

CORRECTIVE MEASURES RELEVANT IN DETERMINING “DISABILITY” UNDER ADA

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The Americans with Disabilities Act of 1990 (ADA), 42 U. S. C. §12101 et seq., prohibits discrimination against individuals on the basis of their disabilities. To what extent, however, will an individual be considered disabled under the ADA when their impairment is mitigated or correctable through the use of medication and/or other remedial measures? This was the major issue before the Supreme Court of the United States in the case of *Sutton v. United Air Lines, Inc.*, No. 97-1943 (S.Ct., June 22, 1999).

Prior to *Sutton*, the Supreme Court found some disagreement among the federal circuit courts of appeal on whether “disabilities should be determined without reference to mitigating measures.” The Court noted further, however, that the Department of Justice (DOJ) had issued the following guideline regarding the proper interpretation of the term “disability” under the ADA: “The question of whether a person has a disability *should be assessed without regard to the availability of mitigating measures*, such as reasonable modification or auxiliary aids and services.” 28 CFR pt. 35, App. A, §35.104 (Emphasis added.) Citing federal guidelines, the plaintiffs in *Sutton*, Karen Sutton and Kimberly Hinton (petitioners), had similarly argued that their visual impairments constituted a “disability” under the ADA even though their conditions were correctable with eye glasses or contact lenses. The facts of the case were as follows:

Petitioners are twin sisters, both of whom have severe myopia. Each petitioner's uncorrected visual acuity is 20/200 or worse in her right eye and 20/400 or worse in her left eye, but with the use of corrective lenses, each has vision that is 20/20 or better. Consequently, without corrective lenses, each effectively cannot see to conduct numerous activities such as driving a vehicle, watching television or shopping in public stores, but with corrective measures, such as glasses or contact lenses, both function identically to individuals without a similar impairment.

In 1992, petitioners applied to respondent for employment as commercial airline pilots. They met respondent's basic age, education, experience, and FAA certification qualifications. After submitting their applications for employment, both petitioners were invited by respondent to an interview and to flight simulator tests. Both were told during their interviews, however, that a mistake had been made in inviting them to interview because petitioners did not meet respondent's minimum vision requirement, which was uncorrected visual acuity of 20/100 or better. Due to their failure to meet this requirement, petitioners' interviews were terminated, and neither was offered a pilot

position.

Sutton and Hinton brought suit against United Air Lines, Inc. alleging they had been discriminated against “on the basis of their disability” in violation of the ADA. In so doing, Sutton and Hinton claimed their severe myopia was a substantially limiting impairment which constituted a disability under the ADA.

The federal district court dismissed the ADA claims on the basis that Sutton and Hinton “could fully correct their visual impairments.” In the opinion of the federal district court, Sutton and Hinton were not “actually substantially limited in any major life activity” and thus not “disabled within the meaning of the ADA.” The federal appeals court affirmed the judgment of the district court. Sutton and Hinton petitioned the Supreme Court of the United States to review this decision.

In granting review, the U.S. Supreme Court noted that “[t]he Tenth Circuit's decision is in tension with the decisions of other [federal] Courts of Appeals.” In so doing, the Court cited an example from a federal circuit opinion which had held that “self-accommodations cannot be considered when determining a disability.”

SUBSTANTIAL LIMITATION?

In pertinent part, the Supreme Court noted that the ADA defines “disability” as a “physical or mental impairment that substantially limits one or more of the major life activities of such individual.” The issue before the Supreme Court was, therefore, whether Sutton and Hinton possessed “a physical impairment that substantially limits them in one or more major life activities.” Specifically, the issue was whether Sutton and Hinton were considered “disabled” within the meaning of the ADA even though they both admitted their vision “is 20/20 or better” with corrective measures.

Sutton and Hinton maintained on appeal that the issue of an impairment’s substantial limitation “should be determined without regard to corrective measures.” In asserting this position, Sutton and Hinton relied upon federal agency guidelines issued by the Equal Employment Opportunity Commission (EEOC) and the Department of Justice which specifically directed that “the determination of whether an individual is substantially limited in a major life activity be made *without regard to mitigating measures*.” (Emphasis added.) See 29 CFR pt. 1630, App. §1630.2(j); 28 CFR pt. 35, App. A, §35.104 (1998); 28 CFR pt. 36, App. B, §36.104.

In response, United argued that “an impairment does not substantially limit a major life activity if it is corrected.” Moreover, United contended that the Court should not defer to the agency ADA guidelines because “the guidelines conflict with the plain meaning of the ADA.” Specifically, United argued that the ADA phrase “substantially limits one or more major life activities” requires that “the substantial limitations actually and presently exist.” United further asserted that mitigation measures must be taken

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into account to satisfy the ADA mandate to “examine the effect of the impairment on the major life activities ‘of such individual’.”

The Supreme Court agreed with United. In the opinion of the Court, “the approach adopted by the agency guidelines--that persons are to be evaluated in their hypothetical uncorrected state--is an impermissible interpretation of the ADA.”

Looking at the Act as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures--both positive and negative--must be taken into account when judging whether that person is "substantially limited" in a major life activity and thus "disabled" under the Act...

The Act defines a "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities" of an individual. §12102(2)(A)... A "disability" exists only where an impairment "substantially limits" a major life activity, not where it "might," "could," or "would" be substantially limiting if mitigating measures were not taken. A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently "substantially limits" a major life activity.

To be sure, a person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not "substantially limi[t]" a major life activity.

The Supreme Court noted further that an “individualized inquiry” is also required to determine whether a person has a disability under the ADA.

The definition of disability also requires that disabilities be evaluated "with respect to an individual" and be determined based on whether an impairment substantially limits the "major life activities of such individual." §12102(2). Thus, whether a person has a disability under the ADA is an individualized inquiry.

The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.

Applying this reasoning to the agency guidelines described above, the Supreme Court found the approach taken by the federal agencies was “contrary to both the letter and the spirit of the ADA”

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because it was “inconsistent with the individualized approach of the ADA.”

[T]he guidelines approach would create a system in which persons often must be treated as members of a group of people with similar impairments, rather than as individuals... The agency approach would often require courts and employers to speculate about a person's condition and would, in many cases, force them 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.

For instance, under this view, courts would almost certainly find all diabetics to be disabled, because if they failed to monitor their blood sugar levels and administer insulin, they would almost certainly be substantially limited in one or more major life activities. A diabetic whose illness does not impair his or her daily activities would therefore be considered disabled simply because he or she has diabetes.

As a result, the Supreme Court concluded that “Congress did not intend to bring under the statute's protection all those whose uncorrected conditions amount to disabilities.”

INTENT OF CONGRESS

In determining the meaning and scope of the term “disability” within the context of the ADA, the Supreme Court also considered the expressed language and legislative history of the ADA. In so doing, the Supreme Court noted Congress had included expressed language in the ADA which found “some 43,000,000 Americans have one or more physical or mental disabilities.” 42 U. S. C. §12101(a)(1). In the opinion of the Supreme Court, this 43 million figure was “inconsistent with the definition of disability pressed by petitioners” Sutton and Hinton.

As described by the Court, “the exact source of the 43 million figure is not clear,” but “the corresponding finding in the 1988 precursor to the ADA was drawn directly from a report prepared by the National Council on Disability.” According to the Court, this report “detailed the difficulty of estimating the number of disabled persons due to varying operational definitions of disability.”

[E]stimates of the number of disabled Americans ranged from an over inclusive 160 million under a “health conditions approach,” which looks at all conditions that impair the health or normal functional abilities of an individual, to an under inclusive 22.7 million under a “work disability approach,” which focuses on individuals' reported ability to work. It noted that “a figure of 35 or 36 million [was] the most commonly quoted estimate.” The 36 million number included in the 1988 bill's findings thus clearly reflects an approach to defining disabilities that is closer to the work disabilities approach than

the health conditions approach.

This background also provides some clues to the likely source of the figure in the findings of the 1990 Act. Roughly two years after issuing its 1986 report, the National Council on Disability issued an updated report. This 1988 report settled on a more concrete definition of disability. It stated that 37.3 million individuals have "difficulty performing one or more basic physical activities," including "seeing, hearing, speaking, walking, using stairs, lifting or carrying, getting around outside, getting around inside, and getting into or out of bed."

The study from which it drew this data took an explicitly functional approach to evaluating disabilities. It measured 37.3 million persons with a "functional limitation" on performing certain basic activities when using, as the questionnaire put it, "special aids," such as glasses or hearing aids, if the person usually used such aids.

The number of disabled provided by the study and adopted in the 1988 report, however, includes only non-institutionalized persons with physical disabilities who are over age 15. The 5.7 million gap between the 43 million figure in the ADA's findings and the 37.3 million figure in the report can thus probably be explained as an effort to include in the findings those who were excluded from the National Council figure.

Accordingly, in the opinion of the Supreme Court, "the 43 million figure reflects an understanding that those whose impairments are largely corrected by medication or other devices are not 'disabled' within the meaning of the ADA." In contrast, the Court found "nonfunctional approaches to defining disability produce significantly larger numbers."

[T]he 1986 National Council on Disability report estimated that there were over 160 million disabled under the "health conditions approach." Indeed, the number of people with vision impairments alone is 100 million. It is estimated that more than 28 million Americans have impaired hearing. And there were approximately 50 million people with high blood pressure (hypertension).

Because Congress expressly included "the finding that 43 million individuals are disabled," the Supreme Court concluded that the ADA's text "gives content to the ADA's terms, specifically the term 'disability'."

Had Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings. That it did not is evidence that the ADA's coverage is

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restricted to only those whose impairments are not mitigated by corrective measures.

As a result, the Supreme Court held that a person has a disability under the ADA if that individual is substantially limited in a major life activity, *notwithstanding the use of a corrective device*.

The use or nonuse of a corrective device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual with an impairment actually faces are in fact substantially limiting.

For example, individuals who use prosthetic limbs or wheelchairs may be mobile and capable of functioning in society but still be disabled because of a substantial limitation on their ability to walk or run. The same may be true of individuals who take medicine to lessen the symptoms of an impairment so that they can function but nevertheless remain substantially limited.

Applying this reasoning to the facts of the case, the Supreme Court concluded that the lower courts had correctly found Sutton and Hinton were not “actually substantially limited in any major life activity” and thus not “disabled within the meaning of the ADA.”

As noted above, petitioners allege that with corrective measures, their visual acuity is 20/20, and that they “function identically to individuals without a similar impairment.” In addition, petitioners concede that they “do not argue that the use of corrective lenses in itself demonstrates a substantially limiting impairment.”

Accordingly, because we decide that disability under the Act is to be determined with reference to corrective measures, we agree with the courts below that petitioners have not stated a claim that they are substantially limited in any major life activity.

The Supreme Court, therefore, affirmed the decision of the lower courts dismissing Sutton’s and Hinton’s claims based upon their failure to establish a “disability” under the ADA.