and coverage if further interpretations allow employers to set employment standards that would remove qualified applicants who were substandard insurance risks from the hiring pool.

The effect on the legal process is also immense. The plaintiff win rate in ADA cases is low [24]. A recent American Bar Association study of almost all ADA trial and appellate court rulings concluded that employers prevailed in 92 percent of the cases [25]. A later study of 267 federal appellate court cases found plaintiffs prevailed only 4 percent of the time [25, T. 5]. Because the post-*Sutton* plaintiff has a more difficult job establishing the existence of a disability, more claims will be intercepted earlier in the legal process, and the number of plaintiff "wins" will probably drop even further. *Sutton* may also encourage forum shopping, particularly where state laws more generously interpret the term "disability" [26].

Problems with the Majority's Decision

Ignoring the Second Prong

The *Sutton* Court ignored the second prong of the definition of disability. The Court overlooked the fact that individuals can be considered statutorily disabled if they have "a *record* of such an impairment." The Sutton sisters and Kirkingburg had *records* indicating their vision was seriously impaired, and seeing is defined by the act as a major life activity. Murphy had a *record* of hypertension and Kirkingburg of amblyopia. If the term "disability" is defined in three ways linked by the connective "or," the Court cannot logically ignore any part of the definition.

Evaluation in the Unmitigated State

The Court also argued that evaluating disabilities on a unmitigated basis violates the rule that disabilities are to be evaluated on a case-by-case basis. Justice Stevens' comments about it being no less universalistic to require a person to be judged in a mitigated rather than an unmitigated state and his comments about it being as easy to test the Suttons with their glasses on as with their glasses off seem to make good sense.

The Court further explained that inferences drawn about how a person would perform in an unmitigated state would be speculative if the mitigating measures have controlled the disorder. But how much speculation is required when all the disorders confronted in the *Sutton* Trilogy were so well-documented? The Suttons, without glasses, might have difficulty finding the plane, let alone flying it. Murphy's hypertension, left alone, could make him a menace at the wheel as could the limited depth perception caused by Kirkingburg's monocularity.

Forty-Three Million Americans

The Court also asserted that the ADA's reference to 43 million Americans with disabilities meant those whose impairments are largely controlled by medication or other devices are not disabled within the meaning of the ADA. Justice Stevens described this as a "thin reed" upon which to make a significant change in the interpretation of a major statute [13, at 2160; 28], and I agree. *Sutton* represents an important shift in public policy. The Court's arguments about the number of people who would be covered are based on a figure contained in the ADA's exhortative preamble, tangential to the substance of the act, and not subject to serious scrutiny or debate. This is a weak basis for a change in policy that affects a significant part of the disabled population.

Ignoring the Legislative History

The majority's unwillingness to examine the legislative history is mind-boggling. The fact that two justices drew contrary conclusions about the

interpretation of the statute should have sent both sides to the legislative history to clarify the intent of Congress. As noted earlier, both houses of Congress did consider whether disabilities should be evaluated in their mitigated or unmitigated state and concluded that protection should be extended to individuals whose disabilities are, in fact, checked by mechanical devices, medication, or their own special efforts.

PROBLEMS IN THE DECISIONS' IMPLICATIONS

The Reach of the Decisions

What are the boundaries of the *Sutton* Trilogy? When the Court determined that infirmities were to be evaluated in their mitigated state, it placed no bounds on the infirmities. The decisions covered only individuals with near-sightedness, hypertension, and amblyopia, but the language extended the potential application of the concept to some large but undefined area. For example, how far do the *Sutton* decisions reach in the area of mental impairments? Individuals with widespread infirmities such as attention deficit/hyperactivity disorder (ADHD), bipolar disorder, or depression have traditionally been considered to be protected under the ADA. Are they now?

Using ADHD as an example, a strict construction of *Sutton* suggests a person who suffers from the disorder will not be covered by the act if it is controlled by medication. Yet part of the problem with disorders such as ADHD is one of denial. The individuals come to think of themselves as being cured and stop taking the medicine. If they stop taking the medication, do they then become covered by the ADA? Has *Sutton* created the anomalous situation whereby the person who has adapted to an infirmity by a device or a medicine might benefit by abandoning the adaptation?

Employment Standards

Perhaps the most serious problem ties into *Sutton's* treatment of employment standards. While the ADA gives employers some discretion in setting employment standards, the *Sutton* decision appears to give them almost unlimited freedom. In determining essential functions, for example, the act states that "consideration shall be given to the employer's judgment as to what standards are essential . . . " [1, §102(8)]. However, the *Sutton* Court, went further, saying that an "employer is free to decide that physical characteristics or medical conditions that do not rise to the level of impairment . . . are preferable to others, just as it is free to decide that some limiting, but not substantially limiting impairments make individuals less then ideally suited for a job [13, at 2150].

Phrases such as "limiting, but not substantially limiting impairments" create an almost impossible interpretive tightrope for employers and employees. But such statements also ignore Section 102 of the ADA, which prohibits employers from utilizing standards or criteria: "(A) that have the effect of discrimination on the basis of disability" [1, §102(3)(A)]. Such statements also ignore the well-known disparate impact test applied under other civil rights statutes. This test essentially means that an employer may establish job requirements, but if the requirement leads to substantially fewer members of a protected class being qualified for employment, the standard itself must be shown to be necessary for job performance. The *Sutton* language appears to deny the disparate impact test to plaintiffs claiming discrimination under the ADA.

Why a Broad Policy Statement?

Finally, the Court could have decided the cases on a more limited basis. Rather than creating a general rule on testing in the mitigated or unmitigated state, the Court could have focused on the public safety aspects. It is possible that testing impaired employees in a mitigated state makes more sense when those employees are charged with the public safety, as are airline pilots and truck drivers. The Court could also have chosen to focus on whether the claimed disability in its unmitigated state denied the petitioners entry into a broad class of jobs or several jobs in different classes. It surely could have found that the infirmity claimed by the Sutton sisters did not qualify under this standard. The majority considered this option but chose to decide the case on a broader basis.

SUMMARY AND CONCLUSIONS

This article examined three recent decisions made by the U.S. Supreme Court that have changed the interpretation of the Americans with Disabilities Act. The three cases, the *Sutton* Trilogy, involved individuals with infirmities whose conditions were controlled by devices, medication, or by the body's own adjustments. The core issue was whether disability determinations under the ADA should be made by considering the infirmity in a mitigated or unmitigated state.

The legislative history of the ADA records that both houses of Congress considered the issue and determined that a person's disability should be evaluated in the unmitigated state. The EEOC, other agencies that had interpreted the act, and the earlier decisions of every circuit court followed the course indicated by Congress. However, in the *Sutton* cases, the Supreme Court concluded that the interpretation made by the federal agencies was "impermissible." Disabilities should be evaluated in their mitigated state, thereby leaving individuals

unprotected by the ADA if their infirmities are held in check by prosthetic devices, medicines, or other means.

The *Sutton* cases address a difficult problem and the Court's solution was not unreasonable. It is difficult to regard people as disabled when they can correct their impairment with a mitigation as simple as eyeglasses. But in deciding the cases on a broad basis, the Supreme Court took on a policy-making role that ignored the original intentions of Congress, reshaped the interpretation of the ADA, altered its coverage in a monumental way, and, in my mind, ignored the letter and violated the spirit of the law.

Justice Stevens' dissent implies that the majority decided the *Sutton* cases on the basis of docket considerations—that the Court's decision was influenced by the specter of an overwhelming flood of lawsuits that would follow a decision in favor of the previously accepted test for disability [28]. It is also possible that some members of the majority thought that if they yielded to the earlier interpretations of the law, they would open the floodgates to millions of *undeserving* individuals—to people who were perfectly capable of handling a wide variety of jobs, whose disabilities were easily and inexpensively correctable.

But the Court's decisions, regardless of motivation, come at a very high cost. The language on employment standards appears to enable an organization to deny employment opportunities whenever the employer is uncomfortable with their corrected disability. The language suggests that the qualified applicant with a prosthetic device might be denied employment lawfully, even if the only reason is an employer's preference for an "able-bodied person." The fully qualified epileptic, whose disorder is controlled by medication, might be rejected lawfully because the employer was haunted by a "What happens if the medicine doesn't work one day?" specter. An applicant with a controlled condition of bipolar disorder might be rejected lawfully because the employer is uncomfortable with employees whose behavior is chemically influenced. The *Sutton* decisions punish otherwise disabled employees for engaging in self-help and for taking advantage of medical advances.

Furthermore, as Justice Stevens argued, limiting the coverage of the ADA also runs counter to the approach taken by Congress and the courts to every other civil rights statute. The rule has been to interpret these laws generously. Prohibitions on racial discrimination, originally intended to protect African Americans, for example, were soon extended to Hispanics, Asians, Native Americans, and other groups. The original prohibition on sexual discrimination was, over time, extended into sexual harassment and same-sex issues [29]. The ADA shares not only a tradition, but a common language with those statutes. The act says broadly that: "No covered entity shall discriminate against a qualified individual with a disability, because of the disability . . . in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms and conditions of employment [1, §12112(2)]. *Sutton* flies in the face of these traditions and these words.

A Simpler, More Traditional Solution

A better approach to the problem would be one more closely tied to the traditional ways that agencies and courts have approached civil rights issues in employment. The recommended approach is one that shifts attention from the basis for determining disability to the basis for the employment standards.

The first question should be factual: was the individual denied an employment opportunity because of an infirmity, the record of one, or the belief that one existed? This question is a simple variation on the "but for" rule traditionally applied in civil rights cases. In relation to a classic civil rights case, would Mr. Griggs have been promoted "but for" the company's requirement of a high school diploma? [30]. Would Messrs. Kirkingburg and Murphy have kept their jobs if it weren't for their physical problems? Would the Sutton sisters have been hired if their vision was better?

If the answer to this question is yes, the next task is to determine the employment effects of the organization's decision. The question would be this: Does this infirmity, the record of one, or the belief that one existed deny the individual opportunities in a single broad class of jobs or a number of jobs in separate classes? The Sutton sisters might have difficulty meeting this requirement, but Murphy and Kirkingburg would probably not because they were denied employment throughout the field of commercial truck operation.

If the answer to the second question is yes, the third step moves us further along with the traditional form of analysis. Can the individual meet the requirements of the position in question with reasonable accommodation? The question regarding the plaintiffs in the *Sutton* Trilogy would concern whether they could meet the requirements of the positions in question with reasonable accommodation. If the corrections enable the individual to perform the job, denying them opportunity at the job could violate the ADA.

Finally we move to employment criteria. United Airlines maintained that uncorrected vision of 20/100 was necessary to qualify for the job of global airline pilot. The criterion should be subjected to the same disparate impact test as was the requirement of a high school diploma or of a score in the intelligence test in *Griggs* [30]. If an employment criterion affects applicants or employees substantially more than it affects the rest of the population, the burden falls on the employer requiring the test to establish its necessity and efficacy. And if the employer is unable to establish the necessity or efficacy of the employment criterion, the criterion should not be a bar to the petitioner.

The same kind of disparate impact test should be applied to such federal regulations as those of the U.S. Department of Transportation that figured so prominently in *Sutton's* two companion cases. It makes a great deal of sense to consider Justice Thomas' suggestion in the Kirkingburg case. Justice Thomas Joined the majority opinion, "only on the understanding that it leaves open the argument that federal laws such as the DOT's visual acuity standards might

be critical in determining whether a plaintiff is a 'qualified individual with a disability'" [20, at 2175].

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ENDNOTES

1. Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*
2. C. C. Jones, Individuals Protected by the Employment Provisions of the Americans with Disabilities Act, *Journal of Individual Employment Rights,* pp. 209-220, 1994-95.
3. S. Feldman, Americans with Disabilities Act: Employer Obligations, *Journal of Individual Employment Rights,* pp. 91-113, 1993-94.
4. Legislative History of P.L. 1-1-336, The Americans with Disabilities Act. Committee on Labor and Education, U.S. House of Representatives, 101 Congress, 2d Session (Dec. 1990), Vol. 1. Serial 102-A, p. 124.
5. R. D. Lee and P. S. Greenlaw, Rights and Responsibilities of Employees and Employers Under the Americans with Disabilities Act of 1990, *Journal of Individual Employment Rights,* pp. 1-13, 1998-99.
6. Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* The coverage of the Rehabilitation Act, however, was limited to employees of the federal government and of federal contractors, while the ADA extends to private and public sector employers of 15 or more employees.
7. CFR § 1630.2(i).
8. *Weiler v. Household Finance Corp.,* 101 F.3d 619, 625 (7th Cir., 1996).
9. The EEOC's regulations define a qualified individual with a disability as one who satisfies the prerequisite skill, experience, education, and other job-related requirements of the position the individual either holds or desires, 29 C.F.R. § 1613.702(f) 1991.
10. 29 CFR App. § 1630.2(n) 1991.
11. J. E. Grenig, *Disabled Wokers,* in T. Bornstein, A. Gosline, and M. Greenbaum, *Labor and Employment Arbitration,* Matthew Bender, New York, 1998.

12. A. F. Silbergeld and R. B. Meeks, Federal Appellate Courts are Split on How to Treat Plaintiffs with Chronic Health Conditions that Can Be Mitigated, Under the Americans with Disabilities Act, *National Law Journal,* Monday, May 4, 1998, p. 2(5).
13. *Sutton v. United Airlines,* 119 S.Ct. 2139 (1999).
14. The Supreme Court referred to the following decisions which held that disabilities should be determined in their mitigated state: *Bartlett v. New York State Bd. of Law Examiners,* 156 F.3d 321, 329 (2d Cir. 1998), learning disability that affected the ability to read; *Baert v. Euclid Beverage, Ltd.,* 149 F.3d 626, 629-630 (7th Cir. 1998), diabetes; *Matzcak v. Frankford Candy & Chocolate Co.,* 136 F.3d 933, 937-938, (3d Cir. 1997), epilepsy; *Arnold v. United Parcel Services, Inc.,* 136 F.3d 854, 859-866, (1st Cir. 1998); and *Washington v. HCA Health Services of Texas, Inc.,* 152 F.3d 464, 470-471 (5th Cir. 1998), adult still disease. For a similar result, see *Elizabeth Criado v. IBM Corporation,* 145 F.3d 437 (1st Cir. 1998), attention deficit disorder. In the *Sutton* decision, Justice Stevens stated repeatedly in his dissent that eight of the nine circuits that have addressed the mitigation issue define the term "disability" without regard to ameliorative measures [14, at 2153].
15. 130 F.3d 933 (1997).
16. The determination of disability must be made *on a case by case basis* without regard to mitigating measures. . . . " 29 CFR pt. 1630. App. § 1630.2(j) (1998). (Emphasis added.) See also *Bragdon v. Abbott*, 524 U.S. 624 (1998), where the court declined to consider whether HIV was a *per se* disability under the ADA.
17. 29 CFR § 1630.2(j)(3)(1).
18. *Murphy v. United Parcel Service,* 119 S.Ct. 2133 (1999).
19. 49 CFR §391.41(b)(6).
20. *Albertsons, Inc. v. Kirkingburg,* 119 S. Ct. 2162 (1999).
21. S. Rep. No. 101-116, p. 23, 24 (1989). Reference made to controlled diabetes and epilepsy.
22. H. R. Rep. No. 101-485, pt. III. p. 28 (1990).
23. The report referred to hearing loss and epilepsy and said they were covered by Section (A), "even if the effects of the impairment are controlled by medication." Com. on Ed. and Lab., H. Rep. 101 Cong., 2d Session (Dec. 1990) v. 1., p. 325.
24. B. A. Lee, The Implications of ADA Litigation for Employees: A Review of Federal Appellate Court Decisions, July 1999, scheduled for publication by *Human Resource Management* (University of Michigan).
25. J. Parry, Study finds employers win most ADA Title I Judicial and Administrative complaints, *Daily Labor Report,* (BNA), 119, E-a-3, June 22, 1998. Cited in [25, p. 9].
26. Notes from a seminar discussion of a paper submitted by Barbara A. Lee, Comparison of Employment Provisions of the ADA and NJLAD, presented at ICLE seminar on Americans with Disabilities Act/Employment Discrimination Conference . . . Future of the ADA Litigation After the Supreme Court Holdings in Olmstead, Kirkingburg, Murphy, Sutton & Cleveland, New Jersey Institute for Continuing Legal Education, October 1, 1999, pp. 223-230.
27. "In the end, the Court is left only with its tenacious grip on Congress' finding that 'some 43,000,000 Americans have one or more physical or mental disabilities,' . . . and that figure's legislative history is extrapolated from a law review article authored by the drafter of the original ADA bill introduced in Congress in 1988 [14, at 2160].

28. For example: “It has also been suggested that if we treat as “disabilities” impairments that may be mitigated by measures as ordinary and expedient as wearing eyeglasses, a flood of litigation will ensue [14, at 2159].
29. *Oncale v. Sundowner Services, Inc.,* 118 S.Ct. 998 (1998).
30. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

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