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I. INTRODUCTION

On September 25, 2008, eighteen years after his father signed the Americans With Disabilities Act ("ADA"), President George W. Bush signed into law the ADA Amendments Act of 2008 ("ADAAA" or "the Act").[1] The goal of the ADA was to create a civil rights law protecting people with disabilities from discrimination on the basis of their disabilities. On the day President George H.W. Bush signed the ADA into law, he stated:

> [N]ow I sign legislation which takes a sledgehammer to [a] . . . wall, one which has for too many generations separated Americans with disabilities from the freedom they could glimpse, but not grasp. Once again, we rejoice as this barrier falls for claiming together we will not accept, we will not excuse, we will not tolerate discrimination in America.[2]

The ADA was supposed to represent a life-changing event for persons with disabilities. The ADA was supposed to open doors that had long been closed for the disabled. In short, great expectations existed for this monumental signing. However, those expectations were not met. From the time of the ADA's enactment in 1990 until the passage of the ADAAA in 2008, the Supreme Court increasingly "barricaded the door that the ADA had opened by interpreting the definition of 'disability' in the ADA to create an overly demanding standard for coverage under the law."[3] In fact, in 2004, legislative proponents noted that plaintiffs lost ninety-seven percent of the ADA employment discrimination claims that were litigated to trial, most often as a result of the interpretation of the "disability" term.[4]

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1. ADA Amendments Act of 2008, 42 U.S.C. §§ 12101-12213 (2009); President Bush Signs Landmark Amendments to Americans with Disabilities Act, JACKSON LEWIS, Sept. 25, 2008, http://www.jackson lewis.com/legalupdates/article.cfm?aid=1507.

2. President George H.W. Bush, Address at the Signing of the Americans with Disabilities Act of 1990 (July 26, 1990), *available at* http://www.eeoc.gov/ada/bushspeech.html.

3. Chai R. Feldblum, Kevin Barry & Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187, 188 (2008).

4. Sandra B. Reiss & J. Trent Scofield, *The New and Expanded Americans with Disabilities Act*, 70 ALA. LAW. 38, 39 (2009), *available at* http://www.alabar.org/publications/articles/Jan09/expanded-americas.pdf.

The ADAAA responds to the increasingly narrow interpretation given the terms "disability" and "major life activity."[5] The Act makes several important changes to the definition of the term "disability" by rejecting the holdings in many Supreme Court decisions that made it extremely difficult for people with disabilities to qualify for protection under the ADA.[6] Most importantly, the Act provides that the determination of "whether an impairment substantially limits a major life activity[,]" such that it rises to the level of a disability, must be made without considering the ameliorative effects of mitigating measures.[7] Although the ADAAA has made several groundbreaking changes to the ADA, this Comment will only briefly explain those changes while focusing on what will likely be the most influential change, the mitigating measures issue.

This Comment examines the complex nature of the mitigating measures issue and the role it has played in the world of employment discrimination litigation regarding disabled individuals. Part II provides a brief summary of courts' interpretations of the mitigating measures issue prior to the ADAAA's enactment. Part III addresses the important changes made to the mitigating measures issue in the ADAAA. Part IV concludes by setting forth predictions of how future courts may interpret the new role mitigating measures will play in determining whether an individual has a disability.

II. THE ROLE OF MITIGATING MEASURES PRIOR TO THE ADAAA

To survive summary judgment under the ADA, an individual must demonstrate the following: (1) the individual has a disability; (2) the individual is qualified for the job with or without reasonable accommodation; and (3) the individual's employer took the adverse employment action because of the existing disability.[8] The element most often litigated, and the focus of this Comment and the ADAAA, is whether the individual has a disability under the ADA.[9] Because the ADA did not precisely describe what constituted a disability prior to the enactment of the ADAAA, courts struggled with its definition. Congress did, however, outline within the ADA the three ways in which a claimant may establish the existence of a disability: (1) demonstration of "a physical or mental impairment that substantially limits a major life activity;" (2) demonstration of "a record of such an impairment;" or (3) demonstration of evidence that the employer regarded the claimant as having such an impairment.[10] Beyond this, unfortunately, the ADA was silent on the

5. *See* Pub. L. No. 110-325, § 2, 112 Stat. 3553 (codified at 42 U.S.C. § 12101 (2009)).
6. *Id.*
7. *Id.*
8. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12112.
9. 42 U.S.C. § 12102(1).
10. *See id.* (defining "disability" in broad terms).

issue of what constituted a disability.[11] Therefore, the courts were forced to look elsewhere, including the Equal Employment Opportunity Commission ("EEOC") regulations and interpretive guidelines, for guidance.

The EEOC interpretive guidelines expanded the definition of an "impairment which substantially limits a major life activity" by providing additional considerations in satisfying the "substantially limits" requirement.[12] The most controversial consideration, and the consideration subject to the biggest debate among the courts prior to the enactment of the ADAAA, was the suggestion that courts should ignore mitigating measures when evaluating the existence of an impairment and the extent to which such an impairment limited an individual's major life activities.[13] Throughout the 1990s and early 2000s, courts struggled greatly with the EEOC's interpretation.[14] They had difficulty resolving issues such as: If a person took medicine or used prosthetic devices to compensate for a disability, did that make the person no longer disabled under the ADA? If a person with 20/200 vision wore glasses or contact lenses that corrected her vision to 20/20, did that person have a disability? To help answer these questions, it bears discussing several United States Courts of Appeals and United States Supreme Court cases that have considered the mitigating measures issue.

A. Discord Among the United States Courts of Appeals

The United States Courts of Appeals disagreed regarding whether an impaired individual had a disability under the ADA if that individual lessened the effects of the impairment with any assistive device. Consequently, courts in the 1990s and early 2000s were unpredictable forums for plaintiffs with such conditions.[15] Some courts agreed with the EEOC interpretive guidelines that suggested mitigating measures should not be a factor in evaluating an impairment.[16] Other courts, however, disagreed with the EEOC interpretive

11. *See id.*

12. *See* 29 C.F.R. § 1630.2(g)-(j) (1997) (interpreting ADA and EEOC definitions of "disability" and suggesting additional considerations for use in evaluating substantially limiting effects of disabilities). The guidelines state that the effect of the impairment on the life of an individual is the crucial factor and that a case by case determination is essential. *Id.*

13. *Id.* at § 1630.2(h)-(j) (stating that courts should not consider mitigating measures used to alleviate impairment's effects).

14. Catherine J. Lanctot, *Ad Hoc Decision Making and Per Se Prejudice: How Individualizing the Determination of "Disability" Undermines the ADA*, 42 VILL. L. REV. 327, 328 (1997).

15. *Id.* at 328 (noting that inconsistent evaluation of ADA claims resulted in "patchwork of holdings, often varying from court to court, as to what set of symptoms constitutes a disability").

16. *See generally* Harris v. H & W Contracting Co., 102 F.3d 516 (11th Cir. 1996); Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933 (3d Cir. 1997).

guidelines, resulting in a division among the circuits.[17]

1. Courts That Gave Deference to EEOC Interpretive Guidelines and Did Not Consider Mitigating Measures

The courts that chose to give deference to the EEOC's interpretive guidelines did so after evaluating the actual language of the ADA as well as its legislative history and congressional intent.[18] These courts agreed that the EEOC's position on the mitigating measures issue was consistent with both the language of the ADA and the ADA's legislative history; thus, the courts felt that they should defer to the guidelines.[19] The following cases demonstrate this deference.

In *Harris v. H & W Contracting Co.*,[20] the plaintiff, Ellen Harris, suffered from Graves' Disease, which was controlled with medication.[21] Harris worked as a comptroller for the defendant, H & W Contracting Company ("H & W"), experienced a panic attack at work one day because of an overdose of medication.[22] Harris was hospitalized for eight days in a psychiatric ward and, when she returned to work, she discovered H & W had replaced her.[23] Subsequently, Harris filed a claim with the EEOC, alleging that H & W had discriminated against her in violation of the ADA.[24] The United States Court of Appeals for the Eleventh Circuit addressed whether it should consider Harris's disease in the medicated or unmedicated state.[25] The court looked to (1) the EEOC interpretive guidelines, which stated that courts should not consider mitigating measures; (2) the plain language of the ADA; and (3) the legislative history behind the ADA's enactment.[26] The court followed *Chevron*, *U.S.A. v. Natural Resources Defense Council, Inc*.[27] and determined that it must adhere to a congressionally mandated agency interpretation that was

17. *See generally* Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999).

18. Maureen R. Walsh, *What Constitutes a "Disability" Under the Americans with Disabilities Act: Should Courts Consider Mitigating Measures?*, 55 WASH & LEE L. REV. 917, 933 (1998).

19. *Id.* at 934 (noting that courts are bound to an agency's interpretation of a statute if Congress requested such an interpretation, but if the interpretation is unrequested, like the EEOC interpretive guidelines, it is not binding; however, courts may defer to it nonetheless if it does not contradict the plain language of the statute).

20. *Harris*, 102 F.3d 516.

21. *Id.* at 517.

22. *Id.* at 518.

23. *Id.*

24. *Id.*

25. *Harris*, 102 F.3d at 518.

26. *Id.* at 521.

27. Chevron, U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

a reasonable construction of the statute at hand.[28] The court reasoned that the EEOC's interpretation was not in direct conflict with the plain language of the ADA and that the legislative history directly supported the EEOC's interpretation.[29] Therefore, the court held that it should adhere to the EEOC's interpretive guidelines.[30]

In *Matczak v. Frankford Candy and Chocolate Co.*,[31] the plaintiff, Joseph Matczak, suffered from epilepsy, which he controlled with medication.[32] While working for the defendant, Frankford Candy and Chocolate Co. ("Frankford Candy"), Matczak suffered an epileptic seizure and was hospitalized for seventeen days.[33] Upon returning to work, Matczak was placed on restricted duty and assigned various tasks that his doctor had not prohibited.[34] Subsequently, Matczak was fired for reasons that were unclear to the court.[35] Matczak filed suit against Frankford Candy for alleged violations of the ADA.[36] The case reached the United States Court of Appeals for the Third Circuit, which considered whether Matczak established the existence of his disability, and whether the district court was correct to grant summary judgment in favor of Frankford Candy.[37] Like the court in *Harris*, the Third Circuit deferred to the EEOC's interpretive guidelines to determine that mitigating measures, such as the epilepsy medicine, should not play a factor in the evaluation of whether Matczak was disabled.[38] The court's reasons for deferring to the guidelines were: (1) that courts should give an agency's interpretation of its own regulations great deference; and (2) the ADA's legislative history strongly supported this method of evaluation.[39] Therefore, the court refused to consider Matczak's epilepsy medication, and it found that Matczak's epilepsy substantially limited a major life activity, precluding summary judgment for Frankford Candy.[40]

The *Harris* and *Matczak* decisions, in addition to other appellate court decisions not mentioned herein, gave great deference to the EEOC's interpretive guidelines. These decisions concluded that the EEOC's position

28. *See id.* at 520-22 (citing *Chevron*, 467 U.S. at 843 (1984)).
29. *Id.* at 521.
30. *Id.*
31. 136 F.3d 933 (3d Cir. 1997).
32. *Id.* at 935.
33. *Id.*
34. *Id.*
35. *Id.*
36. Before the district court, Matczak claimed protection under the ADA because his epilepsy was a physical impairment substantially limiting major life activities. *Matczak*, 136 F.3d at 935.
37. *Id.*
38. *See id.* at 937.
39. *Id.*
40. *See id.* at 938.

on the mitigating measures issue was in accordance with the plain language and legislative history of the ADA.[41] As a result, these courts refused to consider mitigating measures to determine whether an individual was disabled pursuant to the ADA.[42] Not all courts, however, accepted the EEOC's stance on the mitigating measures issue.

2. Courts That Gave No Deference to EEOC Interpretive Guidelines and Considered Mitigating Measures

Three of the most prevalent cases in which the courts considered mitigating measures, *Sutton v. United Air Lines, Inc.*,[43] *Murphy v. United Parcel Service, Inc.,* [44] and *Albertson's, Inc. v. Kirkingburg*,[45] became known as the "Sutton trilogy."[46] These decisions ultimately reduced coverage for individuals with impairments that could be controlled or alleviated by medication or other measures, such as behavioral modifications or devices.[47] Thus, prevailing in court became even more difficult for people with disabilities.[48]

i. Sutton v. United Airlines

The leading case on the issue of mitigating measures, *Sutton v. United Air Lines, Inc.*, was decided on June 22, 1999.[49] In *Sutton*, the plaintiffs, twin sisters with severe myopia, applied for positions as commercial airline pilots for United Airlines.[50] Each plaintiff's uncorrected visual acuity was 20/200 or worse in her right eye and 20/400 or worse in her left eye; however, each had vision that was 20/20 or better with the use of corrective lenses.[51] With corrective measures such as glasses or contact lenses, both plaintiffs functioned identically to individuals without a similar impairment.[52] After submitting their respective applications to United Airlines, both plaintiffs were invited to an interview.[53] However, both plaintiffs were told during their interviews that

41. *See supra* notes 20-40 and accompanying text.
42. *See id.*
43. 527 U.S. 471 (1999).
44. 527 U.S. 516 (1999).
45. 527 U.S. 555 (1999).
46. Feldblum et al., *supra* note 3, at 193.
47. *See id.*
48. *See id.*
49. *Sutton*, 527 U.S. 471.
50. *Id.* at 475.
51. *Id.*
52. *Id.*
53. *Id.* at 476.

although they had the requisite credentials, they were mistakenly invited to interview because they did not meet United Airline's minimum vision requirement.[54] As a result, the plaintiffs were not offered pilot positions.[55]

The plaintiffs filed a claim for disability discrimination under the ADA with the EEOC, and they subsequently filed suit in the United States District Court for the District of Colorado.[56] The plaintiffs alleged that United Airlines "had discriminated against them 'on the basis of their disability, or because [United Airlines] regarded [plaintiffs] as having a disability' in violation of the ADA."[57] "Specifically, [the plaintiffs] alleged that due to their severe myopia they actually [had] a substantially limiting impairment or [were] regarded as having such an impairment, . . . and [were] thus disabled under the Act."[58] The plaintiffs further alleged "that whether an impairment [was] substantially limiting should be determined without regard to corrective measures[,]" pursuant to the EEOC's interpretive guidelines.[59] Because the ADA did not directly address the question at hand, the plaintiffs argued that the court should defer to the EEOC's interpretations of the ADA.[60] United Airlines maintained that a corrected impairment did not substantially limit a major life activity and that the Court should not defer to the EEOC's guidelines because the guidelines conflicted with the plain meaning of the ADA.[61] The term "substantially limits a major life activity" meant that the substantial limitation "actually and presently exist[ed]" and, additionally, that an impairment did not substantially limit a major life activity if it was corrected.[62]

United Airlines persuaded the Supreme Court that the EEOC's guidelines were in conflict with the plain language of the ADA, and the Court held that the determination of whether an individual had a disability under the ADA should include consideration of mitigating measures.[63] Three separate provisions read together led the Court to reach this conclusion.[64] First, the phrase "'substantially limits' appear[ed] in the ADA in the present indicative verb form;" thus, the language was properly read to require an individual to be presently, and not potentially or hypothetically, substantially limited in order to

54. *Sutton*, 527 U.S. at 476. United Airline's minimum vision requirement was uncorrected visual acuity of 20/100 or better. *Id.*

55. *Id*.

56. *Id.*

57. *Id*.

58. *Sutton*, 527 U.S. at 476 (citation omitted).

59. *Id.* at 481.

60. *Id.*

61. *Id.*

62. *Id.* at 481-82.

63. *Sutton*, 527 U.S. at 482.

64. *Id.*

demonstrate a disability.[65] In other words, "[a] disability exist[ed] only where an impairment "substantially limits" a major life activity and not where it "might" or "could" be a substantial limitation if there were no mitigating measures taken.[66] Second, "[t]he definition of disability also requir[ed] that disabilities be evaluated 'with respect to an individual' and be determined based on whether an impairment substantially limit[ed] the 'major life activities of such individual.'"[67] The EEOC's interpretive guidelines' instruction that individuals be looked at in their unmitigated state ran directly counter to the individualized inquiry mandated by the ADA.[68] "The [EEOC's] approach would often require courts and employers to speculate about a person's condition and would, in many cases, force [courts] to make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition."[69] Third, the Court emphasized the fact that Congress found that forty-three million people were disabled and that number was increasing.[70] The Court reasoned that if mitigated measures were included, the number would surely have been much higher.[71]

The Court concluded that "the approach adopted by the [EEOC's] guidelines – that persons [were] to be evaluated in their hypothetical uncorrected state – was an impermissible interpretation of the ADA."[72] Therefore, the Court held that the plaintiffs were not substantially limited in any major life activity and that the ADA did not cover them.[73]

ii. Murphy v. United Parcel Service

In *Murphy v. United Parcel Service*, the defendant, United Parcel Service ("UPS"), hired the plaintiff, Vaughn Murphy, as a mechanic, a job that required him to operate commercial motor vehicles.[74] Murphy "was first diagnosed with hypertension (high blood pressure) when he was ten years old."[75] Unmedicated, Murphy's blood pressure was approximately 250/160.[76] With medication, however, Murphy's physician claimed that his "'hypertension

65. *Id.*
66. *Id.*
67. *Id.* at 483 (quoting 42 U.S.C. § 12102(2)(1998)).
68. *Sutton*, 527 U.S. at 483.
69. *Id.*
70. *Id.* at 484-87.
71. *Id.* at 487.
72. *Id.* at 482.
73. *Sutton*, 527 U.S. at 488-89.
74. *Murphy*, 527 U.S. at 519.
75. *Id.*
76. *Id.*

[did] not significantly restrict his activities and . . . in general he function[ed] normally and [was able to] engage in activities that other persons normally do.'"[77]

In order to drive commercial motor vehicles, Murphy had to satisfy certain health requirements imposed by the Department of Transportation ("DOT").[78] One such requirement was that the driver of a commercial motor vehicle in interstate commerce had "'no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial vehicle safely.'"[79] At the time UPS hired him, Murphy's blood pressure was – it measured at 186/124 – so high that he was not qualified for DOT health certification.[80] Nevertheless, Murphy was erroneously granted certification, and he started to perform his job.[81] Subsequently, a UPS Medical Supervisor who was reviewed Murphy's medical files discovered the error and requested that Murphy have his blood pressure retested.[82] Upon retesting, Murphy's blood pressure was measured at 160/102 and 164/104.[83] As a result, Murphy was fired because his blood pressure exceeded the DOT's requirements for drivers of commercial motor vehicles.[84]

Murphy filed a claim under the ADA in the United States District Court for the District of Kansas, claiming that UPS discriminated against him pursuant to the ADA.[85] The court granted UPS's motion for summary judgment, holding that "to determine whether [Murphy was] disabled under the ADA, his 'impairment should be evaluated in its medicated state.'"[86] The court noted that, when Murphy was medicated, he was inhibited only in lifting heavy objects and otherwise functioned normally; therefore, Murphy was not "disabled" under the ADA.[87] The court also rejected Murphy's claim that he was "'regarded as'" disabled, holding that UPS "'did not regard Murphy as disabled, only that he was not certifiable under DOT regulations.'"[88]

Murphy appealed the matter to the Tenth Circuit Court of Appeals, which

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77. *Id.* (quoting Murphy v. United Parcel Service, Inc., 946 F. Supp. 872, 875 (D. Kan. 1996)).

78. *Id.* DOT requirements stated that "[a] person shall not drive a commercial motor vehicle unless he/she is physically qualified to do so and . . . has on his/her person . . . a medical examiner's certificate that he/she is physically qualified to drive a commercial motor vehicle[.]" *Id.* (quoting 49 C.F.R. § 391.41(a) (1998)).

79. *Murphy*, 527 U.S. at 519 (quoting 49 C.F.R. § 391.41(b)(6) (1998)).

80. *Id.*

81. *Id.* at 520.

82. *Id.*

83. *Id.*

84. *Murphy*, 527 U.S. at 520.

85. *Id.*

86. *Id.* (quoting *Murphy*, 946 F. Supp. at 881).

87. *Id.*

88. *Id.* (quoting *Murphy*, 946 F. Supp. at 882).

affirmed the lower court's judgment.[89] Citing its decision in *Sutton*, that an individual claiming a disability under the ADA should be assessed with regard to any mitigating or corrective measures employed, the court held that Murphy's hypertension was not a disability because his doctor had testified that, when Murphy was medicated, he functioned normally and performed everyday activities.[90]

The Supreme Court granted certiorari to decide whether Murphy's disability determination was made with reference to the mitigating measures he employed.[91] The Court answered in the affirmative, citing its decision in *Sutton* that the determination of disability should be made with reference to mitigating measures.[92] The Court, therefore, found that Murphy was not disabled for purposes of the ADA, and the lower court's holding was affirmed.[93]

iii. Albertson's, Inc. v. Kirkingburg

In *Albertson's, Inc. v. Kirkingburg,* the defendant, Albertson's, Inc., a grocery store chain with supermarkets throughout the United States, hired the plaintiff, Hallie Kirkingburg, as a truck driver based at its warehouse in Portland, Oregon.[94] Kirkingburg had more than ten years of driving experience and performed well on his road test with Albertson's transportation manager.[95] Kirkingburg suffered from amblyopia, an uncorrectable condition that left him with 20/200 vision in his left eye.[96] Despite this condition, Kirkingburg over time learned to compensate for the weakened vision in his left eye by making subconscious adjustments to correct his vision.[97]

Kirkingburg was examined before starting work to see if he met federal

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89. *Murphy,* 527 U.S. at 520.

90. *Id.* (citing App. to Pet. for Cert. at 4a, *Sutton v. United States Air Lines, Inc.*, 130 F.3d 893 (10th Cir. 1997). The court also affirmed the lower court's determination that Murphy was not "regarded as" disabled under the ADA. *Id.* The court stated that UPS did not terminate Murphy "'on an unsubstantiated fear that he would suffer a heart attack or stroke,' but 'because his blood pressure exceeded the DOT's requirements for drivers of commercial vehicles.'" *Id.* at 520-21 (quoting App. to Pet. for Cert. at 5a, *Sutton v. United States Air Lines, Inc.*, 130 F.3d 893 (10th Cir. 1997).

91. *Murphy*, 527 U.S. at 521.

92. *Id.*; *see generally Sutton* 527 U.S. 471. Because Murphy was found to be not disabled, the Court never reached the question of whether Murphy was qualified to perform the job or whether UPS had discriminated against him by refusing to allow him to obtain a temporary DOT certification. *Murphy*, 527 U.S. at 521-23.

93. *Murphy*, 527 U.S. at 521.

94. *Kirkingburg*, 527 U.S. at 558.

95. *Id.*

96. *Id.* at 559.

97. *Id.* at 565. (noting that Kirkingburg made subconscious adjustments to the manner in which he senses depth and perceived peripheral objects in his right eye).

DOT vision standards for commercial truck drivers.[98] Despite Kirkingburg's weak left eye, the doctor erroneously certified that he met the DOT's basic vision standard, and Albertson's hired him.[99] Kirkingburg subsequently injured himself on the job and took a leave of absence.[100] Before returning to work, Kirkingburg went for a further physical as required by Albertson's; however, this time the physician correctly assessed Kirkingburg's vision and determined that his eyesight did not meet the basic DOT standards.[101] The DOT required that a truck driver in interstate commerce have corrected distant visual acuity and distant binocular acuity of at least 20/40 in each eye.[102] Albertson's fired Kirkingburg because he could not meet DOT standards and refused to rehire him once he obtained the necessary waiver from the DOT.[103]

Kirkingburg filed a claim, alleging that Albertson's violated the ADA by firing him because he could not meet the DOT standards.[104] Before the Ninth Circuit, Albertson's argued that Kirkingburg did not have a disability within the meaning of the ADA.[105] The Ninth Circuit rejected this argument, holding that Kirkingburg presented evidence that his vision was effectively monocular and that "'the *manner* in which he sees differs significantly from the *manner* in which most people see.'"[106] That difference in manner, the court held, was sufficient to establish disability.[107]

The Supreme Court reversed the Ninth Circuit, holding that it had been "too quick to find a disability."[108] The Court concluded that, when a court considers mitigating measures in determining whether an individual was disabled, it must include "measures undertaken, whether consciously or not, with the body's own systems."[109] Furthermore, the Court saw "no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems."[110] Thus, *Albertson's* closed the door further for disabled persons than *Sutton*, by considering not only mitigating measures such

98. *Id*. at 558.
99. *Kirkingburg*, 527 U.S. at 558.
100. *Id.* at 559.
101. *Id.*
102. *Id.* at 558-59.
103. *Id.* at 559-560. DOT had a program in effect where drivers demonstrating good performance could get a waiver of their vision requirements. *Kirkingburg*, 527 U.S. at 560.
104. *Id.* at 560.
105. *Id.* at 561.
106. *Id.* (quoting Kirkingburg v. Albertson's, 143 F.3d 1228, 1232 (9th Cir. 1998)) (emphasis in original).
107. *Id.* at 561.
108. *Kirkingburg*, 527 U.S. at 564.
109. *Id.* at 565-66.
110. *Id.*

as glasses and medical devices, but also the "brain" itself when determining whether an individual was disabled under the ADA.

In the *Sutton* trilogy, the Court concluded that the mitigating measures, that the plaintiff used to alleviate the symptoms of his or her impairment, should be taken into consideration when determining if that plaintiff was disabled pursuant to the ADA.[111] According to the Court, the plain language of the ADA was in conflict with the EEOC's interpretive guidelines; thus, the Court did not have to defer to the EEOC's interpretation.

3. Other Cases That Impacted the Shrinking Coverage Under the ADA

In addition to the *Sutton* trilogy, there were many cases that demonstrated the willingness of courts to consider mitigating measures in determining whether an individual was disabled under the ADA.

Michael Schriner, a salesperson who developed major depression after discovering that his children had been abused, was fired from his job for failing to attend a training session.[112] Mr. Schriner brought an ADA claim against his employer.[113] The court never addressed whether Mr. Schriner's mental impairment was the reason he was fired.[114] Instead, the court concluded that Mr. Schriner, because he did so well managing his condition with medication, was not disabled "enough" to be entitled to the protections of the ADA.[115]

Michael McMullin, a law enforcement officer, was fired from his job as a court security officer because a U.S. Public Health Service physician determined that his depression and use of medication disqualified him from his position.[116] Mr. McMullin subsequently brought an ADA claim against his employer.[117] His employer argued that Mr. McMullin was not disabled under the ADA because he had successfully managed his condition with medication for several years.[118] The court agreed with the employer, holding that Mr. McMullin was not disabled "enough" to challenge the discrimination under the ADA.[119] According to the court, "[t]his is one of the rare, but not unheard of, cases in which many of the plaintiff's claims are favored by equity, but

111. *See* Feldblum et al., *supra* note 3, at 192-93.

112. Schriner v. Sysco Food Service of Cent. Pennsylvania, Civ. No. 1CV032122, 2005 WL 1498497, at *1-2 (M.D. Pa. June 23, 2005).

113. *Id.* at *1.

114. *Id.* at *4.

115. *Id.* at *5.

116. McMullin v. Ashcroft, 337 F. Supp. 2d 1281, 1288-89 (D. Wyo. 2004).

117. *Id.* at 1286.

118. *Id.* at 1293.

119. *Id.* at 1297-99.

foreclosed by the law."[120]

Ruth Eckhaus, a railroad employee, was fired when her employer claimed that he could not hire someone with a hearing aid.[121] Ms. Eckhaus brought an ADA claim, alleging that she was discriminated against based on her hearing impairment.[122] The court held that since Ms. Eckhaus's hearing aid helped correct her hearing impairment, she was not disabled "enough" to challenge her firing under the ADA.[123]

Allen Epstein, the Senior Vice-President of Finance of an insurance brokerage firm, claimed that he was demoted from his job after being hospitalized because of his heart disease, and subsequently fired because he told his employer he had diabetes.[124] Mr. Epstein brought an ADA claim, alleging that his employer had discriminated against him because of his disability.[125] The court held that because Mr. Epstein's heart disease and diabetes were well-managed with medication, he was not disabled "enough" to challenge his firing under the ADA.[126]

These decisions demonstrate how the Supreme Court narrowed the class of persons considered to be disabled under the ADA by requiring courts to consider mitigating measures. As Professor Feldblum stated:

> The Supreme Court's requirement that courts consider mitigating measures creates an unintended paradox: people with serious health conditions like epilepsy and diabetes, who are fortunate enough to find treatment that makes them more capable and independent, and thus more able to work, find they are not protected by the ADA because the limitations arising from their impairments are not considered substantial enough. Ironically, the better a person manages his or her medical condition, the less likely that person will be protected from discrimination, even if an employer admits that he or she dismissed the person because of that person's (mitigated) condition.[127]

The fundamental premise behind the ADA was to place people with disabilities on a level playing field in the work environment with those who are not disabled. Congress sought to remove barriers that prevented the disabled from enjoying the same opportunities as those without disabilities. However,

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120. *Id.* at 1286.

121. Eckhaus v. Consolidated Rail Corp., Civ. No. 00-5748, 2003 WL 23205042, at *5 (D. N.J. Dec. 24, 2003).

122. *Id.* at *6.

123. *Id.* at *8-9.

124. Epstein v. Kalvin-Miller Int'l, Inc., 21 F. Supp. 2d 400, 401-02, 405 (S.D. N.Y. 1998).

125. Epstein v. Kalvin-Miller Int'l, Inc., 100 F. Supp. 2d 222, 223-24 (S.D.N.Y. 2000).

126. *Id.* at 224.

127. Feldblum et al., *supra* note 3, at 211.

the protections Congress intended for Americans with disabilities under the ADA were lost when courts interpreted the ADA to include mitigating measures in the determination of whether an individual was disabled.

III. THE ADA AMENDMENTS ACT OF 2008

A. New "Major" Changes

The United States Court of Appeals in the 1990s and early 2000s disagreed regarding whether an individual that used mitigating measures to alleviate the effects of his or her impairment was disabled under the ADA. This disagreement created both a division among the federal appellate circuit courts and great confusion among ADA litigants. Confusion among the courts grew more and more widespread, requiring the change that the ADAAA provided. While the ADAAA does not change the actual language of ADA section 3, which defines the term "disability," the ADAAA set out to address some of the most controversial aspects of the disability definition. ADAAA section 4 adopts the exact same disability definition as ADA section 3.[128] According to the ADAAA:

> (1) DISABILITY. The term "disability" means, with respect to an individual – (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded has having such an impairment[.]129

Upon a closer reading of the ADAAA's language, major changes to the definition become clear, specifically relating to mitigating measures.

1. Redefining "Substantially Limits" Without Considering Mitigating Measures

To constitute an actual disability under the first prong of the ADAAA's definition of disability, an impairment must still substantially limit a major life activity. However, the ADAAA expands the meaning of "substantially limits." The ADAAA expressly "reject[s] the requirement enunciated by the Supreme Court in [*Sutton*] and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the

128. *Compare* ADA Amendments Act of 2008, §4(a), *with* Americans with Disabilities Act of 1990, §3(1).

129. ADA Amendments Act of 2008, § 4(a).

ameliorative effects of mitigating measures[.]"[130] The ADAAA Rules of Construction set forth this new interpretation:

> (4) Rules of Construction Regarding the Definition of Disability
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> . . .
>
> (E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as
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> . . .
>
> (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs or devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; (II) use of assistive technology;
>
> (III) reasonable accommodations or auxiliary aids or services; or (IV) learned behavioral or adaptive neurological modifications.
>
> (ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.[131]

The Rules of Construction require the determination of disability be made "without regard to the ameliorative effects of mitigating measures[.]"[132] However, the ameliorative effects of the mitigating measures of eyeglasses or contact lenses can still be considered in determining whether an individual is disabled.[133] This exception appears to be the only mitigating measure relevant in a court's determination of whether an individual is disabled pursuant to the ADAAA.

The term "major life activities" is now defined in the statute, and the list of such activities originally promulgated by the EEOC has been expanded to include "eating, sleeping, . . . standing, lifting, bending, . . . reading,

130. *Id.* at § 2(b)(2).
131. *Id.* at § 4(a).
132. *Id.*
133. *Id.*

concentrating, thinking, and communicating.[134] Furthermore, the operation of major bodily functions – "immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions" – are included as major life activities.[135] Also, the new list includes "working," which resolves the question of whether working was a major life activity as considered in *Sutton*.[136]

The "regarded as" prong of "disability" has been amended to overturn the decision in *Sutton*, which held that the employer regarded an individual as disabled within the meaning of the actual disability prong; therefore, it is enough that the individual be regarded as having an impairment.[137] The ADAAA provides:

> An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.[138]

This change has the potential to significantly transform ADA analysis in future cases. Now, under the "regarded as" prong, an individual can avoid the very difficult problem of proving he or she is an individual with a disability by establishing that the employer's action was motivated by its perception that he or she has an impairment, even if he or she does not.[139]

In addition to these major changes to the Act, the ADAAA includes a general command for construction "in favor of broad coverage[.]"[140] The ADAAA specifically provides that "[t]he definition of disability in this Act shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter."[141] Furthermore, the ADAAA empowers the EEOC to issue regulations and interpretive guidelines implementing its new provisions, which shall serve to guide the courts in interpreting the new Act.[142]

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134. 42 U.S.C. § 12102(2)(A).

135. *Id.* § 12102(2)(B).

136. *Id.* § 12102(2)(A).

137. *Id.* § 12102(3)(A).

138. *Id.*

139. *See id*.; *but see* 42 U.S.C. § 12201(c)(3)(h) (counterbalancing the expansion of the "regarded as" prong by providing that an employer, "need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures" to an individual who has been discriminated against based upon the employers perception of disability when the victim fails to establish that disability).

140. 42 U.S.C. § 12102(4)(A).

141. *Id.*

142. *See generally* 42 U.S.C. § 12101(b)(3), (4).

B. Congress Supports the Passage of the ADAAA

The purpose of enacting the ADAAA, as set forth in the Act itself, is to carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection.[143] As one congressman proclaimed during the September 12, 2008 congressional debate, "[I]t is time to restore the original intent of the ADA and ensure that the tens of millions of Americans with disabilities who want to work, attend school, and fully participate in our communities will have the chance to do so."[144]

Several representatives present at the congressional debate commented on the amendments regarding the mitigating measures issue.[145] The representatives spoke about the Supreme Court rulings that have greatly reduced the number of individuals with disabilities who are afforded the protections of the ADA.[146] Workers like Ruth Eckhaus are fired as being too disabled to perform their respective jobs.[147] Yet, when these workers bring suit for this discrimination, the courts rule against them and hold that they are not disabled enough to be protected by the ADA. As one representative, George Miller, explained, "[t]his is a terrible catch-22 that Congress will change with the passage of this bill today."[148] Miller went on to state that the ADAAA "reestablishes the scope of protection of the Americans with Disabilities Act to be generous and inclusive. The bill restores the proper focus on whether discrimination occurred rather than on whether or not an individual's impairment qualifies as a disability."[149]

Another representative present at the congressional debate, Mr. Andrews,

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143. *Id.* § 12101(b)(1).

144. ADA Amendments Act of 2008, 154 CONG. REC. H8286 (daily ed. Sep. 17, 2008) (statement of Rep. Miller).

145. *See id.* at H8266, 8296 (statements of Reps. Miller & Jackson-Lee).

146. *Id.* at H28296 ("[T]he Supreme Court's narrow interpretation of the definition [of disability] . . . has made it extremely difficult for individuals with serious health conditions . . . to prove that they qualify for protection under the ADA.").

147. *See supra* notes 123-26 and accompanying text.

148. *See* 154 CONG. REC. H8286, 8289 (statement of Rep. Nadler) ("These decisions have created a Catch-22, in which an individual who is able to lessen the adverse impact of an impairment by use of a mitigating measure like medicine or a hearing aid can be fired from a job or otherwise face discrimination on the basis of that impairment and yet not be considered sufficiently disabled to be protected by the ADA. Congress never intended such an absurd result.").

149. *Id.* at H8288 (the bill further "ensures that individuals who reduce the impact of their impairments through means such as hearing aids, medications, or learned behavioral modifications will be considered in their unmitigated state. For people with epilepsy, diabetes and other conditions who have successfully managed their disability, this means the end of the catch-22 situation that . . . so many others have encountered when attempting to seek justice.").

chose to set forth a hypothetical to emphasize the need for change within the ADA.[150] He explained that a man who was diabetic got a job with a major retail corporation.[151] When the man began work, his employer understood that the employee needed a special lunch break so that "he could deal with his blood sugar needs and stay . . . productive."[152] Subsequently, the employee was assigned to a new supervisor who failed to understand the employee's need and prohibited him from taking a special lunch break.[153] The employee files a suit under the ADA claiming discrimination, and the court holds that the employee is not disabled because diabetes is not enough of a disability to remedy the employee's concern.[154] "Now this is just wrong[,]" Mr. Andrews proclaimed, and every party in this suit knows it's wrong.[155] Mr. Andrews ended his hypothetical by providing: "What we have done in this Act is to restore the commonsense, meaningful definition of what 'disability' means, not so that people with disabilities get special privileges, but so they get the same rights and opportunities that everybody else is guaranteed in this country under the law."[156]

These excerpts demonstrate Congress's intent to restore the original purpose of the ADA. Many statutes do not have a clear and genuine underlying purpose, but the ADA is not one of them. From the time of its enactment in 1990, the ADA was supposed to broadly protect the disabled community. "No one who voted for (or against) [the ADA] understood it to have anything other than a broad purpose: to assist more than 43 million Americans with disabilities."[157] However, as seen above, this assistance did not occur. The purpose of enacting the ADAA was to not only restore the intent and protections of the ADA by providing broad coverage to disabled individuals, but also to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities[.]"[158] In doing so, the ADAAA will likely protect more and more disabled individuals from discrimination in the workplace.

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150. *See* 154 CONG. REC. at H8291.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *See* 154 CONG. REC. at H8291.

156. *Id.*

157. RUTH COLKER, THE DISABILITY PENDULUM, THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 23 (2005).

158. *See* 42 U.S.C. § 12101(b)(1).

IV. FUTURE PREDICTIONS FOR THOSE PLAINTIFFS USING MITIGATING MEASURES – WHAT WILL HAPPEN TO THE CATCH-22?

A. Predictions Regarding the EEOC'S Interpretive Guidelines, Legislative History, and Statutory Interpretation by the Courts

The first question to consider deals with the effect the new EEOC interpretive guidelines and legislative history will have on courts' interpretation of the ADAAA's definition of disability.[159] Even though it is likely that the new EEOC guidelines will have very little effect, more disabled persons will now be protected under the ADAAA.

Unfortunately, one lesson learned since the enactment of the ADA in 1990, is that many courts were often uninterested in the EEOC's interpretive guidelines and the record Congress created while drafting the ADA.[160] In deciding ADA cases, courts were asked to interpret ambiguous statutory terms such as the definition of "disability."[161] This question was a statutory interpretation question; in other words, what did Congress intend the term "disability" to mean? In answering such a question, courts were faced with basic methodological decisions about how it wished to proceed in its holdings. Should courts examine the legislative history? Should courts defer to the EEOC that promulgated interpretive guidelines and regulations? Or, should courts look to the language of the statute itself to resolve all ambiguities? As seen in *Sutton*, one of the most influential ADA cases, courts have answered most questions of statutory interpretation under the ADA without consulting the legislative history and EEOC interpretive guidelines, relying heavily, instead, on the statutory language itself.[162]

The United States Supreme Court has "expressed a persistent lack of faith in the reliability of legislative history and administrative agency regulations when construing the meaning of statutes."[163] When confronted with a question of statutory interpretation, Justice Scalia has renounced the usefulness of

159. *See generally* 42 U.S.C § 12101(b)(1)-(3) (under the ADAAA, the EEOC has the authority to issue binding interpretive guidelines and regulations regarding the implementation of the Act.).

160. *See* 154 CONG. REC. at H288 (statement of Rep. Miller) (since 1990, the scope of the ADA, as intended by Congress, has been decreased by several Supreme Court decisions.).

161. *See, e.g., Sutton*, 527 U.S. at 481-84.

162. *See generally id.* at 481-87. In *Sutton*, the Court held that the term "disability" should be understood to cover only individuals who are substantially limited after the use of mitigating measures. In reaching this decision, Justice O'Connor relied on two aspects of the statutory language: (1) Congress wrote the definition of disability in present tense, implying that it wanted the courts to consider an individual in his corrective state; and (2) Congress claimed to be covering only 43 million Americans. She argued that more than 43 million Americans would be covered if the broader definition of disability were employed. In doing so, however, she overlooked the legislative history, which reflected that Congress had deliberately expanded this number as it considered the ADA. Congress understood the number to be a floor. *Id.*

163. COLKER, *supra* note 157, at 208.

anything but the language of the statute itself.[164] In *Bank One Chicago v. Midwest Bank & Trust Co.*,[165] "[H]e . . . referred to 'the fairyland in which legislative history reflects what was in Congress's mind' and dismissed it as 'fiction of Jack-and-the-Beanstalk proportions to assume that more than a handful of . . . members . . . were . . . aware of the drafting evolution [of a statute].'"[166] Spurred by the hostility toward legislative history, "the Court in the 1990s [became] more concerned about focusing on the literal terms of [the ADA] while minimizing the role of legislative intent."[167] This approach became known as the "ahistorical approach"[168] and was evidenced by the Court's reasoning in *Sutton*.

As a general matter, the purpose of a statute is to provide an outline of major policy decisions and allow administrative agencies, like the EEOC, to fill in the gaps consistent with the intentions of Congress.[169] The ADA exemplified these goals, as Congress drafted a well thought out statute and lengthy committee reports to fill in some of the details, while the EEOC drafted regulations and guidelines clearly consistent with Congress's intentions.[170] However, in the *Sutton* trilogy, the Court "ignored both the legislative history *and* the EEOC's regulations on the definition of disability to arrive at its own unworkable definition of disability that was derived entirely by parsing the statutory language out of context."[171]

Since the 1990s, the consequences of the "ahistorical approach" were felt daily by individuals with disabilities who suddenly fell outside the protections of the ADA.[172] Disabled persons using corrective measures found themselves in a catch-22: they were fired from employment for not meeting their employer's standards, but they were not disabled enough in courts' eyes to fall under the protection of the ADA.[173] Now that the plain language of the

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164. *See id.*; *see also* Conroy v. Aniskoff, 507 U.S. 511, 518-19 (1993) (Scalia, J., concurring) (describing "illegitimacy" of the use of legislative history in statutory interpretation because the language of the statute must be dispositive).

165. 516 U.S. 264 (1996).

166. COLKER, *supra* note 157, at 208 (quoting Bank One of Chicago v. Midwest Bank & Trust Co., 516 U.S. 264, 279, 281 (1996)).

167. *Id.*

168. *Id.* (this hostility stems from the belief that "such history is at best underrepresentative of the Congress as a whole and at worst susceptible to strategic or insincere manipulation by its drafters. Justice Scalia and Thomas, the leading textualists on the Court, have been especially emphatic in contending that courts should not view committee reports, hearing testimony, or floor debate as informative for members in general, much less as reflective of an institutional understanding as to the basis for particular legislation.").

169. *Id.* at 211.

170. *Id.*

171. COLKER, *supra* note 157, at 208 (emphasis in original).

172. *See* 1116 CONG. REC. H8286.

173. *See id.* at H8288.

ADAAA prohibits courts from considering mitigating measures (except for ordinary eyeglass or contact lenses) in determining whether an individual is disabled, both the courts who choose to defer to the EEOC interpretive guidelines and legislative history and those that take an "ahistorical approach" will reach the same conclusion – mitigating measures may not be taken into account.[174]

B. Predictions Regarding Statutory Language Itself

The remaining question is what the new definition of "disability" means in real-life practice if courts continue to ignore the legislative record and EEOC interpretive guidelines and look to the plain language of the statute itself? Now that an employee's condition will be considered without regard to mitigating measures, will coverage for the disabled community broaden in accordance with the purpose of the Act? The answer to this question is almost certainly yes: in the future, the number of individuals with a disability should greatly increase in light of the new definition of disability.

As explained above, the ADAAA overturns Supreme Court decisions in an effort to provide a broad scope of protection for disabled employees. The Act provides that mitigating measures such as medication, hearing aids, and other interventions that help manage a disease must now be ignored in determining whether an individual is disabled pursuant to the Act.[175] Furthermore, the Rules of Construction provide an exhaustive list of what constitutes a mitigating measure pursuant to the Act.[176] The final result of such a significant change most likely will be a rapid increase in ADAAA claims and lawsuits filed against employers throughout the country.[177] One commentator even went so far as to compile examples of different employees who may now be considered disabled under the ADAAA, because the employer may not take into account the mitigating measure of:

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174. *See* 42 U.S.C. § 12102(4)(E)(i)-(ii).

175. *See id.*.§ 12102(4)(E)(i)-(ii).

176. *See id.* The mitigating measures that can now be ignored consist of:

medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs or devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; use of assistive technology; reasonable accommodations or auxiliary aids or services; or learned behavioral or adaptive neurological modifications.

Id. § 12102(4)(E)(i)(I)-(IV). Additionally, "[t]he ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity[.]" *Id.* § 12102(4)(E)(ii).

177. *See* Reiss & Scofield, *supra* note 4, at 41.

> [T]he medication of a legal assistant whom the employer knows has bipolar disorder;
> [T]he weekly treatments of a waiter with HIV;
> [T]he insulin used by a salesperson who is diabetic;
> [T]he walking cane a plumber utilizes to walk;
> [T]he low-vision device relied upon by the elementary school teacher with glasses;
> [T]he prosthetic leg used by the foreman;
> [T]he hearing aid or cochlear implant used by the customer service representative;
> [T]he wheelchair used by a human resource manager; or
> [T]he oxygen therapy required by the librarian.[178]

This list represents the fact that more and more employees will be covered by the ADAAA; and, because the definition of "disability" is extremely broad, it is less likely that employers will be able to succeed on a motion for summary judgment.[179] Litigation techniques will change dramatically as lawyers must focus on whether there was discrimination in the workplace as opposed to whether the employee is merely disabled under the Act.[180] Remember, the purpose behind the ADAAA is to enable individuals with disabilities to be placed on a level playing field with those who are not disabled.[181] It is then up to the employee to demonstrate what he or she can do in the workplace. Therefore, more cases will make it to trial, causing costly litigation in courts flooded with ADAAA claims.

V. CONCLUSION

On September 25, 2008, President George W. Bush signed into law the ADAAA.[182] The primary goal in enacting the ADAAA was to broaden coverage for those employees who may qualify as disabled in the workplace. The ADAAA responded to the increasingly narrow interpretation given the term "disability" by courts in the 1990s and early 2000s. The Act made several important changes to the definition of "disability" by rejecting the holdings in many Supreme Court decisions, which made it very difficult for individuals who were disabled to qualify for protection under the ADA. The change likely

178. *Id.*

179. *Id.*

180. *Id.*

181. *See* Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disability Act, EEOC.gov (Oct. 17, 2002), http://www.eeoc.gov/policy/docs/accommodation.html (by removing barriers that effect the ability of individuals with disabilities to perform in the work place, the ADAAA places individuals with disabilities on an "equal playing field" with those who are not disabled.).

182. *See supra* note 1 and accompanying text.

to be most influential in the courts' interpretation of the meaning of "disability" is that courts must now determine whether an impairment substantially limits a major life activity, such that it rises to the level of disability, without considering the ameliorative effects of any mitigating measures.

In the 1990s and early 2000s, there was great dissention and confusion amongst the appellate courts as they struggled with interpreting the meaning of "disability" under the ADA. Some courts agreed with the EEOC's interpretive guidelines that suggested mitigating measures should not be a factor in evaluating an impairment pursuant to the ADA, while other courts disagreed with the EEOC's interpretive guidelines and considered mitigating measures in their interpretations. The ADAAA will likely rid the courts of this discord and confusion: the plain language of the Act provides that mitigating measures should not be considered in determining whether an individual is disabled. Now, both the courts who choose to defer to the EEOC's interpretive guidelines and those that merely look to the language of the Act itself should reach the same conclusion – mitigating measures may not be considered.

There is no doubt that the ADAAA will be the subject of much litigation in the future. Individuals who were once caught in the terrible catch-22 when attempting to prove that they were disabled will hopefully be afforded the necessary protections they deserve. The ADAAA aims to provide a clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities, something the ADA failed to do. It will be very interesting to see whether the primary goal of the ADAAA, to produce broader coverage for those individuals who may qualify as disabled" in the workplace, will be accomplished. Only time will tell.