

# NCD

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No. 11

The Role of Mitigating Measures in the Narrowing of the ADA's  
Coverage

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In an abrupt break from the legislative history of the Americans with Disabilities Act (ADA or the Act), the position of the executive agencies responsible for enforcing the ADA, and the prior rulings of eight of the nine federal courts of appeal that had addressed the issue, the Supreme Court decided that mitigating measures should be considered in determining whether an individual has a disability under the ADA. This policy brief examines the function and types of ameliorating measures, the prior near-consensus that such measures should not be interjected into the determination of disability, the Supreme Court's decisions on the issue, and the repercussions of the Court's position.

## **The Role of Mitigating Measures**

The relationship between the concepts of impairment and disability is not linear, because the interaction between physical and mental impairments and the physical and social environment is not simple and uniform. A prior policy brief in the *Righting the ADA* series discussed the social model of disability in the ADA as opposed to the traditional medical model of disability (<http://www.ncd.gov/newsroom/publications/negativemedia.html#myth3>). In accordance with the social model, the ADA was concerned primarily with addressing discrimination and not with differentiating one group of people as having disabilities and others as not; it was intended to focus more on the attitudes and perceptions of those accused of discrimination than on the precise physical or mental characteristics of the persons allegedly discriminated against. As applied by the courts, however, the ADA definition has all too often been construed as a narrow gateway to ADA protection that often depends upon technical distinctions about what constitutes a disability under the Act. In this context, the starting point in determining disability is the identification of some trait or condition of a person, typically a diminishment, absence, or unconventional version of some physical or mental capability or attribute that most other people usually have. In the terminology of the ADA, such conditions are referred to as "impairments."

Where an impairment occurs, various techniques may be brought to bear to eliminate, reduce, compensate for, or sidestep its effects. The most dramatic type of corrective measure is one which "cures" or removes the impairment. Sometimes, medications can successfully treat an ailment and a person recovers fully without any ongoing symptoms or need for subsequent medication or treatment. In some situations, surgery or other medical procedures may remove the cause of an impairment and thereby eliminate the impairment. Some types of conditions may disappear over time, on rare occasions spontaneously, or as a result of various kinds of therapeutic regimens, lifestyle changes, and other factors. In circumstances where an impairment has been fully eradicated and no restrictions or need for treatment persist, the person no longer has an impairment and is not eligible for protection under the branch of the ADA definition that applies to actual disabilities. Such a person, however, may still be able to claim ADA protection if she or he is subjected to discrimination because of the previous impairment ("a record of" impairment) or because of a misperception of ongoing impairment ("being regarded as having" an impairment).

In many situations, however, a physical or mental impairment cannot be totally eliminated, but may be susceptible to various kinds of measures to control it, reduce it, compensate for its effects, or otherwise ameliorate the impact of the impairment and enable the person to function more effectively or comfortably. Such measures, which can include medications, techniques, and devices, have been called “mitigating measures.” The extent of the impact of mitigating measures varies greatly from person to person, from impairment to impairment (and according to the degree of severity and the scope of the impairment), and according to the nature of the measure used.

Medications, for example, can reduce or regulate the effects of various conditions, including epilepsy, diabetes, some psychiatric disabilities, HIV infection, high blood pressure, and many others. Various kinds of surgical interventions can sometimes enhance the function of people with some types of physical impairments. Wheelchairs, braces, walkers, crutches, prosthetic devices, canes, and other devices can be used to assist the functioning of people with various kinds of impairments of the arms, legs, and spine. Hearing aids, sign language, the ability to comprehend verbal speech visually (speechreading), and other devices and techniques may prove helpful to various individuals with various degrees of hearing impairments. Eyeglasses, magnifying devices, white canes, mastery of braille, and other measures may be useful for some individuals with visual impairments. Some people with severe speech impairments may use an electronic or manual speech board to communicate. Dietary restrictions can ameliorate the effects of some impairments. The mitigating measures mentioned here are merely examples of a whole gamut of measures that may be used by particular individuals to manage their impairments.

Mitigating measures can be thought of as adjustments made to an individual’s person or personal environment to minimize limitations that might result from impairments, as opposed to modifications of the external environment that may also be necessary. In its *Toward Independence* report in which it first called for the enactment of an ADA, NCD quoted from a United Nation’s report as follows:

Despite everything we can do, or hope to do, to assist each physically or mentally disabled person achieve his or her maximum potential in life, our efforts will not succeed until we have found the way to remove the obstacles to this goal directed by human society—the *physical barriers* we have created in public buildings, housing, transportation, houses of worship, centers of social life, and other community facilities—the *social barriers* we have evolved and accepted against those who vary more than a certain degree from what we have been conditioned to regard as normal. More people are forced into limited lives and made to suffer by these man-made obstacles than by any specific

physical or mental disability.

(*Report of the United Nations Expert Group Meeting on Barrier-Free Design*, 25 International Rehabilitation Review 3 (1975), quoted in *Toward Independence* (1986) at p. 1.)

Consistent with this perspective, the ADA requires covered entities to take certain steps to remove obstacles to people with disabilities. These requirements include certain obligations to remove architectural, transportation, and communication barriers; to provide auxiliary aids and services; and to make reasonable accommodations in the workplace. These obligations relate to enhancing access to the services, programs, jobs, facilities, and opportunities of covered entities. The “mitigating measures” discussed in this policy brief, however, are more intimately associated with the particular person, and may benefit the individual in various settings. The Equal Employment Opportunity Commission (EEOC), for example, has distinguished between an adjustment or modification that “specifically assists the individual in performing the duties of a particular job”—which an employer may be required to provide as a reasonable accommodation—and one that “assists the individual throughout his or her daily activities, on and off the job”—which would be considered a “personal item” that an employer would generally not be required to provide (29 C.F.R. appendix to part 1630 (commentary on §1630.9)). As examples of these “personal item[s],” the EEOC listed “a prosthetic limb, wheelchair, or eyeglasses.” The line between personal and nonpersonal items is not always a bright one, as the EEOC admitted when it added that eyeglasses could be a reasonable accommodation if a person with a visual impairment needed specially designed glasses to do a particular job.

### **The Legal Position on Mitigating Measures Prior to the Supreme Court Weighing In**

Before the Supreme Court upset the appellate court, all the relevant authorities were nearly unanimous in the view that mitigating measures should not be considered in deciding whether a person has a disability under the ADA. Even before the ADA was enacted, the committee reports on the pending legislation declared clearly that mitigating measures should not be factored in. The three ADA Committee Reports that addressed the issue all concurred that mitigating measures are not to be taken into account when determining whether an individual has a disability.<sup>1</sup> The House Education and Labor Committee Report elaborated with the following examples:

For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication. (H.R. Rep. No. 101-485, pt. II at 52 (1990))

During floor debates regarding the ADA's coverage of psychiatric conditions, Senator Harkin, the original sponsor of the Senate Bill, made a point of noting that persons with schizophrenia, manic-depressive illness, and other mental health conditions whose conditions were controlled by medications would be able to pursue ADA claims (101 Cong. Rec. S19864 (1989) (statement of Sen. Harkin)).

After the ADA was passed, both the Department of Justice (DOJ) and the Equal Employment Opportunity Commission (EEOC), the key federal agencies directed to issue regulations implementing the nondiscrimination provisions of the Act embraced the notion that mitigating measures should be excluded from the determination of disability. Regulatory commentary issued in appendices to DOJ's ADA Title II (state and local government entities) and Title III (public accommodations) regulations both contain the identical statement that "disability should be assessed without regard to the availability of mitigating measures" (28 C.F.R. § 35.104, app. A.; 28 C.F.R. § 36.104, app. B). Likewise, in the Interpretive Guidance accompanying its ADA Title I (employment) regulation, the EEOC declared that the existence of an impairment and whether an impairment substantially limits a major life activity are to be determined "without regard to mitigating measures such as medicines or assistive or prosthetic devices" (29 C.F.R. appendix to part 1630) (commentary on §§ 1630.2(h) & 1630.2(j)). Based upon the ADA committee reports, the EEOC cited the following as examples of determining impairment without regard to mitigating measures:

For example, an individual with epilepsy would be considered to have a disability even if the symptoms of the disorder were completely controlled by medication. Similarly an individual with hearing loss would be considered to have an impairment even if the condition were correctable through the use of a hearing aid.  
(*Id.* (commentary on § 1630.2(h)))

As examples of how impairments can be substantially limiting regardless of mitigating measures, the EEOC included the following examples, again derived from the ADA committee reports:

An individual who uses artificial legs would ... be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication.  
(*Id.* (commentary on § 1630.2(j)))

The EEOC reiterated its stance on mitigating measures in its *Guidance on Psychiatric Disabilities and the Americans with Disabilities Act* (59 Daily Lab. Rep. E-1, p. 6 (1977)):

The ADA legislative history unequivocally states that the extent to which an impairment limits performance of a major life activity is assessed without regard to mitigating

measures, including medications. Thus, an individual who is taking medication for a mental impairment has an ADA disability if there is evidence that the mental impairment, when left untreated, substantially limits a major life activity.

Building upon the consistent position of the regulatory agencies on the mitigating measures issue, plus the “unequivocal” legislative history cited by the EEOC, eight of the nine federal courts of appeals to address the issue had ruled that the ADA definition of “disability” should be applied without regard to ameliorative measures. This included the First, Second, Third, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuit Courts of Appeals.<sup>2</sup> Only the Tenth Circuit had ruled that mitigating measures *should* be considered, in the very case in which the Supreme Court first took up the issue.<sup>3</sup>

Accordingly, the legal landscape was highly one-sided in favor of the view that mitigating measures should be disregarded in determining whether an individual has a disability under the ADA.

### **The Supreme Court’s Decisions on Mitigating Measures**

In *Sutton v. United Airlines*, 527 U.S. 471 (1999), the Supreme Court rejected the overwhelming consensus of prior authority and ruled that corrective and mitigating measures must be considered in determining whether an individual has a disability under the ADA. The Court held that “the approach adopted by the agency guidelines—that persons are to be evaluated in their hypothetical uncorrected state—is an impermissible interpretation of the ADA.” *Id.* at 482. The mitigating measure at issue in the *Sutton* case was corrective lenses (eyeglasses and contact lenses). In *Murphy v. United Parcel Service*, 527 U.S. 516, 521 (1999), the Court applied the same analysis to medication used to treat an otherwise disabling condition. In *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 565 (1999), the Court went even further and declared that mitigating measures encompass not only artificial aids, such as medications and devices, but also measures undertaken, whether consciously or not, with the body’s own systems, including subconscious mechanisms for compensating and coping with visual impairments.

The factual backgrounds and full holdings in the *Sutton*, *Murphy*, and *Kirkingburg* decisions are summarized in the NCD paper *Supreme Court Decisions Interpreting the Americans with Disabilities Act (ADA)* found at [http://www.ncd.gov/newsroom/publications/supremecourt\\_ada.html](http://www.ncd.gov/newsroom/publications/supremecourt_ada.html). The Web site of the Judge David L. Bazelon Center for Mental Health Law has an insightful paper, *The Supreme Court’s 1999 ADA Decisions* by Jennifer Mathis, that also provides a summary of the three decisions and presents some advocacy strategies for avoiding some negative effects of the decisions; it is found at <http://www.webcom.com/bazelon/sct99ada.html>

The upshot of these rulings is starkly apparent, however: the Supreme Court drastically narrowed the class of persons protected by the ADA by excluding those whose impairments are successfully addressed by mitigating measures. The only concessions the Court has made with regard to mitigating measures are its recognition in the *Sutton* opinion that a person who makes use of a corrective device may still have a disability anyway if the device does not correct the condition sufficiently to prevent a substantial limitation on a major life activity;<sup>4</sup> and its acknowledgment in the *Murphy* decision that people who take medication for their medical conditions may nonetheless qualify as having a disability due to limitations that persist despite the medication or due to the negative side effects of the medication.<sup>5</sup>

### **The Repercussions of the Court's Position on Mitigating Measures**

As a result of the Court's rulings in the *Sutton*, *Murphy*, and *Kirkingburg* cases, individuals who are currently functioning well due to mitigating measures such as medications or prosthetic devices are not protected as individuals with disabilities under the ADA. The lower courts have applied this unfortunate legal doctrine in a variety of circumstances, dismissing ADA claims because plaintiffs have not demonstrated the existence of a disability, without reaching the issue of alleged discriminatory conduct. Among the claims dismissed by the lower courts have been those of:

a machine operator with epilepsy whose medication reduced her seizures to approximately one or two per week;<sup>6</sup>

a pharmacist with diabetes who controlled his condition with insulin injections and a controlled diet;<sup>7</sup>

an administrative assistant with diabetes who controlled her condition to some degree by daily blood sugar tests and daily injections of insulin;<sup>8</sup>

a forklift operator with depression controlled by medication;<sup>9</sup>

a nurse with focal onset epilepsy controlled by medication;<sup>10</sup>

a convenience store employee with a heart condition controlled by medication;<sup>11</sup>

a bus driver with hypertension controlled by medication;<sup>12</sup>

a police officer with depression controlled by counseling and medication;<sup>13</sup>

a company president with myelodysplastic syndrome, a form of blood cancer, whose condition was treated by chemotherapy;<sup>14</sup>

a correctional officer, whose asthma was treated with medication but still resulted in numerous emergency room visits and absences;<sup>15</sup> and

a county corrections officer with asthma, requiring daily medication, twice weekly injections, use of inhaler, and occasional hospitalization.<sup>16</sup>

In another case, a federal district court ruled that a stocker with epilepsy who, even with medication, experienced weekly seizures, and who, as a result of the side effects of his medication, experienced decreased cognitive function and memory problems, was nonetheless not substantially limited under the ADA.<sup>17</sup> Recognizing the striking change in the law brought about by the Supreme Court's mitigating measures decisions, the court observed that, prior to *Sutton*, "a person suffering from epilepsy would receive nearly automatic ADA protection."

In many of these cases, the plaintiffs were not hired, or were fired, specifically because of their impairments. In others, they were denied accommodations they had requested in order to enable them to perform their jobs or to control their conditions. In the case of the pharmacist with diabetes, for example, all he was asking of his employer was a half-hour off for lunch so that he could administer his medications and eat his lunch uninterrupted to avoid hypoglycemic episodes.<sup>18</sup> In response, the employer allegedly refused his request and then terminated him. Because the Court of Appeals for the Eighth Circuit found that the employee was not substantially limited in any major life activities when the effects of insulin and a controlled diet were considered, it ruled that he was not protected by the ADA; it never reached the issues of the reasonable accommodation he sought, nor of his firing.

This result is typical of such cases—because they are dismissed on the coverage issue, the question of whether discrimination actually occurred is never addressed. It also typifies the contradictory power given to employers by such a construction of the ADA. On the one hand, the employer can consider the underlying condition, despite mitigating measures, to be sufficiently serious to justify terminating or refusing to hire the individual. On the other hand, the employer can simultaneously contend that, because of the mitigating measures, the individual's condition is not sufficiently disabling to qualify for protection under the ADA. Another example of this contradiction occurred in the case of *Spades v. City of Walnut Ridge*,<sup>19</sup> in which a police officer with depression attempted suicide. Later, after he had received successful professional treatment for his condition, he sought to return to his job. The police department decided that his condition was too debilitating to permit him to return to duty, but was able to argue successfully that his depression was not sufficiently limiting to constitute a disability because it was controlled by counseling and medication.

Another troubling aspect of the lower courts' application of the mitigating measures analysis is the arbitrariness of their assessments of how much mitigation is necessary to render a condition not substantially limiting. Many of the individuals whose situations are included in the list of examples above have had quite substantial limitations even after treatment and medication.

Vanessa Turpin, the machine operator with epilepsy, for instance, was taking medication and being treated by a neurologist, but continued to experience seizures about once or twice a week, some nocturnal and some in the daytime. The Court of Appeals for the Fourth Circuit described the ongoing seizures as follows:

The nocturnal seizures were characterized by shaking, kicking, salivating, and at least on one occasion, bedwetting. After having these seizures, Turpin would feel tired in the morning, as if she did not sleep at all. Turpin typically was unaware that she was having seizures, and sometimes would wake up with bruises on her arms and legs.

The daytime seizures were milder in nature. Over the time period at issue in this appeal, four or five seizures happened during work itself. Turpin could feel the seizure about to start, and would sit elsewhere until the episode passed. The seizures normally lasted a couple of minutes. During these seizures, Turpin began shaking, her face took on a blank expression, and she became unaware of and unresponsive to her surroundings. . . . These seizures also sometimes caused Turpin to suffer memory loss.<sup>20</sup>

The memory losses would occasionally cause Turpin to forget to take her medication, or to forget where she was going in her car. Most people would presumably consider Ms. Turpin's seizures and their effects to be substantial problems, but the Fourth Circuit ruled that she was not a person with a disability within the meaning of the ADA, and thus was not entitled to a reasonable accommodation (she sought to be allowed to work the daytime shift). The court concluded that when considered in her mitigated state (while taking medication), Turpin was not *substantially* limited in any major life activity, including the major life activities of sleeping, thinking, and caring for one's self.

It is impossible to know what the outer limits will be of courts' application of the concept that mitigating measures can render a person otherwise eligible for protection under the ADA ineligible for such protection. A debate between the Justices in their opinions in the *Sutton* case suggests, however, that such an approach will be extremely far-reaching. In his dissenting opinion in *Sutton*, Justice Stevens pointed out that the majority's analysis would logically lead to exclusion from ADA protection of some people who wear prostheses to replace missing limbs<sup>21</sup>. He argued that some "individuals who have lost one or more limbs" are able "[w]ith the aid of prostheses, coupled with courageous determination and physical therapy," to "perform all of their major life activities just as efficiently as an average couch potato."<sup>22</sup> In Justice Stevens's view, "when an employer refuses to hire the individual 'because of' his prosthesis, and the prosthesis in no way affects his ability to do the job, that employer has unquestionably discriminated against the individual in violation of the Act." Yet the majority's approach suggests that such individuals might not be protected by the ADA at all.

The majority could provide only a partial response to Justice Stevens's argument:

The use of a corrective device does not, by itself, relieve one's disability. Rather, one has a disability under subsection (A) [of the ADA definition of disability] if, notwithstanding the use of a corrective device, that individual is substantially limited in a major life activity. For example, individuals who use prosthetic limbs or wheelchairs may be mobile and capable of functioning in society but still be disabled because of a substantial limitation on their ability to walk or run.... The use or nonuse of a corrective device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual with an impairment actually faces are in fact substantially limiting.<sup>23</sup>

As one commentator has noted, the majority's response does not really answer Justice Stevens's criticism:

The majority's analysis is something of a "non-denial denial." The Court does not quite prove Justice Stevens is wrong. It merely shows that he is not necessarily or inevitably right.... The Court relies on individualized, case-by-case, person-by-person inquiry guided by the phrase "substantially limits".... [It] all but admits that in some cases, some individuals without limbs, but using a prosthesis, might not be disabled within the meaning of the Act.<sup>24</sup>

Another commentator agreed that, under the Court's analysis, some people missing limbs or parts of limbs would not be protected by the ADA: "[f]or example, neither the late Terry Fox, who for 144 days ran a marathon (26 miles) a day across Canada on an artificial leg and inspired many other amputees to take up running, nor Heather Mills, who runs half-marathons, snowboards, skis and skates using a prosthesis for half of a leg, would be disabled under the ADA."<sup>25</sup>

Some lower courts have expanded upon the Supreme Court's analysis of mitigating measures by ruling that it applies not only to people whose conditions have actually been mitigated, but also those whose impairments *could* be mitigated. In one case, for example, a hospital employee with severe asthma refused to take steroidal medication prescribed by her physician because she feared the adverse effects of the medication on her pituitary tumor. The court ruled that because her asthma could probably have been mitigated by medication, she was not substantially limited in the major life activities of breathing or working, and therefore could not bring suit under the ADA.<sup>26</sup> Commentators have called such analysis "a perverse stretch of *Sutton*,"<sup>27</sup> but other courts have reached similar conclusions that if an impairment could theoretically be controlled by medication—even if in fact it has not been—the person with the condition is not substantially limited and therefore not entitled to protection under the ADA.<sup>28</sup> Although such individuals may be experiencing substantial limitations in their major life activities, these courts have taken the view that, because they have not availed themselves of medication or other corrective devices, they are not entitled to the ADA's protections.

## Conclusion

In making its rulings on mitigating measures, the Supreme Court put into practice an approach it would later make explicit in its decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*—that the ADA’s definition of “disability” should “be interpreted strictly to create a demanding standard for qualifying as disabled ....” (122 S.Ct. at 691). In this light, the *Sutton*, *Murphy*, and *Kirkingburg* decisions were effective vehicles for the Court to make technical distinctions to exclude classes of potential ADA claimants. If, on the other hand, one approaches the Court’s rulings on mitigating measures from the ADA’s stated objective of providing a “comprehensive” remedy to discrimination on the basis of disability, as announced in the purposes section and long title of the Act,<sup>29</sup> quite a different perspective emerges.

To the extent that mitigating measures are successful in reducing the negative effects of an individual’s condition to a manageable level, the Supreme Court’s stance on mitigating measures deprives the individual of the right to maintain an ADA action to challenge acts of disability discrimination she or he has encountered, because such a person is not eligible for the ADA’s protection. This means an employer or other covered entity may discriminate with impunity against such individuals in various flagrant and less flagrant ways. Taking the example of epilepsy to illustrate this result, epilepsy was mentioned frequently in committee reports and floor debates on the ADA. The committee reports expressly included epilepsy in a list of examples of impairments.<sup>30</sup> There is no doubt that Congress intended to prohibit unjustified discrimination based on epilepsy. Accordingly, the Department of Justice’s ADA regulations listed epilepsy as a covered impairment, as had Section 504 regulations before them.<sup>31</sup> The ADA regulatory commentary of the EEOC and the DOJ specifically declared that an individual with epilepsy would remain within the coverage of the ADA even if the effects of the condition were controlled by medication.<sup>32</sup> And as one federal court had accurately observed, prior to *Sutton*, “a person suffering from epilepsy would receive nearly automatic ADA protection.”<sup>33</sup>

The situation changed markedly, however, with the Supreme Court’s mitigating measures decisions. To the extent that a covered entity can successfully demonstrate (after extensive, intrusive discovery into the details of the person’s condition) that an individual’s epilepsy is effectively controlled by medication, the individual cannot challenge the discriminatory actions of the covered entity. This is true even if the employer or other covered entity has an express policy against the hiring of persons with epilepsy, puts up signs that say “epileptics not welcome here,” inaccurately assumes that all persons with epilepsy are inherently unsafe, or has the irrational belief that epilepsy is contagious. The unfairness or irrationality of the covered entity’s actions and motivations, including false stereotypes, fears, assumptions, and other forms of prejudice, cannot be challenged by a person whose condition is mitigated. If persons with epilepsy whose conditions are controlled by medication are the only individuals having epilepsy who happen to encounter the covered entity’s discrimination, the entity will be free to continue its blatantly discriminatory policies and practices.

This leaves only people with epilepsy whose conditions are not controlled by medication to bring such a covered entity to task under the ADA. But if such persons' seizures are seriously debilitating and frequent, it is quite likely that they will be found not "qualified" for jobs or other opportunities, and thus denied ADA protection anyway. If, on the other hand, their unmitigated conditions are not severe or their seizures are relatively rare, there is a good chance that their conditions will be held not to be "substantially limiting." This is a prime example of the unfortunate "Catch-22"<sup>34</sup> that ADA complainants often find themselves frustrated by: either your condition is not serious enough to constitute a disability or it is too serious for you to be qualified. The end result is that it is a rare plaintiff who is in a position to challenge even the most egregious and outrageous discrimination involving a condition that can be mitigated.

The Supreme Court's rulings on mitigating measures, then, almost completely undercut the congressional intent that the ADA prohibit discrimination against persons with epilepsy. And epilepsy is merely discussed here as an illustrative example of the consequences of the mitigating measures rulings. The same principles apply to diabetes, various psychiatric disabilities, hypertension, arthritis, and numerous other conditions that, for some individuals, can be controlled by medication. Moreover, the same problems arise with conditions for which techniques and devices other than medication provide an avenue for mitigation. Thus, a company that discriminates against people who use hearing aids will be insulated from challenge by people for whom the hearing aids are effective in restoring functional hearing ability. In the end, the Supreme Court's position on mitigating measures ignores the rationale that led courts, regulatory agencies, and Congress to take a contrary position—that unless you disregard mitigating measures in determining eligibility for ADA protection, you shield much discrimination on the basis of disability from effective challenge. The result of the *Sutton*, *Murphy*, and *Kirkingburg* decisions is to turn the ADA's terminology into an instrument for slashing out large groups of potential beneficiaries instead of for forcefully eliminating instances of the pervasive unfair and unnecessary discrimination that the law sought to prohibit.

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This policy brief was written for the National Council on Disability by Professor Robert L. Burgdorf Jr. of the University of the District of Columbia, David A. Clarke School of Law. Some of the material about lower court decisions was derived from an earlier paper in the *Righting the ADA Series* written by Sharon Perley Masling, Director of Legal Services, National Association of Protection and Advocacy Systems. That paper is found on the NCD Web site at <http://www.ncd.gov/newsroom/publications/decisionsimpact.html>.

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## Endnotes

1. See S. Rep. No. 101-116, at 23 (1989) (“whether a person has a disability should be assessed without regard to the availability of mitigating measures”); H.R. Rep. No. 101-485, pt. II at 52 (1990) (“Whether a person has a disability should be assessed without regard to the availability of mitigating measures”); H.R. Rep. No. 101-485, pt. III at 28 (1990) (“The impairment should be assessed without considering whether mitigating measures ... would result in a less-than-substantial limitation”).
2. *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 859-866 (1st Cir. 1998); *Bartlett v. New York State Bd. of Law Examiners*, 156 F.3d 321, 329 (2d Cir. 1998); *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937-938 (3d Cir. 1997); *Washington v. HCA Health Servs. of Texas*, 152 F.3d 464, 470-471 (5th Cir. 1998); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 629-630 (7th Cir. 1998); *Doane v. Omaha*, 115 F.3d 624, 627 (8th Cir. 1997); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996); *Harris v. H & W Contracting Co.*, 102 F.3d 516, 520-521 (11th Cir. 1996).
3. *Sutton v. United Air Lines, Inc.*, 130 F.3d 893 (10th Cir. 1997). Some judges on the Sixth Circuit had expressed some doubt about the majority rule. *Gilday v. Mecosta County*, 124 F.3d 760, 766-768 (1997) (Kennedy, J., concurring in part and dissenting in part); *id.*, at 768 (Guy, J., concurring in part and dissenting in part).
4. *Sutton v. United Airlines*, 527 U.S. 471, 488 (1999).
5. *Murphy v. United Parcel Service*, 527 U.S. 516, 521 (1999).
6. *EEOC v. Sara Lee*, 237 F.3d 349 (4th Cir. 2001).
7. *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720 (8th Cir. 2002).
8. *Nordwall v. Sears, Roebuck & Co.*, 46 Fed. App. 364, 2002 WL 31027956 (7th Cir. 2002) (unpublished).
9. *Boerst v. General Mills*, 2002 WL 59637 (6th Cir. 2002) (unpublished).
10. *Chenoweth v. Hillsborough Co.*, 250 F.3d 1328 (11th Cir. 2001), *cert denied*, 534 U.S. 1131 (2002).
11. *Taylor v. Nimock’s Oil Co.*, 214 F.3d 957 (8th Cir. 2000).
12. *Hill v. Kansas Area Transp. Auth.*, 181 F.3d 891 (8th Cir. 1999).
13. *Spades v. City of Walnut Ridge*, 186 F.3d 897, 900 (8th Cir. 1999).

14. *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645 (5th Cir. 1999) (ruled plaintiff not substantially limited, but remanded to the lower court on issues of coverage under “record of” or “regarded as” prongs).
15. *Muller v. Costello*, 187 F.3d 298, 314 (2d Cir. 1999).
16. *Saunders v. Baltimore Co.*, 163 F. Supp. 2d 564 (D. Md. 2001).
17. *Todd v. Academy Corp.*, 57 F. Supp. 2d 448, 453-54 (S.D. Tex. 1999).
18. *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720 (8th Cir. 2002).
19. 186 F.3d 897, 900 (8th Cir. 1999).
20. *EEOC v. Sara Lee*, 237 F.3d 349, 351 (4th Cir. 2001).
21. *Sutton v. United Airlines*, 527 U.S. 471, 498 (1999) (Stevens, J., dissenting).
22. *Id.* at 497.
23. *Id.* at 488.
24. Harry F. Tepker, Jr., “Writing the Law of Work on Nero’s Pillars: The 1998-99 Term of the U.S. Supreme Court,” 15 *The Labor Lawyer* 181, 191 (1999).
25. Vicki J. Limas, “Of One-Legged Marathoners and Legally Blind Pilots: Disabling the ADA on a Case-by-Case Basis,” 35 *Tulsa Law Journal* 505, 532 (2000) (footnotes omitted).
26. *Tangires v. Johns Hopkins Hospital*, 79 F. Supp. 2d 587 (D. Md. 2000), *aff’d by unpublished opinion*, 230 F.3d 1354 (4th Cir. 2000).
27. Jeffrey A. Van Detta & Dan R. Gallipeau, “Judges and Juries, Why are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before a Jury?: A Response to Professor Colker,” 19 *Review of Litigation* 505, 520 n. 36 (Summer 2000).
28. *See, e.g., Hein v. All Am. Plywood Co.*, 232 F.3d 482, 487 (6th Cir. 2000) (truck driver with hypertension who refused to drive a delivery run since he was unable to obtain a medication refill prior to the trip not substantially limited; driver’s condition should be viewed in its mitigated state since he voluntarily failed to take his medication); *Rose v. Home Depot*, 186 F. Supp. 2d 595, 613-614 (D. Md. 2002) (“failure to take the proper measures to gain a proper diagnosis necessary to a proper treatment plan is the legal equivalent of a refusal to avail oneself of proper treatment” because plaintiff “has effectively avoided a reasonable opportunity to achieve mitigating diagnoses and treatment”; plaintiff therefore failed to present proof that he has a disability as defined by the ADA); *Hewitt v. Alcan Aluminum Corp.*, 185 F. Supp 2d 183

(N.D.N.Y. 2001) (fork lift truck driver with post-traumatic stress disorder (PTSD) not substantially limited where PTSD could be mitigated by medication, which truck driver voluntarily chose not to take); *Spradley v. Custom Campers, Inc.* 68 F. Supp. 2d 1225 (D. Kan. 1999) (maintenance worker with epilepsy and active seizures not substantially limited where probability of seizures would have been much lower if worker had taken prescribed medication).

29 . 42 U.S.C. § 12101(b)(1) (“to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”); Pub. L. No. 101-336, long title, 104 Stat. 327 (1990) (“An Act to establish a clear and comprehensive prohibition of discrimination on the basis of disability”). These and other indications in the ADA and in the definition of disability that Congress intended the Act to receive an expansive interpretation are examined in another paper in the *Righting the ADA* series: <http://www.ncd.gov/newsroom/publications/broadnarrowconstruction.html>.

30 . S. Rep. No. 101-116, at 22 (1989); H.R. Rep. No. 101-485, pt. 2 at 51 (1990).

31 . 28 C.F.R. § 35.104 (par. (1)(ii) of definition of “physical or mental impairment”) (DOJ Title II regulation); 28 C.F.R. § 36.104 (par. (1)(iii) of definition of “physical or mental impairment”) (DOJ Title III regulation); 45 C.F.R. pt. 84 app. A (commentary on § 84.3(j)(1)) (HHS Section 504 regulation); 42 Fed. Reg. 22,685 (1977) (original HEW Section 504 regulatory commentary); 28 C.F.R. § 41.31(b)(1) (DOJ Section 504 coordination regulation).

32 . 29 C.F.R. appendix to pt. 1630 (commentary on § 1630.2(h)); 28 C.F.R. preamble to pt. 35 (commentary on § 35.104, par. (1)(ii) of definition of “physical or mental impairment”); 28 C.F.R. § preamble to pt. 36 (commentary on § 36.104, par. (1)(iii) of definition of “physical or mental impairment”).

33 . *Todd v. Academy Corp.*, 57 F.Supp. 2d 448, 453-54 (S.D. Tex. 1999).

34 . Numerous authorities have noted this “Catch-22” dilemma. See, e.g., National Council on the Handicapped, *Toward Independence*, Appendix A-25 (1986); *Doe v. Region 13 Mental Hlth.-Mental Retard. Comm’n*, 704 F.2d 1402 (5th Cir. 1983); *Tudyman v. United Airlines*, 608 F. Supp. 739, 744 (C.D. Cal. 1984); Richard A. Bales, “Once Is Enough: Evaluating When a Person Is Substantially Limited in her Ability to Work,” 11 *Hofstra Labor Law Journal* 203, 239 (1993); Robert L. Burgdorf Jr., “The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute,” 26 *Harvard Civil Rights—Civil Liberties Law Review* 413, 448 (1991); Jonathan Brown, “Defining Disability in 2001: A Lower Court Odyssey,” 23 *Whittier Law Review* 355 (2001); Arlene B. Mayerson and Kristan S. Mayer, “Defining Disability After Sutton: Where Do We Go From Here?,” 27 *Human Rights* 13 (2000). See also *Williams v. Avnet, Inc.*, 910 F.Supp. 1124, 1131 (E.D.N.C. 1995) (referring to necessity of plaintiff proving that she is substantially limited in working and simultaneously qualified as “two conflicting elements” of establishing that one is included in “the ADA’s protected class”).