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Scaling Back the ADA: How the Sutton v. United Airlines Decision Affects Employees with Bipolar Disorder.

Kevin Wiley Jr.
Hicks Law Group, PLLC

SCALING BACK THE ADA: HOW THE *SUTTON V. UNITED AIR LINES* DECISION AFFECTS EMPLOYEES WITH BIPOLAR DISORDER

KEVIN S. WILEY, JR.*

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Six years ago Matthew Hendrix[1] was hired as a junior associate from law school. Matthew, now an associate for one of the largest firms in the world, was given the usual package for top graduates in the field of transactional law. He procured a six figure salary. Law school and undergraduate loans were partially paid off through a lucrative signing bonus, and he was assured the usual incentives of medical and retirement benefits.

In exchange for the perks, Matthew was required to work nights, holidays, and weekends. The pressure to compete with the other associates on the partnership track always loomed. In all, he would have to work twice as hard now as he did when he graduated in the top two percent of his class.

Six years passed, and everything in Matthew's life appeared to be perfect. He worked hard and attained the status of senior associate. Even outside the legal world, Matthew gained respect through his dedication to the legal aid clinic. With six years experience under his belt, he was clearly becoming well-known as one of the up and coming attorneys in the community. It appeared Matthew was well on his way to becoming partner of this particular firm.

Yet, secretly, despite the perfection in his work and the respect he received from the community, Matthew's biggest sense of accomplishment was his ability to fool everyone. Indeed, he had fooled his friends, his colleagues, and his employers. He had fooled everyone who believed he lived a normal existence.

The accumulation of wealth and success did not come easy for Matthew. However, nothing compared to the fact that Matthew continued to survive his illness, an illness known as bipolar disorder.[2]

Looking back a decade ago, Matthew was close to annihilation from the illness that encompassed his entire existence. Bipolar was not only a

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1. Mathew Hendrix is a fictional name and his character is a compilation of different people interviewed for this comment. Their accounts of dealing with employers and their illness are the essential components of the hypothetical.

2. *See* AMERICAN PSYCHIATRIC ASSOCIATION, DSM-IV: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 350-58 (4th ed. 1994) [hereinafter DSM-IV] (identifying the mood disorder specified as bipolar disorder). Bipolar disorder is characterized by major depressive episodes followed by or occurring prior to major manic episodes. *See id.* at 355. The disorder is distinguished by severity into three categories of which Bipolar One is the most severe specifier and the cyclothomic is the least severe. *See id.* at 350-53. Severity is based in the occurrence of mood swings or mixed episodes. *See id.* at 351-53; DAVID J. MILKOWITZ & MICHAEL J. GOLDSTEIN, BIPOLAR DISORDER: A FAMILY-FOCUSED TREATMENT APPROACH 126 (1997) (explaining the role of biological imbalances in the brain). Bipolar disorder is a chemical imbalance affecting the neural transmitters in the brain. *See id.* The chemical imbalance creates the rapid triggering or inhibition of neurotransmitters. *See id.* The rapid triggering stimulates symptoms of mania or upward cycling, while the inhibition of the transmitters causes depression or downward cycling. *See id.*

monster for him to deal with, but for others as well.[3] Relationships with his teachers and friends were strained due to his erratic behavior.[4] His family either demanded control of his illness, or felt too ashamed to acknowledge that the illness even existed. At certain times in his life, Matthew's solitude with the illness almost pushed him to the brink of suicide.

After a string of psychologists, psychiatrists, specialists, group therapies, and an entire array of side effects from various medications, Matthew finally found the relief he needed.[5] This relief came in the form of a miracle drug called neurontin.[6]

Neurontin eventually brought balance into Matthew's life. It brought a sense of peace out of the chaos of cycling from maniacal rage to despotic melancholy.[7] It brought him out of his dark past and into a brighter future.

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3. *See generally* DR. KAY R. JAMISON, AN UNQUIET MIND 68 (1995) (suggesting that bipolar disorder may cause inter-personal relationship problems). Dr. Jamison was a professor at the UCLA School of Psychiatry. *See id. at* 4. She also suffers from Bipolar disorder and has written several books and essays on the subject. *See id.* at 5-8. AN UNQUIET MIND is her autobiographical account of how she lives with this illness and how it may have disastrous effects on marriage, family, and careers. *See id.*; Cory SerVaas, *The Post Investigates Manic-Depression,* SATURDAY EVENING POST, March/Apr. 1996 (reporting that Dr. Jamison is now a professor of a psychology at Johns Hopkins).

4. *See* Chatroom Interview with Bipolar Patients (Jan. 7, 2000) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) [hereinafter Bipolar Patients Interview] (relating that the illness affects peers as well as family). Six people with bipolar disorder were interviewed telephonically for this comment. Despite answering candidly to questions related to family and employment relationships in the context of their bipolar illness, their names shall remain anonymous. This cross section in no way should be interpreted as a statistical account of bipolar illness. Instead, their comments will be utilized to gain a generalized appreciation of the debilitating affects of the disorder.

5. *See* DSM-IV, *supra* note 2, at 354 (suggesting that in order to identify the disorder, the patient may need a battery of tests for a correct diagnosis); *see also* 3 AMERICAN PSYCHIATRIC ASSOCIATION, TREATMENT OF PSYCHIATRIC DISORDERS: A TASK FORCE REPORT OF THE AMERICAN PSYCHIATRIC ASSOCIATION [hereinafter TREATMENTS] (listing the tests to diagnose bipolar disorder to include: physical examination, psychoanalysis, and family medical history).

6. *See* MIKLOWITZ & GOLDSTEIN, *supra* note 2, at 132 (noting that neurontin is a drug used as a mood stabilizer to regulate upward and downward cycling). The generic name of neurontin is gabapentin. *See id.*; DSM-IV, *supra* note 2, at 350-51 (providing that a diagnosis of bipolar disorder will need to be differentiated from substance induced mood disorders with proper medication). *See generally* FRANK J. AYD, LEXICON OF PSYCHIATRY, NEUREOLOGY, AND NEUROSCIENCES 293 (1995). Gabapentin has been marketed for the treatment of adults with epilepsy or refractory partial seizures. *See id.* However, the GABA receptor has been classified to treat mental illness by increasing amino acid neurotransmitter inhibitors in the central nervous system.

7. *See* DSM-IV, *supra* note 2, at 350-51 (stating that the severity of bipolar illness is distinguished through diagnosis). Patients diagnosed with Bipolar I, the most severe specifier, experience severe states of mania then severe states of depression over shorter cyclical

The neurontin essentially placed the major symptoms of the disorder into remission, thus diminishing the days of loosing sleep for three or four days straight, or crying uncontrollably in his apartment for hours with thoughts of committing suicide.[8] He no longer placed fear in the minds of his friends and his family that really never understood his condition, nor attempted to understand what he endured on a daily basis.[9]

Also in the past were the side effects that took control of his life as severely as the illness itself. After an initial diagnosis, the doctors could only experiment with different drugs. The experimentation certainly qualified as a trial and error experience. However, for each error, there was a price to pay in the form of a side effect. The primary drug of choice at that time was lithium.[10] With the lithium came the weight gain, lethargy and tremors.[11] The next drug in this cycle of trial and error was depakote.[12] The depakote not only caused more side effects; it tended to

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phases. *See id.* at 352. Where least severe bipolars may experience four episodes over a ten year span, rapid cyclers experience mixed states of hypomania, psychotic, or depressive states within a year. *See id.* at 353.

8. *See id.* at 353 (detailing that the melancholic effects of bipolar disorder may cause the patient to commit suicide). Completed suicide occurs in ten to fifteen percent of Bipolar I patients. *See id. See also* MIKLOWITZ & GOLDSTEIN, *supra* note 2, at 20-21 (1997) (delineating some of the behavioral patterns associated with bipolar disorder). An upward cycle may last for several hours, days, or months depending on the severity of the illness. *See id.* at 23-24. The physical symptoms can look like quick speech patterns, rapid body movement, or constant frenetic activity. *See id.* at 21-20; JAMISON, *supra* note 3, at 68 (describing the mood swings of bipolar illness from wild, impulsive, chaotic, and energetic replaced by irritable, withdrawn, and suicidal).

9. *See generally* R. JULIAN HAFNER, MARRIAGE AND MENTAL ILLNESS: A SEX-ROLES PERSPECTIVE 149-51 (1986) (suggesting that bipolar disorder will often cause familial problems); MIKLOWITZ & GOLDSTEIN, *supra* note 2, at 151. Families will tend to go through a state of denial concerning the illness. *See* MIKLOWITZ & GOLDSTEIN, *supra* note 2, at 151. The denial can therefore create a schism between the patient and spouse or family member. *See id.* at 152. Therapy is encouraged for spouses of the bipolar patient as well. *See* HAFNER, *supra* at 151.

10. *See also* TREATMENTS, *supra* note 5, at 1925-26 (3d ed. 1989) (suggesting that lithium is one of the first drugs used to identify and diagnose bipolar disorder); Internet Mental Health, *Lithium Carbonate*, (visited Mar. 13, 2000) <http://www.mentalhealth.com/drug/p30-102.html> [hereinafter *Lithium Carbonate*]. The chemical matrix of lithium is similar to that of sodium and somehow alleviates some of the symptoms caused by the illness. *See id.*; MIKLOWITZ & GOLDSTEIN, *supra* note 2, at 131 (providing how medications work to alleviate the symptoms of mental illness).

11. *See* TREATMENTS, *supra* note 5, at 1930 (acknowledging the side effects associated with lithium). Other side effects associated with lithium. *See also Lithium Carbonate*, *supra* note 10 (noting that the adverse effects of lithium may include gastrointestinal discomfort, nausea, vertigo, muscle weakness, fatigue, and constant thirst).

12. *See* MIKLOWITZ & GOLSTEIN, *supra* note 2, at 132 (ascribing depakote as a mood stabilizer to regulate upward and downward cycling). *See also* Internet Mental Health, *Valproic Acid,* (visited Mar. 13, 2000) <http://www.mentalhealth.com/drug/p-30-d)2.html>

exacerbate the illness. Whereas the lithium created an apathetic zombie, the depakote elevated Matthew's depression to a level of suicidal tendency. Other drugs with varying levels of ingestion retained the physical affects of nausea, imbalance, and dry-mouth while also retaining the psychological affects of paranoia and nervousness.[13]

At the end of it all, Matthew was finally prescribed neurontin.[14] This drug seemed to do what all the others could not. The neurontin finally stopped all the maniacal rage and sadness. He no longer felt the compulsive need to spend money or the euphoria of saying and doing whatever he desired no matter the outcome.[15] He no longer felt sick.[16] He was finally "normal."[17]

Yet, in spite of the success of his job and the success of his new drug, Matthew's biggest accomplishment was that no one knew about the illness. Although disclosure of his condition was mandatory to the Board of Law Examiners, their confidentiality assured Matthew of no inhibitions to practice law, as long as he remained stable. Setbacks and flare-

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[hereinafter *Valproic Acid*] (listing the affects of Valproic Acid). Depakote, usually associated as an anticonvulsant drug, is the brand name associated with valporic acid. *See id.* Adverse effects may include depression, psychosis, aggression, hyperactivity, and behavioral deterioration. *See id.*

13. *See* MILKOWITZ & GOLDSTEIN, *supra* note 2, at 178 (describing the varying side effects of drugs to alleviate bipolar disorder); *see also* Bipolar Patients Interview, *supra* note 4 (suggesting that the drugs ingested heightened moods and paranoia and nervousness).

14. *See* MIKLOWITZ & GOLDSTEIN, *supra* note 2, at 132 (listing neurontin as one of many mood stabilizers to regulate upward and downward cycling).

15. *See* JAMISON, *supra* note 3, at 68 (describing that one of the sensations of bipolar disorder is that of "financial omnipotence"); 1 ADA P. KAHN & JAN FAWCETT, ENCYCLOPEDIA of MENTAL HEALTH 75 (1998) (validating that bipolars may incorporate inappropriate degrees of self-confidence, have little need for sleep, and impulse behavior such as excessive shopping and spending); Bipolar Patients Interview, *supra* note 4 (describing a situation in which one patient admitted to spending three months worth of rent money and almost facing eviction).

16. *See* JAMISON, *supra* note 3, at 101-04 (recounting that bipolars may feel cured or impervious to their condition if their medication is working). For many bipolars who feel chained to their medications, the improvement of their mental stability justifies coming off the medication. *See id.* at 103. Such self-diagnosis may lead to relapse to the patient's rapid cycling as it did for Dr. Jamison on several occasions. *See id.* at 105.

17. *See generally* Bipolar Patients Interview, *supra* note 4. It should not be assumed that people with bipolar disorder are abnormal. Millions suffer from bipolar disorder, yet live what may be perceived, by the general public, ordinary lives. *See id.* However, it should be acknowledged that severe effects of bipolar disorder limit the "normal" functions of everyday living. *See id.* The patients interviewed for this comment described a desire to live without the constant effects of their illness or what they described as living "normally." *See id.*

ups from the illness still occurred from time to time.[18] During these infrequent episodes, Matthew would either take a few days from work or fight through his condition.[19] Because Matthew had concealed the bipolar disorder so well, no one bothered to ask why he would snap at support staff or appear tired during the day. Everyone considered Matthew's attitude the simple side effect of practicing law. In most cases, due to the neurontin, these were just the effects of a stressful practice of law. However, any number of things could still trigger the illness.[20] The reality was, Matthew could never really be "normal."[21]

After six years of concealing his illness, the issue of his condition finally surfaced. The new office manager, in charge of contracting with the local medical care facilitator, inquired as to why Matthew's medications were so expensive.[22] Although he was not legally obligated to disclose why the cost of his benefits was so high, as compared to the other associates, Matthew felt comfortable with providing this information. In fact, disclosure would finally come as a relief. During these six years, many of his coworkers became not only mentors, but trustworthy friends as well. Without the pressure to continue his charade, he candidly responded to the manager's inquiry.

As with any corporate setting, the firm had a grapevine that spread from the lowest mail clerk to the highest partner. The partners in charge of the local office had limited knowledge of bipolar disorder. Their awareness stemmed from family members or friends who were diagnosed with the condition.

In an unofficial meeting of the partners, Matthew's bipolar illness was discussed. Several of the partners felt threatened by potential issues that may arise due to the fact that one of their associates practices law with a

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18. *See generally* MIKLOWITZ & GOLDSTEIN, *supra* note 2, at 142 (noting that drugs which offer a solution for bipolar disorder may still be limited by the conduct of the patient).

19. *See* JAMISON, *supra* note 3, at 113 (suggesting that bipolars stop working when they do not take the medication).

20. *See* MIKLOWITZ & GOLDSTEIN, *supra* note 2, at 278-80 (delineating that alcohol usage, drug usage, and stress may be conducive to elevate manic symptoms).

21. *See* JAMISON, *supra* note 3, at 88-89 (projecting that despite the curative value of medication, one should still seek therapy because pills alone cannot "ineffably heal"); MILKOWITZ & GOLDSTEIN, *supra* note 3, at 133 (denoting the importance of psychological treatment). The suggestion here is that beyond the pharmacological treatments, a patient may need therapy to cope with the stress and pressure of the illness. *See id.*

22. *See* 9 MENTAL HEALTH DISORDER SOURCE BOOK 219 (Karen Belliner ed., 9th ed., 1996) [hereinafter SOURCE BOOK](intimating that the costs of having bipolar disorder may be severe both emotionally and financially); *see also* Bipolar Patients Interview, *supra* note 4 (showing that the medication costs range from four hundred to over three thousand dollars a year).

serious psychological disorder. At its conclusion, the bottom line of the meeting turned to the bottom line of the firm. Matthew Hendrix would not make partner; moreover, he should be let go from the firm.

Within the next few weeks, the star associate noticed that his colleagues no longer invited him to lunch. His tasks and assignments were simplified, and even the support staff shied away from working on his projects. After someone told him that the strange conduct was due to the awareness of his illness, and that he should fear for his job, Matthew decided to become more proactive.

Matthew went to the partners, officially disclosed his condition in a memo and asked for 'reasonable accommodations.'[23] The reasonable accommodations requested were to be in the form of excused absences.[24] The firm could then reimburse the excused absences from paid vacation leave.[25]

In response to the memo, the firm denied Matthew's request for extended excused absences. Attached to the response was a memo from the employment section of the firm detailing how under the legal analysis of the recent Supreme Court decision handed down in *Sutton v. United Air Lines*,[26] he would not be considered disabled. Moreover, due to Matthew's outstanding record, as an employee, and his ability to stabilize his condition, the firm would not consider Matthew as having a disability. Ironically, a few months following this exchange, Matthew was told that due to impending financial considerations, the firm no longer needed his services.

Immediately after his termination, Matthew filed suit against the firm for discrimination under the Americans with Disabilities Act (ADA).[27]

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23. *See* 29 C.F.R. app §1630.2(o)(ii) (1998) (defining accommodation for the purposes of the ADA). "[A]n accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." *Id. See also* Karen Dill Danforth, *Reading Reasonableness Out of the ADA: Responding to Threats by Employees with Mental Illness Following Palmer*, 85 VA. L. REV. 661, 669 (1999) (acknowledging that the EEOC has defined "accommodation").

24. *See generally* Bultmeyer v. Ft. Wayne Comm. Schools, 100 F. 3d 1281 (1996) (exemplifying the need for reasonable accommodations in disability discrimination cases involving mental illness).

25. *See* 29 C.F.R. app. § 1630.2 (o) (1998).

26. Sutton v. United Air Lines, Inc., 119 S.Ct. 2139 (1999).

27. *See* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12112, 12132, and 12182 (1994) (prohibiting disability-based discrimination with respect to employment, public services and public accommodations).

42 U.S.C. § 12112(a) General Rule:

> No covered entity shall discriminate against a qualified individual with a disability of such individual in regard to job application procedures, the hiring, advancement, or

Matthew's attorneys, however, explained that the chances of recovery are limited because he has remained stable for the last six years under his medication. In essence, the Supreme Court's decision in *Sutton* may allow the Courts to disregard his claim.[28]

In a state of confusion, anger, and frustration, Matthew understood that there may be little hope for people who spend their lives becoming healthy only to face discrimination based on the appearance of health. The ADA, which purports to protect those with disabilities from discrimination, has ultimately failed Matthew and the millions of others suffering with bipolar disorder.

The story you have just read is a hypothetical situation. Yet, under the recent *Sutton v. United Air Lines, Inc.*[29] opinion, the above scenario could not be more real. Employees with bipolar disorder work under a hypocritical system that does not acknowledge the realities of mental disabilities.[30] The hypocrisy is such that our judicial system forces bipolars to disclose their condition to employers without providing adequate protec-

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discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12132 Discrimination:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by any reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12182(a) General Rule:

No individual shall be discriminated against on the basis of disability in the full and equal enjoymen of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases, (or leases to), or operates a place of public accommodation.

28. *See Sutton*, 119 S.Ct. at 2151 (arguing that the "substantially limited" analysis, proffered by the court, would limit situations in which a plaintiff may bring a disability claim). The argument suggests that if the impairment does not presently substantially limit the plaintiff in a major life activity, the claim is invalid. *See id.* Ron Honberg, *Supreme Court Decisions Could Limit ADA Protections,* 1 NAT'L ALLIANCE FOR THE MENTALLY ILL (visited on Mar. 13, 2000) <http://www.nami.org/legal/990828d.html> (asserting that the Supreme Court decisions of *Sutton* and *Murphy* have narrowed the definition of disability). "Though none of the petitioners suffered from a mental disability, the rulings in *Sutton* and *Murphy* could prove to be particularly problematic for people with mental illness or other conditions which are episodic in nature and characterized by frequent fluctuations in severity of symptoms." *Id.*

29. *See* Sutton v. United Air Lines, Inc., 119 S.Ct. 2139 (1999).

30. *See* Peggy R. Mastrioanni & Carol R. Miaskoff, *Coverage of Psychiatric Disorders Under the Americans with Disability Act*, 42 VILL. L. REV. 723 (1997) (illuminating that disclosure of a mental illness may "provoke" the type of discrimination it is designed to defeat).

tion from the social stigma attached to the illness.[31] Bipolar employees now face the risk that a court may not consider the employee as having a disability if that employee appears to be healthy if taking proper medication.[32] Therefore, arguably, employers are free to discriminate against the mentally disabled without repercussions from the legal system.[33]

I selected bipolar disorder for this comment because it exemplifies the potential for disregarding someone's case based on the appearance of that individual. Bipolar disorder, or what is commonly known as manic/depression, is a psychological disorder affecting a large segment of the nation's populace.[34] It is defined as a genetic condition that creates chemical imbalances, distorting both moods and personalities.[35] The illness may manifest itself in many ways, such as severe mania, depression, psychotic behavior, paranoia, and suicide.[36]

The recognition and advancements towards a cure for bipolar disorder are positive for employees suffering from the illness.[37] However, because

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31. *See* ROBIN M. KOWALSKI ET AL., THE SOCIAL PSYCHOLOGY OF EMOTIONAL AND BEHAVIORAL PROBLEMS 225 (1999) (finding that people with mental illness often feel trapped when confronted with whether they should disclose their condition to friends or employers). *See generally* Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(b)(5)(A) (1999).

According to 42 U.S.C. § 12112(b)(5)(A):

> States that discrimination includes not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant of employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

Id. Reigel v. Kaiser Foundation Health Plan of North Carolina, 859 F. Supp. 963, 966 (E.D.N.C. 1994) (exemplifying that the ADA requires an employer to make reasonable accommodations for individuals qualified to perform the essential elements of their job).

32. *See generally* Sutton, 119 S.Ct. at 2149 (noting that the ADA protects "only those whose impairments are not covered by corrective measures").

33. *See id.* at 2154 (Stevens, J., dissenting) (suggesting "fully cured impairments are covered, but merely treatable ones are not").

34. *See* SOURCE BOOK, *supra* note 22, at 219 (quoting statistical information from the National Health Institute). Bipolar Disorder inflicts over 2.3 million in the United States. *See id.*

35. *See* KAHN & FAWCETT, *supra* note 15, at 75.

36. *See* DSM-IV, *supra* note 2, at 353 (providing the symptoms associated with bipolar disorder).

37. *See* TREATMENTS, *supra* note 5, at 1925 (proposing that recent advances in science have led to a greater recognition of bipolar illness). *See also* National Alliance for the Mentally Ill, *NAMI Presents 10-Year Forecast of Mental Health Trends*, (visited Mar. 13, 2000) <http://www.nami.org/pressroom/000223.html> [hereinafter NAMI] (acknowledging the positive forecasts for mental health care). This press release includes the remarks of Laurie Flynn, executive director of National Alliance for the Mentally Ill (NAMI). *See id.* Her assessment details that with "sophisticated electronic imaging techniques that allow researchers to see in the living brain, scientists can discern areas of the brain that malfunc-

one may not outwardly appear to have a mental illness, it would be easy to disregard the condition, and therefore, disregard one's case for discrimination.[38] There may be prevalent side effects due to the illness, and as the hypothetical situation described, the illness itself may prevent one from working at their full capacity.[39] In effect, this creates the duality that bipolars must live and work under. Further, the social stigma attached to the illness, regardless of the good health exhibited by the employee, nurtures a discriminatory environment.[40]

The purpose of this comment is to delineate the parameters of the ADA under the guise of *Sutton* and to recommend a resolution that would provide a middle ground between lawsuit abuse and scaling back the protections of the ADA to a bare minimum. Bipolar disorder, as discussed in this comment is the background through which the reader should gain an understanding of how the *Sutton* decision went too far in the Supreme Court's effort to scale back the ADA. It will also be the example of how courts and legislators should modify the law to incorporate protections for those who have disabling conditions that are not physically apparent.

In order to illustrate the parameters of the ADA, the comment will look at the specific language of the statute. Within this specific language, we learn how the courts define disability. When disability is defined, we learn who falls under the umbrella of the ADA and how these individuals

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tion during specific illnesses and soon may enable treatments to be targeted more effectively." *Id.;* David Satcher, *Mental Health: A Report from the Surgeon General, Preface to the Surgeon General U.S. Public Health Service* (visited Mar. 13, 2000) <http://www.surgeongeneral.gov/library.mentalhealth/hom.html> (stating that the twentieth century has observed advances in the improvement of the public health through both medical science and innovative advances to health care services).

38. *See* Mastroianni & Miaskoff, *supra* note 30, at 726 (suggesting there are situations where it is not clear whether an individual has a psychiatric disability to bring an ADA claim); *see also* Kotlowski v. Eastman Kodak Co., 922 F. Supp. 790, 798 (W.D.N.Y. 1996) (holding that the plaintiff's depression did not rise to the level of 'substantially limiting' based on her ability to work).

39. *See* MIKLOWITZ & GOLDSTEIN, *supra* note 2, at 178 (noting that bipolars may decide not to take medication due to the side affects); *see also* Bipolar Patients Interview, *supra* note 2 (providing that these side effects may include weight gain, nausea, trembling, sedation, abdominal pain, or temporal imbalance).

40. *See* Satcher, *supra* note 37. "The tragic and devastating disorders such as schizophrenia, depression, and bipolar disorder . . . and a range of other mental disorders affect nearly one in five Americans in any year, yet continue too frequently to be spoken of in whispers and shame." *Id. See generally* JAMISON, *supra* note 3, at 7 (noting her concerns of the repercussions of discussing her illness).

are protected.[41] By establishing who or what the ADA affects, one may then appreciate how *Sutton* essentially shrinks this protection.

Next, this comment will also focus on how one proves up a case of discrimination under the ADA. Within the language of the statute, there are certain criteria to establish before one has standing.[42] Generally, these steps include proving that one indeed has a condition sufficiently discernable for one to be judged as having a disability.[43] Proving that one qualifies as disabled is arguably the most critical stage in a disability case.[44] For without such categorization, one does not have standing to prove that the employer's conduct was unlawful.[45]

The parameters of the ADA and the literal meaning of the statute are also discussed under the statute's legislative intent. One of the central arguments pertaining to the definition of disability concerns the Congressional intent of the ADA.[46] This issue sparked a level of controversy in

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41. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(2) (1994). *See generally* Robert L. Burgdorf Jr., *The American with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 415-26 (1991) (commenting in the origins and purposed of the ADA). Disabled persons in America have been categorized as "uniquely unprivileged and disadvantaged." *Id.* at 415. The ADA was essentially passed to protect the needs of these disadvantaged persons by addressing discrimination practices of employment and facilitating their physical needs with access to public buildings and other accommodations. *See id.* at 437-40.

42. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(b)(1) (1994) (providing the statutory language needed to bring a case of discrimination based on disability). This section of the ADA states: "[T]he term 'discriminate' includes— limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee. . . ." *Id.*

43. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12102 (2) (1999) (providing the criteria which one must show for a case of discrimination due to disability). This sections states:

> The term "disability" means, with respect to an individual—
>
> a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such impairment; or being regarded as having such impairment.

Id.

44. *See* Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the Disability Definition in the Americans with "Disabilities" Act of 1990*, 77 N.C. L. REV. 1405, 1426-27 (1999) (concluding that the burden is on a plaintiff, under the ADA, to prove they belong "in a class of people with disabilities").

45. *See* Bragdon v. Abbott, 524 U.S. 624, 632 (1998); *see also* Eichhorn, *supra* note 44, at 1408 (indicating that a plaintiff must make a *prima facie* case on an ADA discrimination claim to survive summary judgment).

46. *See* Eichhorn, *supra* note 44, at 1408 (suggesting that the issue of congressional intent has been one of the most contested debates concerning ADA interpretation). Problematic statutory language is cited as a reason for such debates. *See id.*

the lower courts that was ultimately recognized by the Supreme Court, in *Sutton*.[47]

Following the legislative history of the ADA, the comment will focus on the Equal Employment Opportunity Commission's ("EEOC") interpretive guidelines pertaining to how courts should define what is considered a disability.[48] The EEOC was attempting to create an interpretive guidance that would enable courts to clearly define the parameters of the ADA.[49] However, the lower courts have debated over whether the interpretive guidelines merit deference to the EEOC.[50] *Sutton* has ultimately decided not to address this issue.[51]

Although the deference issue was ultimately ignored by the Supreme Court, Justice O'Connor's language in *Sutton* cuts like a surgeon's scalpel to scale back the protections of the ADA. One of the central issues of this comment is the focus on Justice O'Connor's written opinion and her utilization of the present indicative form to define the term "substantially limited", thus contorting the meaning of a "disabling condition."[52] In several respects, the narrowing of "the substantially limited" definition quantifies how the court, in *Sutton,* has narrowed the purpose and intent of the ADA.

The main part of this comment, however, focuses on how the limited protections of the ADA are scaled down even further for bipolar employees under the judicial interpretation of *Sutton.* To gain an appreciation of

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47. *See generally* Sutton v. United Air Lines, Inc., 119 S.Ct. 2139, 2144 (1999) (citing the conflicting viewpoints or decisions in various circuits).

48. *See* 29 C.F.R. § 1630.1 (1998) (delineating the purpose, applicability, and implementation of the EEOC provisions of the ADA).

49. *See* 29 C.F.R. § 1630.2(h) (1999). This section states:

'Physical or mental impairment' means:

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

50. *Compare* Arnold v. United Parcel Service, Inc., 136 F.3d 854, 866 (1st Cir. 1998) (finding that the EEOC's interpretation is not merely permissible; it is entirely consistent with the ADA's legislative history and broad intent for a remedial statute), *with Sutton*, 130 F.3d at 902 (holding that the portion which directs courts to ignore mitigating measures is in direct conflict with the ADA and is inconsistent internally with other portions of the EEOC Interpretive Guidance).

51. *See Sutton*, 119 S.Ct. at 2141. The suggestion here is that by stating that deference is a non-issue, the Supreme Court sought to finally qualify whether mitigating measures should be utilized. The Court stated that "no agency has been delegated authority to interpret the term 'disability' as it is used in the ADA." *Id.*

52. *See Sutton*, 119 S.Ct. at 2146.

how it feels to live with the illness, the comment will primarily discuss the medical diagnostics of bipolar disorder. Along with these specific diagnostics, the comment will also shed light on the social stigma that is attached to mental disabilities. Focusing on the physical, psychological, and social aspects in mind, this comment will raise the utility of scaling back the ADA.

Bipolar disorder, as viewed under *Sutton*, will be discussed first through the language of the opinion and, secondly, through the discrimination that results from the social stigma attached to the disorder. In conclusion, this comment will present a response to Justice O'Connor's opinion and recommend an amendment to the ADA as a solution clearly defining what should be considered a disability.

I. THE SUTTON V. UNITED AIRLINES, INC. OPINION

A. *Factual Background and Holding*

Two severely myopic twin sisters applied for and were denied employment for a major commercial airline.[53] Purportedly, the sisters' applications were denied because they did not meet the airline's minimum requirement of visual acuity.[54] In turn, the sisters filed suit against the Airline under the ADA. The Supreme Court upheld the 10th Circuit opinion acknowledging that the sisters' allegations were insufficient to state a claim of discrimination.[55] The majority opinion written by Justice O'Connor held that because mitigating or corrective measures should be considered when determining whether applicants are disabled, the applicants were not disabled under the ADA.[56]

B. *Issues Resolved*

The Supreme Court's opinion in *Sutton v. United Air Lines* has dealt a substantial blow to employees seeking protection under the ADA.[57] The purpose of the ADA was to protect the employees with disabilities in the work place.[58] However, in order to seek protection under the ADA, one

53. *See* Sutton v. United Air Lines, Inc., 119 S.Ct. 2139, 2141 (1999).

54. *See id.*

55. *See id.* at 2146.

56. *See* Sutton v. United Air Lines, Inc., 119 S.Ct. 2139(1999).

57. The Court's decision in *Sutton* has dealt a blow to employee because it permits employers to consider corrective or mitigating measures taken by an individual in determining if they are disabled. *See id.* at 2146.

58. *See* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12112 (a),(b), 12112 (a) (1994). Section 12112 states,

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the

must have a discernable disability.[59] In essence, one's impairment must either be diagnosed and disclosed to the employer, or the employer must regard the employee as having a disability.[60]

From the language of the ADA, one can also logically infer, that employees must provide notice to employers of their condition so that reasonable accommodations when requested are implemented.[61] Reasonable accommodation would be any element within the work place to allow a qualified individual to sufficiently fulfill their tasks as an employee.[62]

Examples of reasonable accommodations may seem commonplace in today's workforce environment.[63] However, prior to the disability movements of the late 1960s and early 1970s, which ultimately resulted in the emergence of the ADA, the pressure and demand to accommodate the disabled was not present.[64] Without such a movement, employers and society in general were free to continue to arbitrarily decide who was disabled and worthy of accommodations, as opposed to those who should have been able to perform "normally" in society.[65]

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hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

59. *See* Erica Worth Harris, *Controlled Impairments Under the Americans With Disabilities Act: A Search of the Meaning of "Disability"*, 73 WASH. L. REV. 575, 590-91 (1998) (showing the three tier prongs a plaintiff must show to establish a prima facie case of discrimination based on a disability).

60. *See* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111(9)(a), (b) (1994); *see also* Eichhorn, *supra* note 44, at 1421-22 (suggesting that the ADA prohibits an employer's failure to make reasonable accommodations that would allow employees access to full participation in the workplace).

61. *See* Americans with Disabilities Act of 1990 (describing the term discrimination to include "not making reasonable accommodations to known physical or mental limitation. . .") (emphasis added); *see also* Burgdorf, *supra* note 41, at 460-61.

62. *See* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111(9)(a)(b) (1994); Eichhorn, *supra* note 44, at 1421-22 (suggesting that the ADA prohibits an employer's failure to utilize reasonable accommodations that would allow employees access to full participation in the workplace).

63. Such accommodations since the inception of the ADA include physical refabrication of buildings and accessibility to public walkways and entrances. *See* Burgdorf, *supra* note 41, at 470-73 (addressing Title III of the Americans with Disabilities Act dealing with public accommodations). The commentator notes that Congress addressed concerns of public accommodation by mandating that construction or alteration of facilities must comply with accessibility requirements. *See id.*

64. *See* Eichhorn, *supra* note 44, at 1409-15.

65. *See id.*

II. IMPACT OF THE SUTTON DECISION ON BIPOLAR DISORDER

A. *Scaling Back the ADA*

In 1990, as he signed the ADA into law, President Bush announced that the new legislation represented the "full flowering of our democratic principles and promised to open up all aspects of American life to individuals with disabilities."[66] The ADA has arguably changed the status of millions of Americans, enabling a formerly invisible section of society to participate more fully in the nation's workforce.[67] However, by 1996, courts applying the language of the ADA had summarily dismissed numerous cases of alleged disability discrimination on the ground that the plaintiffs were not disabled.[68] A survey by the American Bar Association found that ninety-two percent of ADA discrimination claims were dismissed on summary judgment.[69]

Although the ADA has been hailed as a chief accomplishment of a civil rights movement on behalf of persons with physical and mental disabilities, the debate to define what a disability is has seriously undermined the effectiveness of this legislation.[70] *Sutton*, in response to this debate, has whetted the blade fashioned by the circuit courts to surgically remove many of the protections originally included within the ADA.[71]

This removal of original ADA protections begins with Justice O'Connor's stance, that if individuals were reviewed in their unmitigated state, the individualization of their inquiries would no longer take affect.[72] Instead, courts would lump impairments into classifications of disability, rather than evaluating each individual on a case by case basis. The ideology of the ADA was meant to look at each individual case by case.[73] Even the EEOC in its interpretive guidelines addresses the fact

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66. *See id.* at 1407.

67. *See generally id.* at 1409-11 (qualifying how the ADA has successfully emerged as a product of the Civil Rights Movement).

68. *See id.* at 1477 n.171 (listing an ABA study which suggests defendants win 92% of the time).

69. *See id.* at 1432.

70. *See* Catherine J. Lactot, *Ad Hoc Decision Making and Per Se Prejudice: How Individualizing the Determination of "Disability" Undermines the ADA*, 42 VILL. L. REV. 327, 327-28 (1997) (deliberating that the ADA's promise of an end to discrimination against people with disabilities has yet to become a reality due in large part to judicial narrowing of its provisions).

71. *See Supreme Mischief*, N.Y. TIMES, June 24, 1999, at A26 (suggesting that the *Sutton* decision significantly weakens the ADA and ignores its intended purpose).

72. *See* Sutton v. United Air Lines, Inc., 119 S.Ct. 2139, 2147 (1999) (suggesting that viewing persons in their unmitigated state contravenes the statutory intent of individualized inquiry).

73. *See* 29 C.F.R. 1630 app. § 1630.2(j) (1999) (providing that "the determination of whether an individual has a disability is based on the effect of that impairment on the life

that employees seeking redress must have an individualized inquiry.[74] The majority on the Supreme Court essentially feared that one may look at different disabling conditions in their unmitigated state and potentially classify various degrees of infirmities as simply "disabled".[75] For example, one may correlate the condition of myopia with blindness and determine that people wearing glasses with less than perfect vision should still be considered disabled.[76] Similarly, someone with a broken leg could be synonymous with a paralyzed person.[77]

Yet, Justice O'Connor and the rest of the majority failed to recognize that the door swings both ways when interpreting the severity of disabilities.[78] It is just as easy to label certain conditions as not being disabilities if the employee is utilizing some ameliorative aid to alleviate their impairment.[79] Patients whose medications fail to reduce signs of their condition may still face the possibility of limited or no coverage for their ADA claims.[80] As such, the fear of losing individualized inquiry by looking at the mitigated status exists in the same category as looking at individuals only in their unmitigated state.[81] Both sides on this issue may be missing

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of the individual"); Bragdon v. Abbott, 524 U.S. 624, 634 (1998) (holding that Congress did not intend to create per se disabilities under the ADA).

74. *See* 29 C.F.R. app § 1630.2(j) (1998) (establishing that disability claims should be reviewed on a case by case basis).

75. *See Sutton*, 119 S.Ct. at 2147. "The agency guidelines' directive that persons be judged in their uncorrected or unmitigated state runs directly counter to the individualized inquiry mandated by the ADA." *Id.*

76. *See id.* at 2144, 2147 (insinuating that looking at an impairment without regard to mitigating measures would categorize certain conditions as per se disabilities).

77. *See id.* at 2146.

78. Determining whether an individual has a disability under the auspices of ameliorative or mitigating factors diminishes the likelihood of finding a disability. Potentially, a court may assume that the non-manifestation of an illness disqualifies a disability claim. This is true especially for non-chronic or temporary illnesses such as severe migraines, controlled diabetes, or controlled mood disorders. *See generally* Mastroianni & Miaskoff, *supra* note 30, at 734 (sampling situations in which certain impairments may not rise to the level of a disability for purposes of the ADA).

79. *See, e.g.*, Taylor v. Blue Cross & Blue Shield, Inc., 55 F. Supp.2d 604, 611 (N.D. Tex. 1999) (holding that plaintiff's condition did not rise to the level of disability for purposes of the ADA because of his prescribed corrective measure).

80. *See* Todd v. Academy Corp., 57 F.Supp.2d 448, 454 (S.D. Tex. 1999); Rutlin v. Prime Succession, Inc., 75 F.Supp.2d 735 (W.D. Mich. 1999); Robb v. Horizon Credit Union, 66 F.Supp.2d 913 (C.D.Ill. 1999) (holding that plaintiff who suffered depression and took medication for her illness was not "substantially limited" and thus not disabled under the ADA); Francis v. Chemical Banking Corp., 62 F.Supp.2d 948 (E.D.N.Y. 1999) (finding that "thinking normally" and "socializing" are not major life activities, and thereby plaintiff was not disabled from his panic disorder).

81. *Compare* Sutton v. United Air Lines, Inc., 119 S.Ct. 2139, 2144 (1999) (supporting review of disabilities with mitigating measures), *with* Washington v. HCA Health Servs. of

the point of individualized inquiry by ignoring the true intent of the ADA, which is looking at the severity of the employee's condition.[82]

B. *Bipolar Disorder Under the Guise of Sutton*

The *Sutton* opinion increases the potential likelihood of discrimination, and an apparent example of this assertion can be found when one presents the condition of bipolar disorder under the guise of the decision.[83] It is likely Congress did not intend for the ADA to be expanded to people with only slight impairments. The Court in *Sutton* feared that the ADA would potentially reach 160 million people if it included a class of people with slight impairments.[84] Yet, the language in *Sutton* which specifically states that a disability "exists only where an impairment 'substantially limits', . . . not where it 'might', 'could', or 'would' [limit],"[85] allows an employer to discriminate based the present health of an employee. Bipolars that are properly medicated would not have the manifestations needed to bring a claim of discrimination because they would no longer be considered disabled.[86] In fact, if an employee suffered from a disability but exhibited no outward traits of their condition, as is often the case for functioning bipolars,[87] the employer has a green light to adversely impact the terms of employment simply because the employee seemed healthy.[88]

According to a Department of Labor study, approximately 13% of the ADA charges filed with the EEOC were based on emotional or psychiat-

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Texas, 152 F.3d 464, 471 (5th Cir. 1998) (requiring review of disabilities with mitigating measures only in the context of less severe conditions).

82. *See generally* Lauren J. McGarity, Note, *Disabling Corrections and Correctable Disabilities: Why Side Effects Might Be the Saving Grace of Sutton*, 109 YALE L.J. 1161, 1175-78 (2000) (asserting that the protections of the ADA should focus on the "severity" and "duration" of the impairment with or without regard to mitigating measures).

83. *See* Honberg, *supra* note 28 (suggesting that the Supreme Court decisions could prove problematic for people with mental illness).

84. *Sutton*, 119 S.Ct. at 2142.

85. *Id.* at 2141-42.

86. *See generally* Danforth, *supra* note 23, at 666 (noting that determination of what constitutes a disability with regard to is especially difficult because a psychological impairment may show no outward symptoms of the illness).

87. *See Barriers to Employment for People with Disabilities: Hearings on Social Security Before the Subcomm. on Social Security Comm. Of the Ways and Means House Comm.*, 102 Cong. 62 (1999) (statement of Jim McNulty, National Alliance for the Mentally Ill) [hereinafter *Barriers*] (concluding that millions for people suffering from serious brain disorders are able to work and be productive).

88. *See generally* Susan Stefan, *"You'd Have to Be Crazy to Work Here": Worker Stress, The Abusive Workplace, and Title I of the ADA*, 31 LOY. L.A. L. REV. 795, 802 (1998) (stating that despite ADA protections, the majority of claimants with mental disabilities lose their discrimination cases).

ric impairment between July 26, 1992, and September 30, 1998.[89] These impairments included anxiety disorders, depression, schizophrenia, and bipolar disorder.[90] For the fiscal year 1998, claims based on psychiatric or emotional impairment amounted to approximately 16% of the charges received, making this the fastest growing category of claims that year for ADA claimants.[91] Of the impairments most often filed, mental illness is the fastest growing category of charges filed each year since the inception of the ADA.[92] The EEOC responded to the growing number of mental illness claims by issuing enforcement guidelines in 1997 to facilitate the full enforcement of the ADA.[93] The guidelines provide several hypothetical scenarios involving mentally ill employees clarifying the relevant provisions of the ADA and suggest appropriate responses to these situations.[94]

For claimants with bipolar disorder the threshold line of inquiry is a two step process. First, determine whether the impairment at issue is a disability under the statute.[95] Second, if an impairment is found to be a disability, determine whether the individual qualified for the position at issue.[96] In following the pattern of other ADA inquiries, the major point of contention surrounds whether a particular psychiatric disorder constitutes a disability. Prior to the *Sutton* decision, a majority of courts found that individuals diagnosed as "seriously mentally ill" are disabled under the ADA.[97] However, *Sutton* blurs this concept of "seriously mentally ill" patients receiving protected status, due to the physical appearance of a healthy condition.[98]

In the advent of *Sutton*, there will be a significant impact upon employees with bipolar disorder if outward signs of their illness are not prevalent. Thus, employers that fear the effects of the disorder no longer have

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89. *See* Danforth, *supra* note 23, at 673.

90. *See id.* at 663.

91. *See id.* at 673 & n.85 (stating the percentage of claims by the category of claimants).

92. *See id.* at 673.

93. *See id.*

94. *See id.* (illustrating that the EEOC responses to mental disability claims contained in the Guidelines, provides the court with mock scenarios to facilitate their decision making).

95. *See* Danforth, *supra* note 23, at 673.

96. *See id.*

97. *See id.* at 675 (identifying serious mentally ill conditions as: bipolar illness, schizophrenia, psychotic disorders and anxiety disorders).

98. *See* Maggie Jackson, *Rulings Called "Horrible Catch-22" for Disabled,* ATLANTA J.-CONST., June 23, 1999, at A1.

to fear the repercussions of adverse employment decisions based upon the protections of the ADA.[99]

C. *Social Aspects of Scaling Back the ADA*

Bipolar disorder is treatable almost to the point where the symptoms, if properly medicated, enter into remission.[100] There are several drugs and treatments that allow a bipolar to live an ordinary existence, or as close to ordinary as possible.[101] As such, employers may hire individuals with the illness without ever knowing about the condition of their employees.[102] In fact, one of the problems associated with protecting bipolar employees is that many bipolars refuse to disclose their condition.[103] The disclosure difficulty is predicated on the social stigma attached to the illness.[104]

Many bipolars choose not to disclose their condition for fear that they might lose friendships, relationships, and employment.[105] *Sutton* may now have the effect of pushing bipolars deeper into the corners of secrecy by taking away their protective shield against discrimination.[106] One qualification to this note, however, is the fact that any of the debilitating side effects from medication may still protect the bipolar employee.[107]

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99. *See, e.g.*, Marschand v. Norfolk & W. Ry. Co., 876 F.Supp 1528, 1538 (N.D. Ind. 1995) (deliberating that plaintiff's post-traumatic stress disorder undisputedly qualifies as a mental impairment, but it does not satisfy requirement that plaintiff is disabled under the ADA); *see also* Kotlowski v. Eastman Kodak Co., 922 F. Supp. 790, 797 (W.D.N.Y. 1996) (holding that plaintiff is not disabled under the ADA if her claim of depression does not substantially limit her major life activities).

100. *See* AYD, *supra* note 6, at 84 (suggesting that treatments for bipolar disorder are gaining prominence). As the psychological and genetic sciences advance, so will the ameliorative aids for bipolar disorder. *See id.*

101. *See* MIKLOWITZ & GOLDSTEIN, *supra* note 2, at 132.

102. *See* Bipolar Patients Interview, *supra* note 4. Three out of the six people interviewed for this comment are currently employed and have not disclosed the illness to their employers. *See generally A National Suvey of Professionals and Managers with Psychiatric Conditions*, BOSTON UNIVERSITY RESEARCH CENTER FOR PSYCHIATRIC REHABILITATION (visited Mar. 13, 2000) <http://www.bu.edu/sarpsych/research/si_3-page2.html> [hereinafter RESEARCH CENTER] (noting that seventy three percent of four hundred fifty-eight in the study who reported having psychiatric diagnosis, reported full-time employment).

103. *See* MIKLOWITZ & GOLDSTEIN, *supra* note 2, at 173 (validating that disclosure of bipolar illness is different due to the potential social ramifications).

104. *See generally* JAMISON, *supra* note 3, at 84 (recalling the tremendous pain and embarrassment inflicted when bipolars disclose their illness).

105. *See generally id.* at 124.

106. *See* Bipolar Patients Interview, *supra* note 4. All patients responded that they have a greater fear of disclosing their condition if they were not assured protection against discrimination. *See id. See generally* RESEARCH CENTER (noting that 27% of individuals in the study have regrets about disclosing their condition).

107. *See generally* McGarity, *supra* note 82, at 1177-79 (granting that side effects that substantially limit may enable the claimant to bring a discrimination claim).

Moreover, if the employer somehow regards the bipolar condition of its employees as a disability, the employee is ultimately protected.[108] Therefore, the employee may invoke his/her right to make a prima facie case of disability discrimination, with an adverse employment action, based upon the condition of the employee.[109]

As it stands now, properly medicated bipolars showing no signs of their illness may not be covered by the ADA.[110] The injustice unfolds on two levels. First, bipolar employees may fall back into mood swings,[111] however slight, that may affect their capacity to work without reasonable accommodation. Despite the success of medication, stress, diet, and even weather patterns may effect a functioning bipolar employee.[112] Secondly, employers fearing the outcome of hiring or working with an employee exhibiting a psychological disorder may choose to adversely affect the employment relationship without "reasonable inquiry into as to whether the employees condition may be reduced or eliminated by reasonable accommodation."[113]

The essential facet of this analysis returns to the "regarded as" provision of the ADA. An employer will not regard the employee as having a disability if the employee shows no signs of his/her illness and refuses to disclose their condition.[114] However, an employer may adversely affect employment by covertly acting upon hidden prejudices.[115] If such action

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108. *See* Eichhorn, *supra* note 44, at 1461 (substantiating the "regarded as" prong of the disability definition as a saving measure when plaintiffs are unable to prove a substantial limitation).

109. *See id.* A caveat to this assertion questions whether an employee must still provide proof of some instance where they were substantially limited in order for the employer to treat them as disabled. *See id.* at 1462.

110. The suggestion here is that if the bipolar claimant cannot bring forward sufficient evidence of a present substantial limitation in any major life activity, their claim will fail as a matter of law under the *Sutton* analysis. *See generally* Sutton v. United Air Lines, Inc., 119 S.Ct. 2134 (1999).

111. *See* MIKLOWITZ & GOLDSTEIN, *supra* note 2, at 266 (describing the occurrence of manic relapses).

112. *See* TREATMENTS, *supra* note 5, at 1765 (noting the effects of medication can be attributed to the patient's conduct). Diet, stress, lack of sleep, or pre-menstrual cycles may distort the effectiveness of medication. *See id.* This may cause relapses into mixed hypomanic and depressive states. *See id.*

113. *See* Danforth, *supra* note 23, at 691.

114. *See* Alysa M. Barancik, Comment, *Determining Reasonable Accommodations Under the ADA: Why Courts Should Require Employers to Participate in an "Interactive Process"*, 30 LOY. U. CHI. L.J. 513, 539 (1999) (suggesting that employers cannot successfully gauge the reasonable accommodation for their employees without disclosure of the impairment).

115. *See id.* at 519 (qualifying that "plaintiffs often have difficulty providing direct evidence of discrimination because employers generally avoid making clearly discriminatory statements or policies").

occurs, an employee with bipolar disorder may not be able to survive the initial threshold of proving a disability claim.[116] The fact that the bipolar employee is medicated and functions normally, thus, shreds away his/her protected status.

Although the illness is treatable, bipolar disorder is still an incurable condition that above all-else, carries a social stigma.[117] The science of psychological disorders and their treatments are relatively new to the health industry. The history of treating "seriously mentally ill" conditions is filled with stories of involuntary commitments to inhumane institutions. Bipolars cognitive of their condition may no longer have to dread such treatment. However, those who are ignorant of what bipolar is, typify a phobia towards people with the disorder.[118] As such, employers with a phobia have a tendency to discriminate.[119] Presently, if an employer found out about a healthy employee with bipolar disorder, that employer could potentially terminate the employee without repercussions.

III. SUTTON'S IMPACT ON THE ADA

A. *ADA Parameters: Defining What Is Disabled*

To fall within the definition of disability as defined under the ADA, one must have a physical or mental impairment that limits at least one major life activity (an actual disability), have a record of the disability, or be regarded as having a disability.[120]

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116. *See* Sutton v. United Air Lines, Inc., 119 S.Ct. 2139, 2144 (1999) (holding that petitioners must establish a substantial limitation in their major life activity to have standing for ADA discrimination claim); Marschand v. Norfolk & W. Ry. Co., 876 F. Supp. 1528, 1538 (D. Ind. 1995) (inferring that if plaintiff cannot show substantial limitation in their major life activity, their claims fails as a matter of law).

117. *See Mental Health: A Report of the Surgeon General* (visited Mar. 13, 2000) <http://www.surgeongeneral.gov/library/mentalhealth/chapter1/sec1.html> [hereinafter *Mental Health*]. *See generally* JAMISON, *supra* note 3, at 24 (finding that numerous people find bipolar sufferers odd and potentially dangerous).

118. *See* Mark Clements, *What We Say About Mental Illness*, PARADE MAG., Oct. 31, 1993, at 4-5 (providing results from a survey on views of mental illness). In a poll of 2053 men and women surveyed, 70% said there was a stigma attached to admitting mental illness and 55% felt the same stigma applied to seeing a mental health professional. *See id.*

119. *See generally Mental Health*, *supra* note 117 (ascribing the public attitudes about mental illness from the 1950's to the 1990's).

120. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(2) (1999) (providing the criteria which one must show for a case of discrimination due to disability). This sections states:

> The term "disability" means, with respect to an individual—
>
> a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such impairment; or being regarded as having such impairment.

Yet beyond the needs of the disabled, is the fear of invidious discrimination.[121] Although the ADA reduces the ability of an employer to discriminate against the disabled, the statute still permits employers to prefer some physical attributes over others during the employment process.[122] Employers may legally discriminate if there is a business necessity for the tasks of the job.[123] These tasks may take the form of a public policy issue of safety or a specific requirement to perform the functions of the job.[124] Essentially, employers may still legally prohibit some physically or mentally disabled person from being considered for employment despite the protections afforded by the ADA if the employee's disability is determined to pose a direct threat to the safety of others and the risk cannot be eliminated by reasonable accommodations.[125]

However, just as the ADA is limited in its protective status, employers are limited in their preferences; employer's preferences for certain physical attributes shall be reasonable and should not rise to the level of discriminating when the employee can perform the job.[126] Therefore, preferences must correspond to the requirements of the job.[127]

The provisions of the ADA suggest that no covered employer shall discriminate against a qualified individual with a disability with regards to

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121. *See* 42. U.S.C. § 12101 (b)(1) (1994) (stating that the purpose of the ADA is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities").

122. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12113(a) (1994). The statute provides for the following affirmative defense to be raised:

> It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

Id.

123. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12113(a) (1994). Section 12113 (a) also permits the denial of employment to individuals with disabilities if it can be shown to be job related and reasonable accommodation cannot be made that would allow the individual to fully perform the duties of the job. *Id.*

124. *See generally* Danforth, *supra* note 23, at 689-90 (assessing the "direct threat" defense as an issue of public policy for employers).

125. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12113(b) (1994).

126. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12113(a) (1994). Employers may make bona fide occupational qualifications within the employment such as height requirements, weight requirements, or vision requirements so long as they are necessary to the essential functions of the job and cannot be accomplished under reasonable accommodation. *See id.;* Sutton v. United Air Lines, Inc., 119 S.Ct. 2139, 2150 (1999).

127. *See Sutton*, 119 S.Ct. at 2150. *See generally* Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(a) (1994) (asserting the prohibition of discrimination based upon one's disabling condition).

the various aspects of employment.[128] In its expressed language, covered entities such as employers, employment agencies, labor or joint labor management committees with fifty or more employees cannot discriminate against a qualified individual.[129]

As the first decade of the ADA comes to a conclusion, the *Sutton* decision attempts to end the debate on whether mitigating factors should be taken into consideration when constituting an impairment as a disability.[130] The Supreme Court's initial concerns when deciding this case included the Congressional intent for the ADA legislation.[131] The ADA prohibits discrimination against individuals on the basis of their disabilities.[132] In order to be covered under the ADA, one must prove that they have an impairment that "substantially limits" one or more of their major life activities.[133] As such, the focus in litigation shifts from the conduct of the employer to the status of the employee.[134] When *Sutton* limits the ability for plaintiffs to apply for such status, the ADA itself is limited.[135]

B. *Legislative Intent*

The ADA's legislative history explains the issue of mitigating factors through both implicated language and expressed language.[136] The legislative history specifically supports making disability determinations without regard to the effect of mitigating measures in a Senate debate on the issue.[137] The Senate Committee Report states "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids."[138]

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128. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(a) (1994).

129. *See* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111(2), (5)(a) (1994). A qualified individual with a disability is identified as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."

130. *See Sutton*, 119 S.Ct. at 2142 (recognizing that the Sutton decision would end the circuit split on the mitigating factors issue).

131. *See id.* at 2148-49.

132. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(a) (1994) (stating prohibition of discrimination based on disabling conditions).

133. *See generally* Bragdon v. Abbott, 118 S.Ct. 2202, 2209 (1996) (establishing the threshold for proving discrimination claims).

134. *See* Eichhorn, *supra* note 44, at 1426-27.

135. *See id.* at 1472-73 (assessing that changes need to be made in the ADA to prevent the statute's language from undermining its intent). The suggestion here is to refocus the emphasis of ADA litigation toward the employer's discrimination. *See id.*

136. *See* S. REP. No. 101-116, at 23 (1989) (providing the legislative debates on the issue of mitigating measures read into the ADA).

137. *See id.* at 23-24 (explaining whether mitigating factors should be accounted for when defining a disability).

138. *Id.* at 23.

Further, the House Labor Committee explained that a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid.[139] These specific statements express an implicit intent for courts to make disability determinations without regard to mitigating measures.[140]

Congress also intended the ADA to cover a broad range of citizens with a wide range of disabilities.[141] According to one commentator, "'remedial statutes' [of this nature] are generally entitled to a broad interpretation focused on achieving the goals of the statute."[142] The ADA not only sought to provide coverage in a broad range of areas, but also to a large number of individuals.[143] This language was taken directly from the language of the Rehabilitation Act of 1973.[144]

In several respects, the ADA was written to broaden the intent of the Rehabilitation Act that provided limited coverage to the disabled working in the public sector or with private industries contracting under federal subsidies.[145] The protection against discriminatory conduct within the ADA is purported to expand the ideology of the Rehabilitation Act.[146] Even when critics of the ADA called for an enumerated list of covered disabilities to provide clarity, the House of Representatives refused to provide such a list because it would have been impossible to ensure the "comprehensiveness of the ADA."[147] Legislators also refused to provide this list in light of the fact that new disorders may develop in

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139. *See* H.R. REP. NO. 101-485, pt. III, *available in* 1990 WL 121680 (1990).

140. *See generally* S. REP. NO. 101-116, at 23 (1989) (providing that medications should not affect the underlying presence of one's disabling condition); H.R. REP. NO. 101-485, pt. III, *available in* 1990 WL 121680 (1990).

141. *See* Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 861 (1st Cir. 1998) (holding that consistent with the Congressional intent for the ADA as a remedial statute, "individual with a disability" should be interpreted broadly).

142. Isaac S. Greaney, *The Practical Impossibility of Considering the Effect of Mitigating Measures under the Americans with Disabilities Act of 1990*, 26 FORDHAM URB. L.J. 1267, 1273 (1999); *see* Developments in the Law: Employment Discrimination, 109 HARV. L. REV. 1568 (1996) (postulating that a remedial statute deserves broad interpretation).

143. *See generally* S. REP. NO. 101-116, at 2 (1989) (noting that the ADA's intent was to "end discrimination against individuals with disabilities").

144. *See* Vocational Rehabilitation Act of 1973, 29 U.S.C. § 701(b)(1) (1994).

> The purposes of this chapter are—
>
> (1) to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society . . .

Id.

145. *See id.*

146. *See* Vocational Rehabilitation Act of 1973, 29 U.S.C. § 701 (1994).

147. *See generally* H.R. REP. NO. 101-485, pt. III, *available in* 1990 WL 121680 (1990) (arguing that a comprehensive list of disabilities would be more exclusive than inclusive due to the fact that new conditions may be discovered every period).

the future.[148] These arguments from Congress could therefore be construed to support the broad interpretive coverage of the ADA.[149]

The legislative history also calls for a practical approach on a case by case basis when making these disability determinations.[150] Here, a scientific or hypothetical approach gives way to a functional analysis of one's disability.[151] Representative Steve Bartlett, ADA House Bill manager, stated that "the ADA does not cover nine hundred classes of disability . . . Instead, the ADA includes a functional approach rather than a medical definition of disability."[152]

The functional approach is a broader technique that allows the presiding court to hear the evidence on a disability claim and rely on the court's discretion.[153] The functional approach is in opposition to a more formulized approach that, in effect, enumerates the disabilities that shall or shall not be covered.[154] This may provide the reason why Congress refused to provide a list of enumerated disabilities.

However, court decisions such as *Washington v. HCA* followed the House Reports for the following reasons: the court decisions were directly on point; came after the Senate Report; and were incorporated by the Senate Bill that was passed and signed by the President.[155] Consequently, the *Washington* court, upon remand and wary of contradicting legislative intent, evaluated the plaintiff's condition in its unmitigated state.[156] Yet, the *Washington* court limited its ruling by stating that mitigating measures should still be taken into account for less serious impairments.[157]

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148. *See generally id.*

149. *See* Greaney, *supra* note 142, at 1274 (asserting that the broad approach has mainly been used by courts in support of the EEOC's interpretive guidance).

150. *See id.* at 1275.

151. *See id.* at 1273 (suggesting that one's disability should be functionally analyzed rather than hypothetically analyzed).

152. *See* 136 CONG. REC. 9072 (daily ed. May 1, 1990) (quoting Steve Bartlett in referring to the functional utilization of the ADA).

153. *See* Greaney, *supra* note 142, at 1273 (defining the focus on how courts should determine whether employees are disabled for purposes of the ADA).

154. *See id.* The rationale for enumerating each disabling condition is such that the legislature would be inundated with medical testimony as to what qualifies as a substantially limiting impairment. *See id.*

155. *See* 48 CONG. WKLY. REP. Q. 2227 (1990) (evaluating that the incorporation of the Senate report by the House legitimized the intent of Congress to disregard mitigating measures).

156. Washington v. HCA Health Servs. of Texas, Inc., 152 F.3d 464, 470-71 (5th Cir. 1998) (holding that the House report is unambiguous and incorporates a reference from the Senate report that does not allow a court to look at mitigating measures unless the "amount to permanent corrections or ameliorations").

157. *Id.* at 471.

The Congressional findings attached to the ADA supported the explicit qualification that the statute would cover approximately forty-three million Americans.[158] For many jurisdictions deciding on disability issues, the fear is that the umbrella of the ADA is too expansive in its explicit form.[159] However, Justice O'Connor noted in *Sutton* that the number grows from forty-three million to one-hundred-sixty million if the EEOC guidelines were adhered to.[160]

Logic may dictate that it was not the intent of Congress to protect one-hundred-sixty million people where the clear majority of those people have minor or permanently correctable conditions. For example, it would be difficult to compare a broken arm or someone with correctable vision to someone suffering from cancer or diabetes. The penultimate issue, therefore, centers upon whether the numbers utilized by Congress should be read broadly or adhered to specifically.

C. *EEOC Guidelines*

Congress authorized the EEOC to create regulations for enforcement of the ADA and to provide interpretive guidelines.[161] The administrative guidelines defined the terms absent from the statutory text.[162] Thus, the EEOC constructed its interpretive guidelines by defining crucial terms such as "mental and physical impairment," "substantially limiting," and "major life activities".[163] The guidelines direct the courts to approach the disability inquiry by comparing an individual's ability to perform a specific activity with members of the general population.[164] The EEOC regulations also instruct the courts to specifically adhere to an individualized inquiry into the plaintiff's impairment.[165]

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158. *See* Burgdorf, *supra* note 41, at 434 n.117.

159. *See* Michel Lee, *Searching for Patterns and Anomalies in the ADA Employment Constellation: Who Is a Qualified Individual with a Disability and What Accommodations Are Courts Really Demanding?*, 13 THE LAB. LAW. 149, 149-51 (1997).

160. *See* Sutton v. United Airlines, 119 S.Ct. 2139, 2147-48 (1999). In *Sutton*, Justice O'Connor discusses that the estimated number of disabled Americans stretches to an over-inclusive one hundred sixty million under a health conditions approach which looks at all conditions that impair the health or normal functional abilities of an individual. *Id.* at 2148.

161. *See* Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. app. § 1630.

162. *See* Greaney, *supra* note 142, at 1274.

163. *See* 29 C.F.R. §§ 1630.2(h)(1), (2)(i), (j) (1999); Greaney, *supra* note 142, at 1274.

164. *See* Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(j) (1999). "The term *substantially limits* means: (i) unable to perform a major life activity that the average person in the general population can perform." *Id.*

165. *See id.* (noting that in paragraph eight determining whether one is substantially limited requires a case by case basis).

Although the original regulations did not discuss the effects of mitigating measures, the interpretive guidelines, attached as an appendix to the regulations, clarify its provisions and respond to the courts' need to define whether mitigating circumstances should be considered.[166] Specifically, these guidelines expressly state that whether an impairment substantially limits a major life activity should be made on a case by case basis, without regard to mitigating measures.[167]

Despite the fact that Congress mandated the EEOC to create regulations pursuant to the Administrative Procedure Act, the interpretive guidelines are not promulgated under Congressional direction.[168] Thus, some courts prior to *Sutton* agreed that the EEOC's interpretive guidelines were less binding than the mandated regulations and thereby deserved less judicial deference, particularly when in conflict with the statutory language.[169] Such decisions suggest support to discount mitigating measures utilized by ADA claimants and have provided the Supreme Court with a justified basis for not adhering to Congressional intent.

Prior to the Sutton decision, the lower courts were split among the circuits that adopted the EEOC's approach of ignoring mitigating circumstances when determining whether the claimant was disabled and the circuits that took mitigating circumstances into consideration.[170] The

166. *Compare* 29 C.F.R. § 1630.2 (1999) (denoting definitions for use in implementation of the ADA) *with* 29 C.F.R. app. § 1630.2(j) (1999) (stating the need for the disability analysis to be made without regard to mitigating measures).

167. *See* 29 C.F.R. app. § 1630.2(h) (1999). "The existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices." *Id.*

168. *See* Greaney, *supra* note 142, at 1275 (acknowledging that courts have disagreed on the level of deference because of conflict in guidelines and regulations).

169. *See* Sutton v. United Air Lines, Inc., 130 F.3d 893 (10th Cir. 1997), *cert granted* (holding that EEOC interpretive guidelines conflict with the intent of the ADA); Hodgens v. General Dynamics Corp., 963 F.Supp. 102 (D.R.I. 1997) (reasoning that the EEOC interpretations are not entitled to the same amount of deference ordinarily accorded to its promulgated regulations); Schluter v. Industrial Coils, Inc., 928 F.Supp. 1437, 1445 (D.Wis. 1996) (concluding that EEOC guidelines are "at odds" with the ADA and therefore do not deserve judicial deference). *See generally* James G. Frierson, *Heads You Lose, Tails You Lose: A Disturbing Judicial Trend in Defining Disability*, 48 LAB. L.J. 419, 425 (1997) (noting the absence of express Congressional direction with regard to the creation of the EEOC's interpretive guidelines); Greaney, *supra* note 142, at 1281.

170. *Compare* Sutton v. United Air Lines, Inc., 130 F.3d 893 (10th Cir. 1997) *aff'd*, 119 S.Ct. 2139 (1999) (holding that mitigating measures should be viewed when assessing whether ADA plaintiffs are substantially limited) *and* Holihan v. Lucky Stores, 87 F.3d 362, 366 (9th Cir. 1996) (stating that mitigating factors should be viewed when defining whether one has a disability), *with* Washington v. HCA Healthcare Services, 152 F.3d 464 (5th Cir. 1998) (stating that in determining whether mitigating factors should be considered, a case by case analysis should be conducted), *with* Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933, 937 (3d Cir. 1997) (suggesting that mitigating factors should

EEOC's guidelines suggest that an individual's condition should be evaluated in its uncorrected or unmitigated form.[171] The guidelines essentially focus on what is a "substantial limitation" to a major life activity.[172] Thus, it is the EEOC's interpretation that 'substantially limited' can and should be determined regardless of mitigating measures.[173] The majority of courts on this issue were persuaded that the EEOC guidelines were correct in ignoring an individual's condition in its mitigated state.[174] *Sutton*, however, contradicts this majority and the interpretation of the EEOC.[175]

No agency or regulation has specifically defined disability for the courts to utilize under the ADA. The EEOC, however, provides guidance in its regulations of what should be seen as a "substantially limiting" condition in order to demonstrate what qualifies as a disability.[176]

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not be considered when defining disabilities), *and* Doane v. City of Omaha, 115 F.3d 624, 627-28 (8th Cir. 1997) (holding that the mitigating factors should not be considered when defining what is disabled for purposes of the ADA). *But see* Gilday v. Mecosta County, 124 F.3d 760, 767 (6th Cir. 1997) (Kennedy, J., dissenting) (providing that no deference should be given to the EEOC guidelines when defining what is "substantially limited" for purposes of the ADA).

171. *See* 29 C.F.R. app. § 1630.2 (h) (1997).

> The term "substantially limits" means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

Id.

172. *See* C.F.R. 1630.2(j)(3)(I) (1997).

173. *See* C.F.R. 1630 (1997); *see also* Greaney, *supra* note 142, at 1276-79 (addressing how the EEOC interprets the substantially limiting determination without regard to mitigating measures).

174. *Compare* Sutton v. United Air Lines, Inc., 130 F.3d 893 (10th Cir. 1997) *aff'd*, 119 S.Ct. 2139 (1999) (holding mitigating measures should be viewed when assessing whether ADA plaintiffs are substaintially limited), *with Washington*, 152 F.3d at 464 (stating that mitigating factors should be considered when reviewing less than severe impairments), *and Matczak*, 136 F.3d at 937 (suggesting that mitigating factors should not be considered when defining disabilities), *with Holihan*, 87 F.3d at 366 (agreeing with the EEOC assessment that mitigating factors should not be considered when defining disabilities), *and Doane*, 115 F.3d at 627 (holding that the mitigating factors should not be considered when defining what is disabled for purposes of the ADA). *But see Gilday*, 124 F.3d at 766-77 (Kennedy, J., dissenting) (promoting no deference should be given to the EEOC guidelines when defining what is "substantially limited" for purposes of the ADA).

175. *See* Sutton v. United Air Lines, Inc., 119 S.Ct. 2139, 2144 (1999).

176. *See* C.F.R. § 1630.2(j) (1999) (according to the EEOC, substantially limiting life activities include any element which limits one's ability to breathe, see, hear, walk, or take care of themselves).

The Supreme Court has adhered to the EEOC regulations that have defined impairments as any psychological or physiological disorder which "substantially limits" major life activities.

The Supreme Court did not raise the issue of whether the interpretive guidelines deserve deference.[177] However, the deference issue was made moot by the Court when it affirmed the 10th Circuit's stance that the guidelines were in conflict with the ADA.[178] As such, the opinion did not follow the regulations of the EEOC and Justice Department providing that the determination of whether an individual is substantially limited must be made without regard to mitigating measures.[179] Therefore, the *Sutton* decision marks a change in the way courts will view disabilities.[180] By narrowing the scope of the disability definition, the Supreme Court has undercut the power of the ADA and the power of the agency that oversees its regulation.[181]

IV. Proving Up the Disability

A. *Threshold Analysis*

Discrimination in the context of the ADA involves several nuances. In a similar vein to Title VII,[182] the ADA prohibits discrimination during the application process, within the job itself, within the aspects of retention, advancement, promotion, or training, and within the aspects of any adverse employment action.[183] Employees must not only show that they are qualified individuals with a disability, they must also show how notice was provided to the employer concerning the disability and how reasonable accommodations were requested by the employee.[184] The "regarded as" provision in the ADA provides further protection from employers

177. *See Sutton*, 119 S.Ct. at 2146.

178. *See id.*

179. *See id.* (holding that persons who are to be evaluated in their hypothetical uncorrected state is an impermissable interpretation of the ADA).

180. *See* Washington v. HCA Healthcare Servs., 152 F.3d 464, 470 (5th Cir. 1998); Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933, 937 (3d Cir. 1997); Holihan v. Lucky Stores, Inc., 87 F.3d 862, 366 (9th Cir. 1996); Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir. 1997).

181. *See* Sutton v. United Air Lines, Inc., 119 S.Ct. 2139, 2145 (1999) (deciding that the EEOC guidelines are an impermissible expansion of the ADA statute).

182. *See* Title VII, 42 U.S.C. § 2000e-2(a) (1994) (prohibiting discrimination against the five protected classes). The five protected classes include race, sex, color, religion, and national origin. *See id.*

183. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(a) (1994); *see also* Title VII, 42 U.S.C. § 2000e-2(a) (1994) (providing aspects of protection for employees against discrimination).

184. *See* Danforth, *supra* note 23, at 668-70 (assessing that employees must disclose their conditions before requesting reasonable accommodations).

who seek to discriminate based upon the condition of the employee.[185] Therefore, even if an employee does not freely disclose their disability, employers may not adversely affect an individual's terms of employment upon recognition of the employee's disability.[186]

An employee may create a prima facie case for discrimination based upon the analysis of *McDonnell Douglas Corp. v. Green*.[187] Under *McDonnell Douglas*, the employee must first show that he is a member of the protected class of disabled individuals and must then show that the employer took an adverse employment action by replacing the employee or continuing to hold the position open although the individual was qualified.[188] The employer is then free to rebut the presumption of discriminatory conduct with a legitimate explanation for their employment decision.[189] However, the employee may then show that the non-discriminatory explanation given for the employment decision is a pre-textual decision.[190]

This analysis taken from *McDonnell Douglas* exemplifies how proving up the discriminatory case in Title VII is analogous to disability discrimination.[191] The technical aspects of proving up both sides of discrimination are similar; the qualifications of Title VII are clearly enumerated,

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185. *See* Harris, *supra* note 59, at 590-91 (suggesting that the "regarded as" provision within the ADA provides an additional protection for employees). The "regarded as" provision allows the employer to simply view the employee as disabled thus granting the employee a reasonable expectation of protection and accommodation. *See id.*

186. *See* School Bd. of Nassau County v. Arline, 480 U.S. 273, 284-86 & n.13 (1987) (discussing the purpose of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994)); Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 860-61 (1st Cir. 1998) (holding that employers may not utilize adverse employment action based upon their belief that the employee has a disabling condition).

187. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793 (1973). Most circuits have applied the analysis of *McDonnell Douglas* when the employer denies discriminatory conduct for their employment decision and there is no direct evidence of discrimination. *See* Harris, *supra* note 59, at 587 & n.44 (listing several cases from six circuits that have applied the *McDonell Douglas* analysis).

188. *See generally McDonnell Douglas Corp.*, 411 U.S. at 802 (providing the factors that must be established in order to meet a prima facie case of discrimination).

189. *See id.*; *see also* Harris, *supra* note 59, at 587-89 (noting the eligibility factors for a prima facie case of discrimination for ADA claimants under the *McDonnell Douglas* concept).

190. *See McDonnell Douglas Corp.*, 411 U.S. at 804 (holding that an individual must be given the opportunity to show that employer's explanation to the court is in fact pretext); *see also* Harris, *supra* note 59, at 587-89 (analyzing the burden shifting analysis for ADA claimants under the *McDonnell Douglas* concept).

191. *See* Halperin v. Abacus Tech. Corp., 128 F.3d 191, 196-97 (4th Cir. 1997) (holding that "[a]bsent direct evidence of discrimination, [plaintiff] must satisfy three-step proof scheme established in *McDonnell Douglas Corp. v. Green*. . . to prevail on his ADA and ADEA claims" (citation omitted)).

while what qualifies as a disability remains contentious at best.[192] The extra step in proving that one has a disability before going into the *McDonnell Douglas* analysis creates a substantial roadblock for plaintiffs seeking protection. In reality, the promises of the ADA to integrate the disabled into mainstream society is constantly met with judicial roadblocks as courts narrow the interpretation of the statute.[193] Decreasing the scope of redress in which a plaintiff may seek protection for his/her disability has a significant impact in the interests of justice.[194]

With the ADA, a plaintiff faces more obstacles compared to Title VII when proving that they are a member of a protected class.[195] At times, the class membership issue, or determination of whether one has a disability, may be the most important issue in dispute.[196] Because the definition of disability is not as clear as those of Title VII protected classes, plaintiffs claiming discrimination under the ADA may be unable to access the services necessary to assess their condition in order to meet their burden of proof.[197] As such, plaintiffs usually face a daunting task in surmounting this extra barrier in the burden of proof allocation.[198] Further, in more complex cases where the discriminatory conduct is at issue, an ADA plaintiff cannot satisfy their burden of proof by merely showing there was discriminatory conduct.[199] In addition to showing that employers engaged in such conduct, the ADA plaintiff would also have to provide proof of their membership in a "protected class".[200]

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192. *See* Eichhorn, *supra* note 44, at 1424 (imploring that ADA claimants have an additional barrier to prove their cases as compared to Title VII cases).

193. *See* Lanctot, *supra* note 70, at 328 (asserting that the "failure of the ADA to provide comprehensive protection against discrimination can be attributed to judicial narrowing of its provisions").

194. *See generally* McGarity, *supra* note 82, at 1173 (asserting that a beneficial outcome of *Sutton* will only occur if lower courts maintain the "breadth of disabling corrections" and "ensure that meritous claims are not improperly rejected at summary judgment stage").

195. *See* Eichhorn, *supra* note 44, at 1424-25.

196. *See* Lee, *supra* note 159, at 153 (assessing that a disability determination is for discrimination claims is the "crucial threshold question of most ADA cases").

197. *See id.* Eichhorn, *supra* note 44, at 1424 (stating that the burden to show they indeed have a disability resides with the claimant; thus, claimants must bear the cost to prove up their disability); Mastroianni & Miaskoff, *supra* note 30, at 728 (asserting that individuals who cannot afford mental health assessment or other types of medical documentation should not be excluded from ADA coverage).

198. *See* Eichhorn, *supra* note 44, at 1424-25 (indicating that before pursuing a discrimination claim, the ADA requires a plaintiff to prove they are a "qualified individual with a disability"); Mastroianni & Miaskoff, *supra* note 30, at 728.

199. *See* Eichhorn, *supra* note 44, at 1424-25 (suggesting that plaintiffs have additional burdens of proof in their ADA discrimination claims compared to Title VII claims).

200. *Id.* (establishing that the ADA wrongly focuses on whether claimants can provide proof that they belong within a "protected class").

B. *Sutton's Treatment of the "Actual Disability" Prong*

Justice O'Connor's opinion specifically states that a 'disability' exists only where an impairment 'substantially limits' a major life activity, not where it 'might,' 'could,' or 'would' be substantially limiting" absent mitigating measures.[201] Her logic stems from an interpretation of the language in the ADA itself, which she concludes should be read in a present indicative form.[202] Therefore, according to Justice O'Connor, "substantially limits" means, to be presently substantially limited.[203]

Justice O'Connor's interpretation of the ADA in its present indicative form correlates with the decision in circuits that have ignored the EEOC guidelines in both majority and dissenting opinions.[204] Examples include Justice Kennedy's concurring and dissenting opinion in the Sixth Circuit case of *Gilday v. Mecosta County*.[205] Justice Kennedy suggested that mitigating factors should be considered when reviewing whether an individual is disabled.[206] Justice Kennedy observed, contrary to the opinion of the majority, that although Gilday's medication stabilized his condition, he would be "substantially limit[ed] . . . in the major life activity of working."[207] It was his opinion, therefore, that Gilday appears to be disabled for purposes of ADA protection.[208] In contrast, the Fifth Circuit in *Washington v. HCA Health Services of Texas, Inc.*, agreed with the Sixth Circuit majority in *Gilday*.[209] In *Washington*, the court reasoned that a disability must be assessed without regard to mitigating measures due to an apprehension of overruling the EEOC interpretation and Congressional intent.[210] However, applying a narrow interpretation of the EEOC

201. Sutton v. United Air Lines, Inc., 119 S.Ct. 2139, 2146 (1999).

202. *See id.*

203. *See id.* (opining that the statute should be interpreted in its present indicative form, and thus when discerning one's condition it must be viewed in its present form).

204. *See* Sutton v. United Air Lines, Inc., 130 F.3d 893 (10th Cir. 1997); Gilday v. Mecosta County, 124 F.3d 760, 767 (6th Cir. 1997).

205. *See Gilday*, 124 F.3d at 767 (Kennedy, J., concurring in part and dissenting in part) (concluding that it was not necessary to consult the EEOC guidelines because the statute is unambiguous).

206. *See id.* (proposing that the remission of the claimants condition no longer makes him disabled).

207. *Id.* at 767-68 (Kennedy, J., concurring in part and dissenting in part).

208. *See id.*

209. Washington v. HCA Health Servs. of Texas, Inc., 152 F.3d 464, 469-70 (5th Cir. 1998) (holding that the EEOC guidelines deserve some deference when determining whether a disability exists under mitigating measures utilized by the claimant because the statute is ambiguous). The court stated that the court does not defer to the EEOC's guidelines only when the language of the ADA is unambiguous. *See id.*

210. *Washington*, 152 F.3d at 470.

guidelines, the court held that such review should not be provided to claimants with less severe impairments.[211]

The appellate court opinions of *Sutton, Gilday* and *Washington* present the issue of whether a court should give the EEOC deference when determining what should be considered as a disabling condition under the ADA.[212] The deference issue is key due to the fact that the EEOC' s guidelines purport to not look at mitigating measures utilized by the plaintiff.[213] The majority of courts have decided to support the EEOC guidelines and give them deference.[214] The *Gilday* decision, however, provides dicta proposing that the guidelines were in direct conflict with the statute.[215]

Above all else, the *Sutton* decision now directs the lower courts to at all times illicit the employee's condition in its present state.[216] Therefore, if a plaintiff is currently healthy, an inquiry as to one's condition when viewed in its present form will always be viewed in a healthy/non-disabled form if there are no manifestations of their condition.[217] Inexplicably, despite the majority circuit court opinions, the Supreme Court, in one fell swoop, has gutted the ADA and segregated employees from those with

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211. *See id.* (noting that mitigating measures should be utilized by the court when revealing less severe impairments but not when the impairment is more severe). The court's reasoning held that although taking mitigating measures seemed unreasonable under less severe circumstances, one could not ignore the administrative guidelines provided by the EEOC. *See id.*

212. *Compare Washington*, 152 F.3d at 471 (stating that mitigating factors should be considered when defining disabilities with less severity), *and* Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933, 937-38 (3d Cir. 1997) (suggesting that mitigating factors should not be considered when defining less severe disabilities), *with* Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996) (noting that mitigating factors should not be considered when defining disabilities), *and* Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir. 1997) (holding that the mitigating factors should not be considered when defining what is disabled for purposes of the ADA). *But see* Gilday v. Mecosta County, 124 F.3d 760, 767 (6th Cir. 1997) (Kennedy, J., concurring in part and dissenting in part) (proposing that no deference should be given to the EEOC guidelines when defining what is "substantially limited" for purposes of the ADA).

213. *See* 29 C.F.R. § app. 1630.2(j) (1999).

214. *See Washington*, 152 F.3d at 471 (holding that the EEOC guidelines are not in conflict with the ADA); *Matczak*, 136 F.3d at 937-38 (finding that the EEOC guidelines deserve some judicial deference); *Holihan*, 87 F.3d at 366; *Doane*, 115 F.3d at 627.

215. *See Gilday*, 124 F.3d at 766 (Kennedy, J., dissenting) (providing that the EEOC guidelines directly conflict with the ADA).

216. *See generally* Sutton v. United Air Lines, Inc., 119 S.Ct. 2139, 2146 (1999).

217. *See generally* McGarity, *supra* note 82, at 1171 (postulating that the Supreme Court has observed "substantially limiting" should be utilized in a present indicative form in order to demonstrate disability).

visible conditions and those with less perceivable conditions.[218] Employees who are clearly handicapped with physical impairments such as paraplegics, the blind, or the hearing impaired will still fall under the umbrella of the ADA.[219] However, the employees whose conditions are less obvious, such as employees with bipolar disorder, stand outside the protection of the ADA.[220]

C. *Sutton's Treatment of the "Record Of" Prong*

Claimants alleging there is a record of their disability have greater leeway when bringing a disability claim. However, allegations under the "record of" a disability prong is the least likely candidate for ADA claims.[221] In fact, the record of prong was not treated in *Sutton.* Yet, by implication, this second prong of the three prong test must still rely on the interpretation of whether the claimant has a "substantial limitation" in a "major life activity."[222] The substantial limitation comes in to play whereby in the immediate past, the claimant had a recorded impairment sufficient to bring an ADA claim.[223] With this implication in mind, *Sutton* could potentially detract from the recordation of an impairment by determining the mitigated state in the past precluded standing for a disability claim in the present.[224]

D. *Sutton's Treatment of the "Regarded As" Prong*

Justice O'Connor, in *Sutton*'s parallel decision of *Murphy v. United Parcel Service, Inc.*,[225] suggests that those with continuing disabling conditions will still be covered because the key to enabling a discrimination claim is looking at the substantial limitations of the employee or the con-

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218. *See* Lynette Clemetson, *A Sharper Image of Bias: Three Major Disability Decisions Put Stricter Limits on Who Can Sue Employers for Discrimination in Hiring*, NEWSWEEK, July 5, 1999, at 27 (quoting Georgetown University Law Center professor, Chai Feldblum).

219. *See generally* McGarity, *supra* note 82, at 1170-71 (indicating that the majority in *Sutton* conceived that not all corrected impairments were precluded from ADA coverage).

220. *See* Eichhorn, *supra* note 44, at 1430 (asserting that individuals with conditions that are less severe are deemed suspect even though they are discriminated against because of that impairment).

221. *See id.* at 1461.

222. *See id.*

223. *See* 29 C.F.R. § 1630.2(k) (1998) (noting that a "record of such impairment" means a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities).

224. *See generally* Eichhorn, *supra* note 44, at 1461 (suggesting that if the substantial limitation hurdle is not met in the record of prong, claimants are disqualified from claiming disabled status).

225. Murphy v. United Parcel Serv., Inc., 119 S.Ct. 2133 (1999).

duct of the employer.[226] Employees with AIDS or cancer will continue to work under the protections of the ADA as long as their impairments substantially limit their abilities.[227] These types of disabling conditions may therefore be "regarded as" disabling if the employer chooses to regard the employee as disabled.[228]

However, there is an assumption from the Supreme Court that the regarded as prong is realistically affective in identifying employer conduct; and, as a result of their conduct, employer's will identify the employee as disabled.[229]

The unfortunate truth is the "regarded as" prong of the disability definition places the plaintiff in no better position than a plaintiff who must prove up their disability.[230] Medicated employees with conditions such as cancer or AIDS may find their conditions falling into remission. At that point, under *Sutton*, an employer or presiding court may potentially no longer consider that employee as disabled.[231] As such, *Sutton* leaves the door open for courts to trump the conduct of employer by only looking at the condition of the employee.[232]

For example, if an employer regarded their employee as a cancer risk, and that cancer went into remission due to mitigating treatments, the employer would then be free to adversely affect the employee's terms of employment due to the fact that they are no longer considered disabled.

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226. *Murphy*, 119 S.Ct. at 2137 (deliberating whether a claimant may be protected by the ADA if they can show evidence of a substantial limitation of a major life activity). *See also* Mastroianni & Miaskoff, *supra* note 30, at 737 (validating that perceived impairments by the employer regarding a disability will be covered under the "regarded as" prong of the ADA).

227. *See* Sutton v. United Air Lines, Inc., 119 S.Ct. 2139, 2149 (1999) (stating that the use of a corrective device does not relieve one's disability if that individual is still substantially limited in a major life activity).

228. *See* American with Disabilities Act of 1990, 42 U.S.C. § 12102(2)(c) (1994) (denoting the third prong defining disability); *see also* Mastroianni & Miaskoff, *supra* note 30, at 739. The "regarded as" prong is intended to guard against employers that take adverse action against employees with no impairment, but who are perceived as having a disabling condition. *See* Mastroianni & Miaskoff, *supra* note 30, at 739.

229. *See Sutton*, 119 S.Ct. at 2149-50.

230. *See* James M. Zappa, Note, *The Americans with Disabilities Act of 1990: Improving Judicial Determinations of Whether an Individual is "Substantially Limited"*, 75 MINN. L. REV. 1303, 1330-31 (1991).

231. *See* Honberg, *supra* note 28.

232. *See* Ellis v. Software Spectrum, Inc., 85 F.3d 187, 192 (5th Cir. 1996) (stating that plaintiff's ability to work precluded her record of a disability claim).

The argument against this assertion relies on the "regarded as" prong of the ADA.[233] Proponents of viewing conditions in their unmitigated state argue that an employer will become subject to scrutiny if its adverse employment actions are due to some form of prejudice towards a perceived disability.[234] Yet, the reality is, employees have an almost impossible task of proving discriminatory conduct towards perceived disabilities short of direct proof.[235] Moreover, an employee that appears healthy will have difficulty bringing a claim if they are not presently "substantially limited" according to *Sutton.*[236]

V. BALANCING TENSIONS

In a litigious society, arguably, the dangers of frivolous suits and abuse of the legal system already exists. With this in mind, there is logic behind the Supreme Court's decision to limit the ADA protective umbrella.[237] In hindsight however, the issue of justice must enter into the debate of whether scaling back these protections creates greater social utility. In its efforts to curtail the expansion of the ADA, the Supreme Court has chopped off a segment of society truly deserving of protection. In point of fact, millions of Americans will be unjustly ignored from the protections of the ADA through the expressed language of the *Sutton* decision.[238]

As the first decade of the ADA comes to a conclusion, the *Sutton* decision attempts to end the debate on whether mitigating factors should be taken into consideration when constituting an impairment as a disability.[239] Coverage under the ADA extends only to those who can prove that they have an impairment that "substantially limits" one or more ma-

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233. *See* Peter R. Marksteiner, *Supreme Court Limits Coverage of the Americans with Disabilities Act*, 74 FLA. B.J. 32, 38 (2000) (granting that the "regarded as" door is still "wide open" for ADA claimants).

234. *See* Equal Employment Opportunity Comm'n Compliance Manual § 902.8(a) (EEOC Order 915.002, Mar. 14, 1995) (stating that the "regarded as" provision applies to individuals subjected to discrimination based on information relating to illness, disease or other types of disorders); 29 C.F.R. § 1630.2(l)(1) (1999).

235. The argument here is that the *McDonnell Douglas* burden shifting analysis has been applied to the ADA because direct proof of discrimination is hard to come by. Yet, despite the application of the *McDonnell Douglas* test, the overwhelming majority of claims still fail during the summary judgment stage. *See generally* Harris, *supra* note 59, at 590-91.

236. *See generally* McGarity, *supra* note 82, at 1170-71.

237. *See* Harris, *supra* note 59, at 582-83 (alluding to the unnecessary expansiveness of the ADA through the EEOC's no mitigation guideline).

238. *See* Clemetson, *supra* note 218 (quoting Georgetown University Law Center professor, Chai Feldblum as that "[t]he ruling cuts the heart out of the ADA").

239. *See* Sutton v. United Air Lines, Inc., 119 S.Ct. 2139, 2144 (1999).

jor life activity. Therefore, the focus in litigation shifts from the conduct of the employer to the status of the employee.[240] When *Sutton* limits the ability for plaintiffs to apply for such status, the ADA itself is limited.[241]

The fallout from the language of *Sutton* is only slightly apparent.[242] However, the news is not good for employers when one considers the lower court opinions reading *Sutton* as a limitation on judicial redress.[243] Some commentators have noted that firms dropping clients due to the *Sutton* opinion may be premature in their assessment of their cases.[244] However, interpreting the ADA in its present indicative form creates the danger of allowing an employer to reassess the condition of its employees, and allows an opening for these employers to freely discriminate.[245] Arguably therefore, *Sutton* has limited access to the courts through the ADA.[246]

As with many other issues, the Supreme Court is concerned with judicial economy and must balance legitimate claims with those that do not comport to the standards of the ADA's original intent.[247] By the same

240. *See* Eichhorn, *supra* note 44, at 1472-73 (assessing that changes need to be made towards the focus of the ADA to prevent the statute's language from undermining its intent). The suggestion here is to refocus the emphasis of ADA litigation toward the employer's conduct and away from the protected status assessment of the employee.

241. *See generally* Burgdorf, *supra* note 41, at 437-38.

242. *See generally* McGarity, *supra* note 82, at 1170-71.

243. *See* 23 Mental Health & Physical Disability L. Rep. 841, November/December 1999 *citing* Taylor v. Phoenixville Sch. Dist., 184 F.3d 296 (3d Cir. 1998) [hereinafter Mental Health Disability] (noting the Third Circuit's vacated prior opinion of a teacher suffering from bipolar disorder). The Third Circuit originally reversed a federal court's grant of summary judgment finding that the plaintiff, in her unmedicated condition, demonstrated that she had a disability. *See id.* The court vacated this opinion after the announcement of *Sutton* and remanded inquiries of general factual disputes. *See id. See generally* McGarity, *supra* note 82, at 1173 n.74 (allucidating that there is already a strong trend for lower interpreting the use of mitigating measures to limit the "applicability" of the ADA).

244. *See generally* McGarity, *supra* note 82, at 1170-71.

245. *See* Sutton v. United Air Lines, Inc., 119 S.Ct. 2139, 2152-54 (1999) (Stevens, J., dissenting) (suggesting that the majority opinion's application of "substantially limited" diminishes the ADA's three pronged definition of disability). *See generally* McGarity, *supra* note 82, at 1161 & n.1 (citing Maggie Jackson, *Rulings Called "Horrible Catch 22" for Disabled*, ATL. CONST., June 23, 1999, at A1 and underscoring an attorney's experience from an article that the legal community will drop ADA cases due to the *Sutton* decisions).

246. *See* Marksteiner, *supra* note 233, at 32-33 (suggesting that the legal decisions of mid-July, 1999, concerning the ADA have limited the protections afforded by the statute).

247. *See Sutton*, 119 S.Ct. at 2149 (noting that Congress utilized the bright line of 43 million to establish discrimination coverage).

token, the concern for judicial economy must not sacrifice the interests of justice.[248] At a minimum, *Sutton* creates an imbalance of these interests.

VI. RECOMMENDATION

Despite the legitimate concerns of limiting ADA coverage due to frivolous suits, the principles of justice should prevail. At the very core of this analysis, it should be understood that the intent of the ADA was to provide broad coverage to disabled employees. The directive from Congress is unambiguous on this point, and the interests of justice require such broad application.

Indeed, a more practical approach is needed when determining whether an employee should be protected under the ADA.[249] In order to attain this practical approach, one may refer to the letter of the statute itself and its original intent. Imbedded within the ADA and the regulations of the EEOC is a functional approach to decide what should be considered a disability.[250] This functional basis allows courts to look at the severity of the illness on an individual inquiry.[251] Moreover, the severity of the illness should be applied from both its present state and its potential state. This means looking at an impairment without regard to mitigating factors depending on the severity of the condition. In all fairness, the potential state of an illness is not a hypothetical state. For those that suffer from bipolar disorder, the potential for certain relapses is very real.[252]

Congress should review the *Sutton* decision and amend the ADA to consider disabilities as they exist without regard to mitigating measures based on the severity of the illness.

Another consideration, especially for bipolars, is the potential side effect of taking these mitigating measures. The side effects of bipolar medications may take a debilitating toll as severe as the illness itself.[253] If, however, an individual chooses not to use certain treatments because of the potential for side effects, it will be difficult for a court to determine whether the impairment in reality is truly mitigated. In any case, a pre-

248. *See* McGarity, *supra* note 82, at 1197 (concluding that the sweeping deleterious affects of the *Sutton* decision can be avoided if lower courts and EEOC espouse to the original intent of the ADA).

249. *See* Greaney, *supra* note 142, at 1285-86 (asserting that a practical approach of viewing disabilities is to look at the severity of the illness without regard to mitigating measures).

250. *See* 42 U.S.C. § 12102(2) (1994).

251. *See generally* McGarity, *supra* note 82, at 1172.

252. *See generally id.* at 1177-81.

253. *See* JAMISON, *supra* note 3, at 137-75. *See generally* McGarity, *supra* note 82, at 1176-77 (referring to the debilitating side effects of disabling conditions).

siding court should not take the position of mandating treatments to people with mental illness. In other words, the *Sutton* decision also marks an opening for courts to determine that if a cure for the impairment is reasonably available to the employee, that employee is not disabled. This type of judicial posturing is wrong and unethical.

An answer to this scenario would appear to be that if the side effects rise to the level of an impairment that substantially limits a major life activity, then the individual is still covered. In the case of bipolar disorder, the answer, unfortunately is not that simple. Many bipolars choose not to take medications due to their dehumanizing side effects. At the other end of the spectrum, bipolar patients desire to live a normal functioning life. Thus, medication and other such remedial or mitigating tools are necessary. The duality of living with bipolar illness is compounded even further when one considers the prejudice from employers that do not understand the condition.

Considering mitigating measures will compel courts to determine what risks are acceptable and what risks are not reasonably acceptable. Consequently, such a consideration requires delving into the flux of physiological and psychological diagnosis and effective treatments. As a result, judges render inconsistent decisions in cases involving certain medicated impairments.

On the other hand, the bright line rule approach, only serves the purpose of discharging individual inquiry. By this measure, the fear of classifying disabilities into specific groups once again surfaces. Therefore, it seems that the easiest way to allocate fairness while looking at the side effects issue is to examine both the personal history of the claimant and the potential realities of a relapse.

From the outset of this comment, there have been glaring examples of how taking mitigating measures into account for an individual's disability is intrinsically unfair. The corollary, though, is that forcing claimants to take mitigating measures is too intrinsically unfair. And for many, the costs may be too high both emotionally and financially.

There is little question that the Supreme Court has potentially gone too far in scaling back the protections of the ADA. By using bipolar disorder as one of many impairments affected by the Sutton decision, this comment exemplifies how the ADA is more than just a umbrella for those seeking protection against the discriminatory conduct of employers. It is also a shield against those who would act upon their social prejudices and ignorance.