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## *I. Introduction*

On July 26, 1990, President George Bush signed into law the Americans with Disabilities Act of 1990 (ADA).[1] Through the ADA, Congress sought to remove barriers that prevented individuals with disabilities from enjoying the same opportunities as the non-disabled.[2] At first glance, the ADA seemed sufficient to provide the long-awaited rights for Americans with disabilities.[3] Eight years after its enactment, however, the ADA still has not permitted Americans with disabilities to enjoy the protections Congress intended.[4] The ambiguous language Congress incorporated into the ADA is to blame.[5]

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1. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213 (1994)).

2. *See id.* § 12101(b) (stating purpose of Americans with Disabilities Act of 1990). Congress created the Americans with Disabilities Act (ADA) to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Id.*

3. *See id.* (stating purpose of ADA). Most Americans thought that the ADA could accomplish its stated purpose of eliminating discrimination based on a disability. *See* Stephanie Proctor Miller, *Keeping the Promise: The ADA and Employment Discrimination on the Basis of Psychiatric Disability*, 85 CAL. L. REV. 701, 702 (1997) (describing public's anticipation, at time of ADA's enactment, of tremendous impact ADA likely would have for individuals with disabilities); *see also* Bonnie Tucker & Bruce A. Goldstein, *The Americans with Disabilities Act of 1990*, *in* AMERICANS WITH DISABILITIES ACT: LAW AND REGULATIONS 1, 1 (1st ed. 1991) (stating that upon ADA's enactment many considered it "Emancipation Proclamation" for disabled and named July 26, 1990 "Liberation Day for the Disabled"). Twenty-six years prior to the enactment of the ADA, Congress passed laws protecting citizens of the United States from discrimination based on race, color, religion, national origin, and sex. *Id.* According to Tucker and Goldstein, expansion of these civil rights to individuals with disabilities was long overdue. *Id.*

4. *See* Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107, 108 (1997) (discussing inability of ADA to remedy effectively disability discrimination).

5. *See id.* (arguing that ADA's ambiguous terms have caused courts to raise prima facie standards for plaintiffs). Although the heightened prima facie standard works to "weed out" ineligible claimants, it also deprives many disabled individuals of the protection of the ADA. *Id.* at 108-09.

Congress used broad and vague terms throughout the ADA in an effort to include all Americans with disabilities within the ADA's scope.[6] Rather than increase the rights of the disabled, however, this ambiguous language has only confused courts and, as a result, undermined the ADA's power.[7] This Note addresses one specific area of confusion involving a seemingly fundamental aspect of the ADA: Who is disabled under the ADA?[8] More specifically, did Congress intend to include under the ADA those individuals who treat their impairments with medication, aid their impairments with a device, or ease the effects of their impairments in some other fashion such that the impairment no longer substantially limits any major life activities? The question of what constitutes a disability has divided the United States Courts of Appeals and has perplexed several federal district courts.[9]

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6. *See* Arlene B. Mayerson, *Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 588-89 (1997) (discussing ADA's broad definition of "disability" and narrow approach many courts use when evaluating individuals' disabilities). Mayerson states that Congress intended to have the courts apply the ADA liberally. *Id.* at 588. Rather than liberally construing the term "disability" so as to afford individuals the right to have their claims heard, however, many courts apply a heightened disability standard and dismiss claims for failure to prove a disability under the ADA definition. *Id.* at 589-90. This application of a heightened disability standard, Mayerson concludes, is contrary to the purpose of the broad language of the ADA: to protect all individuals with disabilities from discrimination. *Id.* Mayerson recognizes this problem of narrow judicial interpretation of the ADA's terms but she focuses her analysis on the "regarded as" prong of the disability definition. *Id.*

7. *See* Carolyn L. Weaver, *Disabilities Act Cripples Through Ambiguity*, WALL ST. J., Jan. 31, 1991, at A16 (highlighting ambiguities within terms of ADA and potential implications of such). Since the enactment of the Rehabilitation Act of 1973, courts and commentators have disagreed on the meaning of the term "disability." *Id.* The ADA and the accompanying EEOC regulations continue this ambiguity. Neither clarifies exactly what constitutes a disability. *Id.*; *see also* 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, 329 (1997) (stating that until courts resolve issue of exactly who ADA covers, ADA will not have "transformative effect" that Congress intended it to have); Locke, *supra* note 4, at 109 (discussing danger of ADA becoming ineffective due to ambiguities in its terminology); Noreen Seebacher, *Employers' Focus Turns to Disabilities: With Golfer's Case Making Headlines, Many Again Question Parameters of the ADA*, THE DETROIT NEWS, Feb. 25, 1998, at B4 (quoting attorney Thomas Kienbaum) (noting that within definition of "disability" under ADA there are "many gray areas, and different interpretations of them by the courts").

8. *See* 42 U.S.C. § 12102(2) (1994) (defining disability in broad terms). According to this section of the United States Code:

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

*Id.*

9. *See infra* Part III (discussing circuit split and district court confusion).

Part II of this Note reviews the relevant sections of Title I of the ADA, the legislative history of Title I, the Equal Employment Opportunity Commission's (EEOC) efforts to implement it, and the elements of a prima facie case under Title I.[10] Part III discusses the current division in the United States Courts of Appeals as well as the confusion among the United States District Courts regarding the appropriate method of analyzing an impairment that a claimant aids with mitigating measures.[11] Part III.A examines decisions in which courts have not considered mitigating measures when evaluating ADA claims.[12] Part III.B discusses decisions in which courts have incorporated the use of mitigating measures into ADA claim evaluations.[13] Part IV considers possible ways to remedy the division among the circuits and presents a multi-factored guideline that could assist courts in the evaluation of ADA claims involving mitigating measures.[14] Finally, Part V summarizes this persistent issue and concludes that the multi-factored guideline is the best approach to assessing impairments that individuals control or aid with mitigating measures.[15]

## *II. Overview of the Americans with Disabilities Act*

### *A. History of the ADA*

Congress enacted Title I of the ADA to remove barriers that historically have prevented qualified individuals with disabilities from becoming gainfully employed.[16] The ADA states that "[n]o covered entity shall discriminate

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10. *See infra* Part II (providing overview of Title I of ADA).

11. *See infra* Part III (discussing confusion among courts of appeals and district courts regarding issue of mitigating measures). "Mitigating measures" is the term the EEOC uses in its Interpretive Guidelines to the ADA. *See* 29 C.F.R. app. § 1630.2(j) (1997) (describing mitigating measures). The EEOC mentions medicines and assistive or prosthetic devices as examples of mitigating measures. *Id.*

12. *See infra* Part III.A (evaluating courts of appeals and district courts decisions in which courts have adhered to EEOC guidelines regarding mitigating measures).

13. *See infra* Part III.B (evaluating courts of appeals and district courts decisions in which courts have concluded that courts should incorporate mitigating measures into evaluation of substantially limiting effect of impairment).

14. *See infra* Part IV (proposing possible methods of solving problem of mitigating measures and introducing multi-factored guideline).

15. *See infra* Part V (summarizing mitigating measure problem and multi-factored guideline proposal).

16. *See* 29 C.F.R. app. § 1630 (1997) (examining background of ADA and purpose behind enactment of Title I). The ADA requires employers to give disabled individuals the same consideration for employment as individuals without disabilities. *Id.*; *see also* Cyndy Falgout, *Businessmen Told No Need to Fear Disabilities Act*, BATON ROUGE ADVOC., Apr. 20, 1991, *available in* 1991 WL 4365943 (stating Congress's purpose in enacting ADA was to eliminate fear-based artificial barriers to employment for qualified individuals with disabilities).

against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, . . . [nor any] other terms, conditions, and privileges of employment."[17] The employment provisions of the ADA originated in Title V of the Rehabilitation Act of 1973 (Rehabilitation Act), which, prior to the enactment of the ADA, was the primary statutory protection for individuals with disabilities.[18] The primary purpose of Title V of the Rehabilitation Act was to prohibit disability discrimination by federally funded employers.[19] Although the Rehabilitation Act is an important civil rights statute for the disabled, it was unsuccessful in fully remedying discrimination against individuals with disabilities.[20] Its scope was too limited to address adequately the widespread discrimination affecting Americans with disabilities.[21] In

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17. 42 U.S.C. § 12112(a) (1994).

18. *See* 29 U.S.C. §§ 791-794 (1994) (governing employment practices for federally funded entities). Sections 501, 503, and 504 of the Rehabilitation Act of 1973 prohibit employment discrimination based on an individual's disability by any entity that receives federal funds or is an executive agency. *Id.*; *see also* Jane West, *The Evolution of Disability Rights*, *in* IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT 3, 10-13 (Lawrence O. Gostin & Henry A. Beyer eds., 1993) (describing legislation leading up to enactment of ADA). This Note discusses only legislative acts pertaining to the employment of individuals with disabilities. Section 504 of the Rehabilitation Act of 1973 addresses this issue. 29 U.S.C. § 791 (1994). It prohibits discrimination against "otherwise qualified persons with disabilities." *Id.*; *see also* Chai R. Feldblum, *Antidiscrimination Requirements of the ADA*, *in* IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT 35, 37 (Lawrence O. Gostin & Henry A. Beyer eds., 1993) (discussing substantive and procedural basis for ADA).

19. *See* 29 U.S.C. § 791 (describing prohibitions against discrimination as applied to federally funded employers).

20. *See* H.R. REP. NO. 101-485, pt. 2, at 32-33 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 314 (1990) (citing Louis Harris poll that documents persistence of disability discrimination even after enactment of Rehabilitation Act of 1973). According to the Louis Harris poll, two-thirds of all disabled persons of working age are not employed and of that group 66% said they would like to have a job. *Id.* By citing this poll in the CONGRESSIONAL REPORTS, Congress evidenced its concern that the Rehabilitation Act of 1973 was not alleviating the employment discrimination of disabled individuals. *See also* Robert L. Mullen, *The Americans with Disabilities Act: An Introduction for Lawyers and Judges*, 21 LAND & WATER L. REV. 175, 177 (1994) (noting conclusion of National Council on the Handicapped that federal laws and programs existing prior to ADA over-emphasized income support and under-emphasized initiatives to encourage independence and self-sufficiency); Robert E. Rains, *A Pre-History of the Americans with Disabilities Act and Some Initial Thoughts as to Its Constitutional Implications*, 11 ST. LOUIS U. PUB. L. REV. 185, 189-97 (1992) (outlining deficiencies of Rehabilitation Act of 1973 for protection of disabled individuals). Rains cites several limitations of the Rehabilitation Act that created the need for the ADA: (1) Congress limited the Act's scope to federally funded employers; (2) the Act lacked enforcement mechanisms; and (3) Congress did not adequately fund the Act resulting in the inability of the included employers to comply with the Act's mandates. *Id.* at 189-91.

21. *See* Rains, *supra* note 20, at 189-191 (discussing deficiencies of Rehabilitation Act).

response to the Rehabilitation Act's shortcomings, Congress enacted the ADA.[22]

Congress incorporated much of the language of the employment provisions of the Rehabilitation Act into Title I of the ADA.[23] In the ADA, however, Congress expanded the Rehabilitation Act's protections to include individuals with disabilities employed in the private sector.[24] Additionally, the ADA added explicit enforcement mechanisms that the Rehabilitation Act lacked.[25] These modifications reflect Congress's effort to broaden the already existing protections for individuals with disabilities.[26]

### *B. Assistance in Interpreting the ADA*

Congress realized that its use of broad language in the ADA rendered the ADA unenforceable as written.[27] In an attempt to remedy this problem, Congress ordered the EEOC to promulgate regulations to clarify the provisions of the ADA for courts and claimants.[28] On July 26, 1991, one year after the

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22. *See* 42 U.S.C. § 12101 (1994) (describing tremendous need among disabled for protection from discrimination); 29 C.F.R. § 1630.1 (1997) (explaining that EEOC implementation provisions for ADA do not apply lesser standard than that of Rehabilitation Act, indicating that Congress intended to increase rights of disabled); *see also* Mullen, *supra* note 20, at 177 (discussing shortcomings of prior disability discrimination legislation that created need for ADA).

23. *See* Feldblum, *supra* note 18, at 37 (discussing origin of ADA). Congress incorporated much of the language of the Rehabilitation Act into the ADA in an effort to minimize the litigation concerning the application of the ADA. *Id.* Congress intended courts to apply the case law already developed under the Rehabilitation Act to ADA claims. *Id.*

24. *See* 42 U.S.C. § 12111 (1994) (defining "employer" to include private employers); Rains, *supra* note 20, at 190 (noting modifications of provisions of Rehabilitation Act which Congress incorporated into ADA).

25. *See* Rains, *supra* note 20, at 189-191 (discussing shortcomings of Rehabilitation Act that Congress intended to remedy by enacting ADA). The Rehabilitation Act did not delegate the duty to enforce its provisions. *Id.* at 190. In contrast, Congress explicitly charged the EEOC with implementing and enforcing the terms of the ADA. 42 U.S.C. § 12116 (1994).

26. *See* 29 C.F.R. § 1630.1 (1997) (stating that under ADA, courts are to apply same or greater standard than that applied under Title V of Rehabilitation Act of 1973).

27. *See* John Parry, *Title I – Employment, in* IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT 57, 58 (Lawrence O. Gostin & Henry A. Beyer eds., 1993) (documenting criticisms of ADA as "too broad," "confusing," and "hard to interpret"). This broad language, Parry states, although confusing, may have been necessary. *Id.* In civil rights legislation, he states, often one must sacrifice certainty in a law's application in order to obtain the desired individualized remedies under the law. *Id.*

28. *See* 42 U.S.C. § 12116 (1994) (conferring upon EEOC duty to issue regulations to carry out Title I of ADA); *see also* Mullen, *supra* note 20, at 186 (stating that Congress gave EEOC duty to promulgate rules and regulations to supplement ADA); Tucker & Goldstein, *supra* note 3, at 3 (stating that Congress requires EEOC to promulgate regulations to carry out Title I of ADA as well as oversee and enforce all employment provisions under ADA).

enactment of the ADA, the EEOC issued the requisite regulations.[29] The EEOC's regulations are binding on courts if, as stated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[30] Congress mandated the regulations and the resulting regulations constitute a permissible construction of the statute.[31]

Concurrent with the issuance of these regulations, the EEOC published interpretive guidelines.[32] The EEOC designed the interpretive guidelines to provide further assistance to claimants, courts, and covered entities in interpreting the terms of the ADA.[33] Unlike the regulations, Congress did not

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29. 29 C.F.R. § 1630 (1997). The EEOC issued regulations in accordance with the Congressional mandate outlined in the ADA. *Id.*; *see* 42 U.S.C. § 12116 (1994) (directing EEOC to issue regulations).

30. 467 U.S. 837 (1984).

31. *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) (determining that appropriate standard of review for agency statutory interpretations made under congressionally delegated authority is two-part test); *see also* E. Livingston B. Haskell, Note, *"Disclose-or-Abstain" Without Restraint: The Supreme Court Misses the Mark on Rule 14e-3 in* United States v. O'Hagan, 55 WASH. & LEE L. REV. 199, 206-08 (1998) (discussing *Chevron* test). In *Chevron*, the Supreme Court reviewed the Environmental Protection Agency's (EPA) interpretation of the term "source" as used in the Clean Air Act Amendments of 1977. *Chevron*, 467 U.S. at 840. The Court's task in *Chevron* was to determine if courts must adhere to an agency's interpretation of a statute. *Id.* The interpretation in question in *Chevron* arose from the Clean Air Act. *Id.* In the Clean Air Act Amendments of 1977, Congress required any company that produces a major new "source" of air pollutants to go through an extensive review process to obtain a permit. *Id.* at 850. The EPA interpreted the term "source" to refer to the entire plant such that only new plants were subject to the elaborate review process necessary to obtain a permit. *Id.* at 857-58. Additions and modifications to existing plants were, therefore, not subject to the review process. *Id.* The Natural Resources Defense Council opposed this interpretation of the term "source" and claimed that it contradicted the text and policy of the Clean Air Act. *Id.* at 859. The Court held that the EPA's definition of "source" was a permissible construction of the statute. *Id.* at 866. In doing this, the Court outlined a two-part test to assist courts in the future review of agencies' statutory interpretations. *Id.* at 842-43. The two-part test includes analysis of the following: (1) is the agency interpretation contrary to a specific statute or statutory intent and (2) is the interpretation of the statute reasonable. *Id.* The Court ruled that if Congress has given the agency the authority to clarify a specific provision of a statute and the resulting agency regulation is not "arbitrary, capricious, or manifestly contrary to the statute," the agency action is a permissible construction of the statute. *Id.* at 844. Through the application of its newly created test, the Court concluded that: (1) the relevant provisions of the Clean Air Act do not clearly state Congress's intent in using "source" and (2) the intent that courts can derive from the statutory language reveals that Congress hoped to expand rather than confine the EPA's power to regulate particular sources through enforcement of the Clean Air Act. *Id.* at 861-62. Thus, the Court held that the EPA's interpretation of "source" was a permissible construction of the statute and was binding on the courts. *Id.* at 866.

32. 29 C.F.R. app. § 1630 (1997).

33. *See id.* (stating that purpose for interpretive guidance is to assist qualified individuals with disabilities to understand their rights under ADA as well as to ease and to encourage compliance by included employers).

order the EEOC to create these guidelines.[34] Rather, the EEOC issued the guidelines independently.[35] Because they are not congressionally mandated, the EEOC interpretive guidelines do not bind courts.[36] Agency action that is not congressionally mandated is binding on courts only to the extent that they explicitly adopts the agency's interpretation.[37] However, courts tend to defer to nonbinding agency pronouncements because they perceive agencies as consisting of experts whose opinions courts should not dismiss lightly.[38] Thus, when evaluating an ADA claim, courts must incorporate the EEOC regulations into their analysis but may choose not to incorporate the EEOC interpretive guidelines.[39]

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34. *See* 29 C.F.R. app. § 1630 (1997) (noting EEOC has duty to issue regulations but that EEOC additionally issued interpretive guidelines because further assistance was necessary).

35. *See id.* (introducing EEOC interpretive guidelines and stating need for such assistance). "The Commission believes that it is essential to issue interpretive guidance concurrently with the issuance of this part in order to ensure that qualified individuals with disabilities understand their rights under this part and to facilitate and encourage compliance by covered entities." *Id.*

36. *See* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 58 (1990) (stating that agency interpretations not mandated by Congress are not binding on courts); *see also* KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.3, at 239-43 (3d ed. 1994) (explaining that when Congress has not delegated power to agency to issue guidelines, guidelines subsequently issued are not binding on court). Davis and Pierce state that a court is free to reject an agency position that is reflected in an interpretive rule. *Id.* at 239. However, courts must adhere to a congressionally mandated agency rule if it is a permissible construction of the statute at issue. *Id.* at 235.

37. *See* Batterton v. Francis, 432 U.S. 416, 424-26 (1977) (stating that courts are to give agency interpretation of statutory terms "important but not controlling significance"); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971) (stating that EEOC guidelines deserve "great deference," especially if Act and legislative history support such statutory interpretation, but such guidelines are not binding on courts); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (stating that when legislative body has not delegated legislative power to agency, regulations promulgated by such agency are not binding on courts); *see also* DAVIS & PIERCE, *supra* note 36, at 239 (stating that courts have choice either to reject explicitly or accept agency interpretation not mandated by Congress); Anthony, *supra* note 36, at 55 (stating that two-step evaluation from *Chevron* does not apply to agency interpretations because they are not made through formal rulemaking procedures and thus are not binding on courts).

38. *See Griggs*, 401 U.S. at 433-34 (noting that courts should give great deference to EEOC interpretive guidelines if guidelines support Act and Act's legislative history); *Skidmore*, 323 U.S. at 140 (explaining that because EEOC guidelines come from "body of experience and informed judgment," courts "may properly resort [to them] for guidance"); *see also* DAVIS & PIERCE, *supra* note 36, at 236-39 (discussing controlling weight of non-congressionally mandated agency interpretations). Some courts appear to give greater deference to the EEOC interpretive guidelines than others. *See infra* Subparts III.A and III.B (discussing courts' varying levels of deference to EEOC interpretive guidelines).

39. DAVIS & PIERCE, *supra* note 36, at 236-39 (discussing levels of deference due various agency actions).

### *C. Making a Claim Under Title I of the ADA*

To survive summary judgment, an individual making a Title I claim under the ADA must sufficiently 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.[40] The first and often case determinative element is whether the individual has a disability under the ADA.[41] Even though courts treat this element as crucial to the prima facie case, the ADA's text does not describe precisely what a disability is.[42] Congress did outline within the text of the ADA the three ways that 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.[43] Beyond this broad description, however, the ADA is silent on the issue of what constitutes a disability.[44] This ambiguity forces courts to look elsewhere for guidance – the EEOC regulations and the appended interpretive guidelines.[45]

#### *1. Impairment that Substantially Limits a Major Life Activity*

First, an individual is disabled if that person has a physical or mental impairment that substantially limits a major life activity.[46] Congress so broadly stated this first method of demonstrating a disability that courts may wonder exactly what Congress intended by this statement. To assist the courts, the EEOC promulgated regulations that interpret the following critical terms within the ADA definition: "physical or mental impairment," "major life activity," and "substantially limits."[47] A "physical or mental impairment,"

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40. *See* 42 U.S.C. §§ 12111-12112 (1994) (discussing elements of prima facie case under Title I of ADA).

41. *See* Locke, *supra* note 4, at 108 (discussing importance of establishing disability).

42. *See* 42 U.S.C. § 12102(2) (defining "disability" in broad terms).

43. *Id.*

44. *See id.* (limiting discussion of "disability" to three general ways claimant may establish disability under ADA).

45. *See id.* § 12116 (commanding EEOC to "issue regulations in an accessible format to carry out this subchapter"). It is clear that Congress realized that the broad language of the ADA left it unenforceable on its own. *Id.*; *see also* 29 C.F.R. § 1630.2 (1997) (interpreting Title I of ADA); *id.* app. § 1630 (same).

46. *See* 42 U.S.C. § 12102(2) (1994) (outlining methods of demonstrating existence of disability).

47. *See* 29 C.F.R. § 1630.2(h)-(j) (1997) (interpreting "impairment that substantially

according to the EEOC regulations, is any physiological, mental, or psychological disorder.[48] A "major life activity" includes "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[49] And finally, an impairment is "substantially limiting" if, because of it, the individual is unable to perform any of the major life activities to a level "that the average person in the general population can perform," or if the individual is "[s]ignificantly restricted as to the condition, manner or duration under which [the] individual can perform" this activity as compared to the general population.[50] The EEOC regulations add to the ADA's framework and assist courts in evaluating ADA claims.[51]

The EEOC interpretive guidelines further expand the definition of an "impairment that substantially limits a major life activity" by providing additional considerations and examples of impairments that can satisfy the "substantially limits" requirement.[52] The most controversial of the additional considerations, and the consideration subject to much debate among the courts, is the suggestion that courts should ignore mitigating measures when evaluating both the existence of a physical or mental impairment and the

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limits a major life activity").

48. *See id.* § 1630.2(h) (listing disorders that constitute impairments). The regulations include as impairments

> [a]ny 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 . . . [a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

*Id.*

49. *Id.* § 1630.2(h)(2)(i).

50. *Id.* § 1630.2(j). The EEOC lists factors to consider in determining if an impairment substantially limits an individual in a major life activity: "(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." *Id.*

51. *Id.* § 1630.2.

52. *See* 29 C.F.R. app. § 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 mention 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.* Also, the guidelines further discuss the duration and impact of factors that the EEOC addresses in the regulations. *Id.* The duration of the impairment, according to the guidelines, refers to the length of time that the impairment itself exists. *Id.* The impact of the impairment includes the residual effects of the actual impairment. *Id.* The EEOC cites, as examples of substantially limiting impairments, an individual with artificial legs, a diabetic who without insulin would lapse into a coma, and an individual who is blind. *Id.*

extent to which such an impairment limits an individual's major life activities.[53] According to the guidelines, mitigating measures include, but are not limited to, medicines and assistive or prosthetic devices.[54] The appendix to the EEOC regulations suggests that the ADA should protect from discrimination an individual whose medically assisted impairment *would* substantially limit the individual in a major life activity *if* left in an unaided state.[55] This implies that even if medical assistance alleviates or minimizes an individual's symptoms, a court could still find that individual to be disabled under the ADA.[56] Through this recommendation, the EEOC appears to advocate the expansion of ADA coverage to individuals who, under the plain language of the ADA, would have received protection only under the third method of proving the existence of a disability: being regarded as having a disability.[57]

### 2. *Record of an Impairment that Substantially Limits a Major Life Activity*

An individual who either previously had, but who no longer has, an impairment that substantially limits a major life activity or an individual misclassified as having such an impairment is an individual with a record of an impairment.[58] The ADA protects individuals with a record of an impair-

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53. *See id.* app. §§ 1630.2(h)-(j) (noting that courts should not consider mitigating measures used to alleviate impairment's effects). The EEOC interpretive guidelines provide an example of a claim that a court should evaluate without consideration of mitigating measures. 29 C.F.R. app. § 1630.2(h) (1997). The individual in the example suffers from epilepsy controlled with medication. *Id.* According to the EEOC interpretive guidelines, the courts should make their determination without considering the medication both if the underlying illness is an impairment and if it substantially limits a major life activity. *Id.* Under this rationale, the individual clearly has an impairment and if the individual can show that without medication the epilepsy will substantially limit a major life activity, courts can consider the individual disabled as well. *Id.* The EEOC's interpretation suggests that an individual with epilepsy may, although presently not suffering from any symptoms of the disorder, satisfy the requirements for a disability. *Id.*. *See also infra* Part III (discussing circuit split on issue of mitigating measures).

54. 29 C.F.R. app. § 1630.2(h) (1997).

55. *Id.* app. § 1630.2(j) (1997).

56. *See id.* (providing example of individuals for whom medicine or medical aides alleviate symptoms but who, according to EEOC, are still individuals with disabilities under ADA); *see also infra* Parts III-V (discussing judicial reaction to EEOC appendix on mitigating measure issue and impact of such reactions).

57. *See* 29 C.F.R. § 1630.2(*l*) (1997) (describing individuals who do not have substantially limiting impairment but may still qualify as disabled under ADA); *see also infra* Part II.C.3 (describing "regarded as" prong of disability definition).

58. 29 C.F.R. § 1630.2(k) (1997). *See* Thomas H. Christopher & Charles M. Rice, *The Americans with Disabilities Act: An Overview of the Employment Provisions*, 33 S. TEX. L. REV. 759, 770 (1992) (discussing "record of" disability). This Note focuses mainly on the first

ment to prevent the possibility of discrimination arising from the discovery of a record indicating a prior substantially limiting impairment.[59] The controversial provision of the EEOC interpretive guidelines that addresses mitigating measures also applies to this method of proving the existence of a disability.[60] Mitigating measures should not, according to the EEOC, be a part of a disability analysis.[61] The distinguishing factor in this methodology is that the claimed disability existed in the past. For purposes of the EEOC's provision on mitigating measures, however, the timing of the disability is not critical.[62] The individual still must show that the impairment substantially limited a major life activity, and thus, according to the EEOC interpretive guidelines, the court should not integrate the mitigating measures into the evaluation.[63]

### *3. Regarded as Having an Impairment that Substantially Limits a Major Life Activity*

The final method of demonstrating a disability is by establishing that the employer regarded the individual as having a disability.[64] Claimants who cannot successfully utilize the first or second method of proving a disability

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method of proving a disability: an impairment that substantially limits a major life activity.

59. *See* Feldblum, *supra* note 18, at 40 (explaining EEOC regulations regarding individuals discriminated against because of "record of" impairment). Examples of individuals who may have valid claims under the "record of impairment" prong of the disability definition are individuals who have a history of cancer or heart disease or a misdiagnosis of a learning disability. *See id.* (citing 29 C.F.R. app. § 1630.2(k)).

60. *See* 29 C.F.R. app. § 1630.2(h) (1997) (noting that mitigating measures should not be part of claim evaluation). This provision of the interpretive guidelines necessarily applies to the second method of proving a disability, record of a substantially limiting impairment, because a claim brought under this method, like the first method, involves an evaluation of the limiting effects of an impairment. *Id.*

61. 29 C.F.R. app. § 1630.2(j) (1997). Although the mitigating measure provision applies to this method of proving a disability, the case law and commentaries addressing this issue have focused on the first method: an impairment that substantially limits a major life activity.

62. 29 C.F.R. app. § 1630.2(k) (1997).

63. *See id.* (explaining congressional intent in creating "record of disability" method of proving disability under ADA). Congress, by creating this provision, intended to protect individuals who suffered from a substantially limiting impairment that no longer substantially affects their lives. *Id.*

64. *See* 42 U.S.C. § 12102 (1994) (outlining three methods of proving existence of disability); Nancy Lee Jones, *Overview and Essential Requirements of the Americans with Disabilities Act*, 64 TEMPLE L. REV. 471, 480-81 (1991) (discussing "regarded as" method of proving disability); *see also* Mayerson, *supra* note 6, 591-98 (same). This Note focuses on the first method of proving a disability: an impairment that substantially limits a major life activity. For a thorough analysis of the "regarded as" method of proving a disability, see the above-cited references.

under the ADA often turn to this final option.[65] According to the EEOC regulations, a claimant who an employer regards as having a disability is an individual: (1) who has an impairment that is not substantially limiting but whose employer treats the individual as if it is; (2) whose impairment is substantially limiting only because of employer and employee attitudes toward the impairment; or (3) who does not have an impairment but whose employer treats that individual as if she has a substantially limiting impairment.[66] Individuals who aid their impairment with medication and bring their claims in a court that adheres to the EEOC's position on mitigating measures are less likely to need to resort to this final method of proving their disability. For these individuals, a court that evaluates an impairment in its unaided state is more likely to find that the impairment substantially limits a major life activity.[67] However, under the EEOC's interpretation, this final method of proving a disability is still necessary to protect those individuals who, even without consideration of mitigating measures, do not have an impairment that substantially limits a major life activity.[68] In addition, this method is necessary to protect those individuals who do not claim to have a substantially limiting impairment but who nonetheless have employers who treat them as if they do.[69]

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65. *See* 29 C.F.R. app. § 1630.2(*l*) (1997) (discussing third method of proving disability); *see also* School Bd. of Nassau County v. Arline, 480 U.S. 273, 283 (1987) (stating for first time that disability may substantially limit individual in major life activity because of attitude of employer regarding employee's otherwise nonlimiting impairment). The Court decided *Arline* under the Rehabilitation Act of 1973. *Id.* However, case law developed under the Rehabilitation Act is applicable to issues arising under the ADA. 42 U.S.C. § 12117(b) (1994).

66. 29 C.F.R. § 1630.2(*l*) (1997).

67. *See* Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933, 937-38 (3d Cir. 1997) (evaluating claimant in his unmedicated state and concluding that individual's impairment substantially limited him in major life activity). *But see* Sutton v. United Air Lines, Inc., 130 F.3d 893, 902 (10th Cir. 1997) (evaluating claimants' vision impairments in their medicated states and concluding that their vision impairments do not substantially limit the claimants).

68. *See* 29 C.F.R. app. § 1630.2(*l*) (1997) (discussing rationale for "regarded as" portion of disability definition).

69. *See* Feldblum, *supra* note 18, at 40 (explaining "regarded as" prong of disability definition). The notion underlying the "regarded as disabled" aspect of the disability claim is that the ADA should cover individuals not only because they have a substantially limiting impairment but also because they are treated as if they do. *Id. But see* Mayerson, *supra* note 6, at 594-96 (stressing importance of separating proof requirements for actually disabled and regarded as disabled). Mayerson focuses on courts' convergence of these requirements into one standard and the implications of this convergence. *Id.* Mayerson stresses the importance of keeping separate the requirements for "substantially limited" and "regarded as." *Id.* Three different methods exist for demonstrating a disability in order to protect all who may feel the impact of the stigma associated with disabilities. *Id.* The purpose of the "regarded as" aspect of the disability claim was, according to Mayerson, to protect individuals without disabilities from disability discrimination by employers. *Id.* at 597.

Regardless of which of the three methods the claimant uses to prove the existence of a disability, the claimant must prove that the basis for the adverse employment action was in fact the disability.[70] It is obvious, then, that the proof of an actual disability, record of a disability, or treatment as a disabled individual is a crucial part of any claimant's case. At this critical phase of a trial, claimants and courts alike need the benefit of a reliable framework to determine what constitutes a disability and who exactly the ADA includes within its definition. This need for certainty has proven to be most poignant in cases in which the claimant suffers from an impairment that is no longer substantially limiting due to the claimant's use of medication or other assistive device.[71] It is in these cases that the courts have been unable to reach a uniform method of evaluation.[72]

### *III. Dissension Among the United States Courts of Appeals and District Courts*

The United States Courts of Appeals disagree whether an individual who has an impairment has a disability under the ADA if that individual alleviates the effects of the impairment with medicine or other assistive devices.[73]

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70. *See* 42 U.S.C. § 12112 (1994) (stating that only adverse employment actions made because of individual's disability are subject to evaluation under ADA).

71. *See* Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 858 (1st Cir. 1998) (stating that statutory language is not clear regarding meaning of impairment that "substantially limits" individual and that statute completely ignores issue of mitigating measures).

72. *See infra* Part III (discussing circuit split and district court confusion on issue of mitigating measures).

73. *See* Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 629-31 (7th Cir. 1998) (following EEOC interpretive guidelines which recommend evaluating claimant's impairment without consideration of mitigating measures); Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 859-63 (1st Cir. 1998) (same); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 938 (3d Cir. 1997) (same); Doane v. City of Omaha, 115 F.3d 624, 627-28 (8th Cir. 1997) (same), *cert. denied*, 118 S. Ct. 693 (1998); Harris v. H & W Contracting Co., 102 F.3d 516, 521 (11th Cir. 1996) (same); Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996) (same), *cert. denied*, 117 S. Ct. 1349 (1997); Roth v. Lutheran Gen. Hosp., 57 F.3d 1446, 1454 (7th Cir. 1995) (same); Sherback v. Wright Automotive Group, 987 F. Supp. 433, 437 (W.D. Pa. 1997) (same); Fallacaro v. Richardson, 965 F. Supp. 87, 93 (D.D.C. 1997) (same); Shiflett v. GE Fanuc Automation Corp., 960 F. Supp. 1022, 1028-29 (W.D. Va. 1997) (same); Wilson v. Pennsylvania State Police Dept., 964 F. Supp. 898, 905-07 (E.D. Pa. 1997) (same); Sicard v. City of Sioux City, 950 F. Supp. 1420, 1435-39 (N.D. Iowa 1996) (same); Canon v. Clark, 883 F. Supp. 718, 721 (S.D. Fla. 1995) (same); Sarsycki v. United Parcel Serv., 862 F. Supp. 336, 339-40 (W.D. Okla. 1994) (same). *But see* Sutton v. United Air Lines, Inc., 130 F.3d 893, 902 (10th Cir. 1997) (disagreeing with EEOC interpretive guidelines and deciding to evaluate claimants' disabilities with consideration of mitigating measures); Gilday v. Mecosta County, 124 F.3d 760, 767 (6th Cir. 1997) (same); Wilking v. County of Ramsey, 983 F. Supp. 848, 853-54 (D. Minn. 1997) (same); Hodgens v. General Dynamics Corp., 963 F. Supp. 102, 107-08

Because of this, courts are currently unpredictable forums for claimants with such conditions, as well as for the defendant-employers in these actions.[74] The confusion arises from a disagreement over the statutory requirement that, in order to qualify as a disability under the ADA, an impairment must substantially limit a major life activity.[75] If an individual suffers from an underlying impairment but, because she receives medical aid, she does not suffer from the impairment's limiting effects, can the impairment still substantially limit a major life activity? The EEOC interpretive guidelines suggest that mitigating measures should not be a factor in evaluating an impairment and, thus, courts could still find that a medicated impairment substantially limits an individual's major life activities.[76] Some courts, however, have disagreed with the EEOC.[77] This disagreement has created a division among the circuits.[78] The United States Courts of Appeals for the First, Third, Seventh, Eighth, and Eleventh Circuits all explicitly follow the EEOC guidelines and do not consider mitigating measures when evaluating an individual's disability.[79] In

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(D.R.I. 1997) (same); Cline v. Fort Howard Corp., 963 F. Supp. 1075, 1080 n.6 (E.D. Okla. 1997) (same); Gaddy *ex. rel.* Gaddy v. Four B Corp., 953 F. Supp. 331, 336-37 (D. Kan. 1997) (same); Moore v. City of Overland Park, 950 F. Supp. 1081, 1087-88 (D. Kan. 1996) (same); Murphy v. United Parcel Serv., Inc., 946 F. Supp. 872, 879-81 (D. Kan. 1996) (same), *aff'd*, 141 F.3d 1185 (10th Cir. 1998); Schluter v. Industrial Coils, Inc., 928 F. Supp. 1437, 1444-48 (W.D. Wis. 1996) (same); Coghlan v. H.J. Heinz Co., 851 F. Supp. 808, 813 (N.D. Tex. 1994) (same).

74. *See* Lanctot, *supra* note 7, at 328 (noting that inconsistent evaluation of ADA claims has resulted in "patchwork of holdings, often varying from court to court, as to what set of symptoms constitutes a disability"); Huntley Paton, *ADA Still Baffling to Employers*, DALLAS BUS. J., Dec. 5, 1997, at 42, 44 (noting that ADA is continual source of confusion for litigants).

75. *See* Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 858-60 (1st Cir. 1998) (explaining that several interpretations of ADA's term "substantially limiting" exist); *see also* Mayerson, *supra* note 6, at 589 (claiming judicial interpretations of "disability" under ADA are too narrow in scope). Mayerson, however, focuses on the "regarded as" prong of the definition of disability under the ADA. *Id.* Nonetheless, she supports the tenet of this Note in that she agrees that courts' interpretation of "disability" has led to inconsistent rulings and precedents. *Id*; *see also* Locke *supra* note 4, at 109 (arguing that ambiguity of ADA's terms has led to narrowing of scope of "disability").

76. *See* 29 C.F.R. app. § 1630.2(j) (1997) (stating that courts should not consider mitigating measures when evaluating limiting effects of impairment).

77. *See* cases cited *infra* note 151 (listing circuit and district court decisions in which court decided not to adhere to EEOC interpretive guidelines regarding issue of mitigating measures).

78. *See Major Depression and Other Psychiatric Disorders Under ADA: EEOC Guidance*, EMPLOYMENT L. UPDATE (Rutkowski & Assocs.), June 1997, § F (discussing disagreement among courts regarding deference due EEOC's guidelines on mitigating measures).

79. *See* Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 629-31 (7th Cir. 1998) (following EEOC guidelines on issue of mitigating measures); Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 859-63 (1st Cir. 1998) (same); Matczak v. Frankford Candy and Chocolate Co., 136

contrast, the United States Courts of Appeals for the Sixth and Tenth Circuits have determined that mitigating measures should be part of the inquiry when evaluating this threshold issue.[80] Similarly, the district courts in the remaining circuits have disagreed regarding the proper standard to apply.[81]

This dissension among the courts can prove to be of significant importance for ADA claimants and their employers alike.[82] Several circuits permit easy passage through this threshold requirement, thereby affording the claimant the opportunity to present her claim in court.[83] However, the same claim in a circuit that does not broadly interpret the term "disability" may not survive a summary judgment motion.[84] For example, if a court does not defer to the EEOC interpretive guidelines and instead rules that a court should consider mitigating measures in an impairment evaluation, a claimant with an impairment aided by mitigating measures has drastically diminished odds of surviving a summary judgment motion in that court.[85] Likewise, a defendant-

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F.3d 933, 937-38 (3d Cir. 1997) (same); Doane v. City of Omaha, 115 F.3d 624, 627-28 (8th Cir. 1997) (same), *cert. denied*, 118 S. Ct. 693 (1998); Harris v. H & W Contracting Co., 102 F.3d 516, 521 (11th Cir. 1996) (same). The Ninth Circuit has also followed the EEOC guidelines and disregarded mitigating measures in ADA claim evaluations. *See* Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996) (accepting, without analysis, EEOC guidelines that suggest courts should evaluate impairments without considering mitigating measures), *cert. denied*, 117 S. Ct. 1349 (1997).

80. *See* Sutton v. United Air Lines, Inc., 130 F.3d 893, 902 (10th Cir. 1997) (disregarding EEOC guidelines on issue of mitigating measures in disability determination); Gilday v. Mecosta County, 124 F.3d 760, 767 (6th Cir. 1997) (same).

81. *See* cases cited *supra* note 73 (listing cases in which courts have evaluated and ruled on issue of mitigating measures in disability determination).

82. *See* Mark Johnson, *Lawsuits Expanding Scope of Disabilities Act*, LAS VEGAS REV. J., Aug. 31, 1997, at 39 (discussing implications of ambiguities in ADA). "The courts are all over the place . . . [s]omeone with diabetes in one jurisdiction is considered disabled, while if it's controlled with medication in another jurisdiction it's not. It's very hard to divine any guidance." *Id.* (quoting Stanley Kiszkiel, former regional attorney with EEOC in Miami).

83. *See, e.g.*, Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 629-31 (7th Cir. 1998) (relying on EEOC's position on mitigating measures and, as result, permitting plaintiff to present his claim in full); Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 859-63 (1st Cir. 1998) (same); Matczak v. Frankford Candy and Chocolate Co., 136 F. 3d 933, 937-38 (3d Cir. 1997) (same); Harris v. H & W Contracting Co., 102 F.3d 516, 521 (11th Cir. 1996) (same); Shiflett v. GE Fanuc Automation Corp., 960 F. Supp. 1022, 1028-29 (W.D. Va. 1997) (same).

84. *See, e.g.*, Sutton v. United Air Lines, Inc., 130 F.3d 893, 902 (10th Cir. 1997) (disregarding EEOC's position on mitigating measures and, as result, denying plaintiffs' opportunity to present their ADA claim); Ellison v. Software Spectrum, Inc., 85 F.3d 187, 191 n.3 (5th Cir. 1996) (same); Murphy v. United Parcel Serv., Inc., 946 F. Supp. 872, 879-81 (D. Kan. 1996) (same), *aff'd*, 141 F.3d 1185 (10th Cir. 1998). In all of these cases, the court dismissed the ADA action for failure to state a claim.

85. *See, e.g.*, *Sutton*, 130 F.3d at 902 (denying claimants opportunity to present their claims because court did not apply EEOC guidelines and therefore evaluated claimants' impair-

employer who knows that a court does not apply the EEOC guidelines will not be eager to settle with such a claimant in anticipation of a summary judgment motion in its favor. Thus, the court in which an individual brings a claim becomes crucial to the individual's case. Congress did not intend such a result.[86]

### *A. Courts Should Not Consider Mitigating Measures: Deference to EEOC Interpretive Guidelines*

The courts that have chosen to give deference to the EEOC's position on mitigating measures have done so after evaluating the language of the ADA, its legislative history, and Congress's intent in creating the ADA.[87] These courts agree that the position on mitigating measures that the EEOC presented in its interpretive guidelines comports with the language of the ADA and the ADA's legislative history.[88] Additionally, several courts have pointed to overarching policy concerns that have compelled them to apply the method of evaluation that the EEOC embodied in its interpretive guidelines.[89]

#### *1. Legislative History and Language of the ADA*

The United States Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* stated "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the

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ments in their treated states); Gilday v. Mecosta County, 124 F.3d 760, 763-65 (6th Cir. 1997) (same); *Murphy*, 946 F. Supp. at 881 (same).

86. *See* Mayerson, *supra* note 6, at 588-89 (noting Congress intended courts to interpret "disability" broadly).

87. *See Arnold*, 136 F.3d at 859-61 (reviewing legislative history of ADA and Congressional intent in creating ADA); *Matczak*, 136 F.3d at 937 (examining legislative history to determine if EEOC guidelines are permissible construction of ADA); *Harris*, 102 F.3d at 521 (same); Wilson v. Pennsylvania State Police Dept., 964 F. Supp. 898, 905-06 (E.D. Pa. 1997) (examining legislative history and finding that regardless of EEOC guidelines, ADA's legislative history dictates evaluation of impairments without considering mitigating measures); *Shiflett*, 960 F. Supp. at 1028-29 (concluding EEOC interpretation is "entirely consistent" with legislative history and ADA itself); Fallacaro v. Richardson, 965 F. Supp. 87, 93 (D.D.C. 1997) (finding ADA legislative history dictates evaluation of impairments in their unmedicated states); Sicard v. City of Sioux City, 950 F. Supp. 1420, 1437-38 (N.D. Iowa 1996) (finding legislative history supports EEOC interpretive guidelines).

88. *See* cases cited *supra* note 87 (listing cases in which courts have agreed with EEOC's position on mitigating measures).

89. *See* Fallacaro v. Richardson, 965 F. Supp. 87, 93 (D.D.C. 1997) (finding it would be improper to create blanket exclusion to specific groups simply because disability is easy to correct); Wilson v. Pennsylvania State Police Dept., 964 F. Supp. 898, 906 (E.D. Pa. 1997) (pointing to remedial nature of ADA as reason to construe ADA's terms broadly enough to evaluate individuals without consideration of medicinal aides).

agency's answer is based on a permissible construction of the statute."[90] *Chevron* binds courts to an agency's interpretation of a statute if Congress requested such an interpretation and if the resulting interpretation is reasonable.[91] An unrequested interpretation, like the EEOC interpretive guidelines, is not binding, but courts may defer to it nonetheless.[92] Courts have consistently agreed that if an agency interpretation is a reasonable construction of the statute, it merits adherence.[93] Several courts have evaluated the EEOC interpretive guidelines under this reasonableness test.[94] To be a reasonable construction of the ADA and thus worthy of adherence, the EEOC interpretive guidelines must not contradict the plain language of the ADA and must find support in the legislative history of the ADA.[95]

In *Harris v. H & W Contracting Co.*,[96] the United States Court of Appeals for the Eleventh Circuit addressed the reasonableness of the EEOC's interpretive guidelines when deciding if a disability evaluation should include an assessment of mitigating measures.[97] The claimant in *Harris* suffered from

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90. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).

91. *Id.* at 843-44.

92. *See* Anthony, *supra* note 36, at 58 (discussing when courts must defer to agency interpretation and when they may defer to agency interpretation).

93. *Id.* at 59-60 (discussing courts' general support of non-congressionally mandated agency determinations if they are reasonable).

94. *See* Harris v. H & W Contracting Co., 102 F.3d 516, 521 (11th Cir. 1996) (determining EEOC interpretive guidelines are reasonable construction of ADA); Wilson v. Pennsylvania State Police Dept., 964 F. Supp. 898, 904 (E.D. Pa. 1997) (same); Shiflett v. GE Fanuc Automation Corp., 960 F. Supp. 1022, 1029 (W.D. Va. 1997) (same).

95. *See Chevron*, 467 U.S. at 842-43 (creating test for courts to apply when evaluating agency interpretations).

96. 102 F.3d 516 (11th Cir. 1996).

97. *See* Harris v. H & W Contracting Co., 102 F.3d 516, 521-22 (11th Cir. 1996) (finding court should not consider mitigating measures when determining disability). In *Harris*, the court evaluated the ADA claim that Harris brought after H & W Contracting Company terminated her. *Id.* at 518. Harris alleged that the termination was in response to a panic attack she suffered following a change in the medication she took for an underlying thyroid condition (Graves' disease). *Id.* To decide if Harris had an impairment that rose to the level of a disability, the court first determined if it should consider Harris's Graves' disease in the medicated or unmedicated state. *Id.* at 520. To decide this issue, the court undertook an analysis of the following: (1) the EEOC interpretive guidelines which dictate that courts disregard mitigating measures; (2) the plain language of the ADA; and (3) the legislative history behind the ADA's passage. *Id.* at 521-22. The court reasoned that, following *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, it must adhere to a congressionally mandated agency interpretation that is a reasonable construction of the statute. *Id.* at 521 (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984)). The EEOC's interpretation, the court reasoned, was not in direct conflict with the language of the ADA. *Id.* In

Graves' disease, the symptoms of which she controlled medically.[98] Prior to analyzing Harris's claim, the court examined the EEOC interpretive guidelines to determine if her medication should be a factor in the evaluation of her disability.[99] To ascertain the reasonableness of the EEOC position on mitigating measures, the court first examined the text of the ADA and compared it to that of the EEOC interpretive guidelines.[100] Upon review, the court found no direct conflict between the EEOC interpretation and the language of the ADA.[101] The court then looked to the relevant House and Senate Reports.[102] In these reports, the court discovered that Congress clearly intended to have the courts evaluate impairments without consideration of mitigating measures.[103] As a result of these two findings, the court concluded that the EEOC interpretive guidelines were a reasonable construction of the ADA and thus merited the court's deference.[104] The Eleventh Circuit adopted the EEOC's interpretation and chose to evaluate Harris's impairment without consideration of the mitigating measures used to alleviate her symptoms.[105]

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addition, the legislative history of the Act directly supports the agency interpretation. *Id.* Thus, the court found that it should adhere to the EEOC's interpretive guidelines. *Id.* As a result, the court remanded the case to the district court to evaluate Harris's Graves' disease in its unmedicated state. *Id.* at 524.

98. *Id.* at 522-23. Graves' disease may involve any of the following conditions: hyperthyroidism accompanied by goiter, exophthalmos, or myxedema. *See id.* at 522 (citing MERCK MANUAL OF DIAGNOSIS AND THERAPY, 1038-39 (Robert Berkow et al. eds., 15th ed. 1987)). Without medication, the most frequent symptoms of the disease include nervousness, increased sweating, hypersensitivity to heat, palpitations, fatigue, weight loss, weakness, and frequent bowel movements. *Id.* In some extreme cases, Graves' disease can result in "thyroid shock" which, if untreated, can cause cardiovascular collapse. *Id.* Because Harris controlled her disorder with medication, the court's position on the mitigating measures issue was critical to the viability of her claim. *Id.*

99. *See id.* at 520 (evaluating EEOC interpretive guidelines).

100. *Id.* at 521.

101. *See id.* (stating "[t]here is nothing inherently illogical about determining the existence of a substantial limitation without regard to mitigating measures such as medicines or assistive or prosthetic devices").

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* Following its decision, the court denied H & W Contracting Co. summary judgment. *Id.* To avoid summary judgment in this instance, Harris needed only to demonstrate the existence of a genuine issue of material fact. *Id.* at 521-22. In this case and many other similar ADA cases, the claimant must show that an issue of fact exists regarding whether an impairment rises to the level of disability. *Id.* The evaluation of the issue of mitigating measures determines whether a claimant with a treatable impairment ever has the opportunity to present her claim. *See* Mayerson, *supra* note 6, at 589 (discussing dismissal of ADA claims through summary judgment motions); Locke, *supra* note 4, at 109 (arguing that courts are

In *Matczak v. Frankford Candy and Chocolate Co.*,[106] the United States Court of Appeals for the Third Circuit similarly relied on the EEOC interpretive guidelines in evaluating a claimant's epilepsy without considering the medication the claimant took to control the symptoms.[107] The *Matczak* court, like the *Harris* court, found the ADA's legislative history to be supportive of the EEOC's position.[108] This support, the court reasoned, allowed it to adhere to the EEOC's recommendations.[109]

The *Matczak* and *Harris* decisions exemplify the notion that courts should give deference to agency interpretations, even if Congress has not mandated such agency action, provided that: (1) the interpretations are not in conflict with the terms of the statute which they are expounding and (2) the legislative history of the statute supports the interpretations.[110] These courts,

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raising prima facie standard for Title I ADA claims resulting in increased summary judgments against plaintiffs).

106. 136 F.3d 933 (3d Cir. 1997).

107. Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933, 936-37 (3d Cir. 1997) (following EEOC interpretive guidelines and stating that courts should not consider mitigating measures when evaluating disabilities). In *Matczak*, the court considered whether Matczak had established the existence of his disability such that it should not grant summary judgment as a matter of law. *Id.* at 935. Matczak was diagnosed with epilepsy thirty years before Frankford Candy and Chocolate Company hired him as a Maintenance Supervisor in April 1993. *Id.* at 935. He controlled his epilepsy with medication and did not suffer from any seizures until November 1993. *Id.* Following this seizure, Matczak's doctor put him on a new course of medication for five and one-half months. *Id.* Although Matczak could only do limited work during those five and one-half months, the doctor permitted him to return to a regular schedule after the course of medication. *Id.* Frankford fired Matczak during this restrictive period. *Id.* Matczak alleged that the firing was due to his disability (epilepsy). *Id.* The Court of Appeals for the Third Circuit overruled the district court's decision to grant Frankford summary judgment by finding that Matczak had adequately shown that epilepsy substantially limits him in a major life activity. *Id.* at 937. In evaluating this impairment, the court determined that mitigating measures, in this case the medicine controlling his seizures, should not factor into the evaluation. *Id.* The court outlined two reasons for deferring to the EEOC guidelines on this matter: (1) courts should give an agency's interpretation of its own regulations great deference and (2) the ADA's legislative history strongly supports this method of evaluation. *Id.* As a result, the court did not consider Matczak's medication and found enough evidence showing that Matczak's epilepsy substantially limited a major life activity to preclude summary judgment. *Id.* at 938.

108. *Id.* at 937.

109. *See id.* at 937-38 (explaining rationale for evaluating epilepsy without consideration of medication).

110. *See id.* (accepting EEOC interpretation); Harris v. H & W Contracting Co., 102 F.3d 516, 521 (11th Cir. 1996) (same); *see also* Anthony, *supra* note 36, at 59-60 (discussing authoritative power of congressionally mandated agency interpretations versus interpretations that Congress did not mandate).

along with several district courts, have concluded that the EEOC's position on mitigating measures is in accordance with Congress's intent as evidenced by both the language of the ADA and the House and Senate Reports that accompanied the ADA's passage.[111] Several courts that have concurred in this reasoning have additionally put forth policy-based arguments in support of their decisions to consider impairments in their unaided states.[112]

### *2. Policy Reasons in Support of the EEOC's Interpretation*

Congress created Title I of the ADA to ensure the same employment opportunities for individuals with and without disabilities.[113] To further this goal, many courts reason that a broad interpretation of the ADA is necessary.[114] They argue that because Congress intended the ADA to be a sweeping anti-discrimination statute, courts must liberally apply the ADA's terms.[115] As a result, these courts find that the only permissible way to deal with the issue of mitigating measures is to disregard the measures when evaluating the

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111. *See Matczak*, 136 F.3d at 937 (finding EEOC's position is in accordance with Congress's intent); *Harris*, 102 F.3d at 521 (same); Wilson v. Pennsylvania State Police Dept., 964 F. Supp. 898, 905 (E.D. Pa. 1997) (finding that "even a cursory examination of the legislative history" indicates that EEOC patterned its guidelines on language found in congressional reports); Shiflett v. GE Fanuc Automation Corp., 960 F. Supp. 1022, 1029 (W.D. Va. 1997) (concluding that EEOC interpretation is "entirely consistent" with legislative history of ADA and ADA itself); Sicard v. City of Sioux City, 950 F. Supp. 1420, 1435-38 (N.D. Iowa 1996) (stating that legislative history supports EEOC interpretive guidelines).

112. *See* Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 861 (1st Cir. 1998) (stating that courts should construe ADA's terms broadly to further its remedial purpose); Fallacaro v. Richardson, 965 F. Supp. 87, 93 (D.D.C. 1997) (noting policy considerations that support EEOC's position); Wilson v. Pennsylvania State Police Dept., 964 F. Supp. 898, 905 (E.D. Pa. 1997) (bolstering decision with policy considerations); Shiflett v. GE Fanuc Automation Corp., 960 F. Supp. 1022, 1029 (W.D. Va. 1997) (same).

113. *See* 42 U.S.C. § 12101 (1994) (outlining purpose of ADA); *see also* Subpart II.A (outlining history of ADA).

114. *See Arnold*, 136 F.3d at 861 (1st Cir. 1998) (finding that remedial nature of ADA necessitates broad interpretation of it by courts). *But see* Wilson v. Pennsylvania State Police Dept., 964 F. Supp. 898, 906 (E.D. Pa. 1997) (noting but then disregarding policy concerns in support of evaluating impairments in their medicated state). The court in *Wilson* concluded that courts should evaluate impairments in their unmedicated states. *Id.* at 907. In reaching this conclusion, the *Wilson* court addressed and then discredited policy arguments contrary to its conclusion. *Id.* at 906-07. The greatest concern in interpreting the ADA in accordance with the EEOC on the issue of mitigating measures is that such an interpretation will lead to the "unwarranted expansion of disability laws beyond their intended scope." *Id.* at 906. The *Wilson* court noted this concern but found it unconvincing. *Id.*

115. *See id.* at 861 (finding courts must apply terms of ADA broadly); *Wilson*, 964 F. Supp. at 906 (finding remedial nature of ADA necessitates broad interpretation of its terms); *Shiflett*, 960 F. Supp. at 1029 (finding courts' liberal application of ADA terms is proper).

limiting effect of an impairment.[116] Acceptance of the EEOC's position on this issue, these courts reason, will allow courts to apply liberally the ADA's protections.[117]

In *Fallacaro v. Richardson*,[118] the United States District Court for the District of Columbia addressed these policy concerns regarding the consideration of mitigating measures.[119] In its evaluation of a claimant's vision impairment claim, the court found that it should not consider corrective eye wear.[120] It is unfair, the court reasoned, to deprive a group of individuals of coverage under the ADA simply because their disability is one that is easy to correct.[121] This reasoning, the court continued, is based on common sense.[122] An individual does not eliminate an underlying disability by the use of a prosthetic device or medication even though such assistance may alleviate the impairment's effects.[123] If a court did choose to evaluate an underlying impairment in its aided state, the court would unreasonably exclude from

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116. *See Arnold*, 136 F.3d at 863 (finding courts should evaluate impairments in their unmedicated states); *Wilson*, 964 F. Supp. at 898 (finding remedial purpose of ADA dictates evaluation without consideration of mitigating measures); *Shiflett*, 960 F. Supp. at 1029 (same).

117. *See Arnold*, 136 F.3d at 863 (finding courts must evaluate impairments in their unmedicated states); *Wilson*, 964 F. Supp. at 905-06 (concluding liberal application of ADA requires evaluation of impairment without consideration of mitigating measures); *Shiflett*, 960 F. Supp. at 1029 (same).

118. 965 F. Supp. 87 (D.D.C. 1997).

119. *See* Fallacaro v. Richardson, 965 F. Supp. 87, 93 (D.D.C. 1997) (following EEOC guidelines). In *Fallacaro*, the court evaluated whether an individual who has corrected vision of 20/20 but is legally blind without corrective lenses has an impairment that substantially limits a major life activity. *Id.* at 90. The Internal Revenue Service (IRS) denied Fallacaro a promotion because she did not satisfy the uncorrected vision requirement of the position. *Id.* Fallacaro alleged that the vision requirement was a blanket exclusion of individuals with vision impairments. *Id.* The IRS stated that it based its exclusion in safety concerns and that Fallacaro was simply medically ineligible and not handicapped under the Rehabilitation Act. *Id.* After evaluating recent case law and the legislative history of both the Rehabilitation Act and the ADA, the court reasoned that it would be furthering the purpose of both of the acts if it evaluated Fallacaro's impairment in its uncorrected state. *Id.* at 92-94. The court, therefore, denied the IRS's motion to dismiss and found that the IRS must justify its adverse employment decision before a fact-finder. *Id.* at 94. The court also denied partial summary judgment to Fallacaro and noted that simply because her vision impairment may rise to the level of a disability did not mean that she did not have to satisfy the requirement that she was a "qualified individual." *Id.* In summary, the court concluded that it should enable Fallacaro to benefit from the provisions of the ADA and granted her an evaluation of the alleged adverse employment action. *Id.*

120. *Id.* at 94.

121. *Id.* at 93.

122. *Id.*

123. *Id.*

coverage an entire group of potentially disabled individuals at the threshold question level.[124] Such individuals would be deprived of even the chance to present their claims to the court.[125] According to the *Fallacaro* court, it then follows that to prevent this inequitable result, courts should evaluate the underlying impairment rather than the temporarily corrected state of the impairment.[126] Therefore, in its attempt to further the broad anti-discrimination policy of the ADA, the *Fallacaro* court ruled that it should not consider mitigating measures when evaluating the limiting effects of an impairment.[127] The court eventually denied summary judgment for the defendant-employer and ordered an assessment of the claimant's vision without the assistance of corrective lenses.[128]

In *Wilson v. Pennsylvania State Police Department*,[129] the United States District Court for the Eastern District of Pennsylvania also advanced a policy argument in support of its decision to evaluate a claimant's vision impairment without the aid of corrective lenses.[130] In particular, the court cited to the generally accepted policy that because the ADA is a remedial statute, courts should construe it broadly.[131] Agreeing with this proposition, the court further

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124. *Id.*

125. *Id.* The court stated that the facts of this case exemplify this logic. *Id.* The IRS argued that the Rehabilitation Act did not protect Fallacaro because her corrected vision did not rise to the level of a disability. *Id.* However, the IRS excluded her from the special agent position specifically because of her uncorrected vision level. *Id.* The court reasoned that the fact that the IRS considers the uncorrected vision level in its qualifications for the agent position demonstrates that the IRS itself did not think that the corrective measures eliminated the underlying impairment. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. 964 F. Supp. 898 (E.D. Pa. 1997).

130. *See* Wilson v. Pennsylvania State Police Dept., 964 F. Supp. 898, 907 (E.D. Pa. 1997) (finding that courts should not consider mitigating measures when evaluating impact of impairment). The court in *Wilson* examined whether individuals denied positions as state troopers due to a failure to satisfy the uncorrected visual acuity requirement can bring a claim under the ADA. *Id.* at 900. The police department argued that because Wilson can see clearly with corrective lenses his impairment does not substantially limit him in any major life activities. *Id.* at 902. The court disagreed with this rationale and denied the police department's motion for summary judgment. *Id.* at 908-09. According to the court, the EEOC guidelines and the legislative history on the issue supported its decision to evaluate Wilson's vision without consideration of his corrective lenses. *Id.* at 905. The court found that a claimant who does not currently experience the adverse effects of his impairment because of medication should still have the opportunity to present his ADA claim to a fact-finder. *Id.*

131. *See id.* at 906 (discussing remedial nature of ADA) (citing Heilweil v. Mt. Sinai Hosp., 32 F.3d 718, 722 (2d Cir. 1994)).

explained that a broad interpretation of the ADA necessarily entails a liberal application of its protections.[132] Such a liberal application, the court reasoned, includes the evaluation of an individual's impairment in its unmedicated state.[133] The court recognized that this was the best way to ensure coverage of all individuals with disabilities.[134] This broad application will likely result in coverage of individuals who are not obviously substantially impaired.[135] The court recognized that the public may not think of these individuals as being disabled.[136] However, it reasoned that societal intuition should not dictate nor interpret the ADA.[137] Instead, looking to Congress's intent to create a broadly sweeping remedial statute, the court discovered that an evaluation of an impairment in its unaided state is proper.[138] The *Wilson* court, in its conclusion on this issue, decided that corrective eye wear should not be a consideration in evaluating a vision impairment.[139]

The United States Court of Appeals for the First Circuit added yet another policy argument in support of the EEOC's position on mitigating measures.[140] In *Arnold v. United Parcel Service, Inc.*,[141] the First Circuit reasoned that an evaluation of a claimant's impairment in its medicated state would result in different treatment of individuals who are financially able to treat their impairment.[142] For example, courts will evaluate an individual who

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132. *Id.* at 907.

133. *See id.* (concluding that courts should not interpret "substantially limits" so narrowly as to exclude automatically individuals whose impairments are correctable with medical assistance).

134. *Id.*

135. *Id.*

136. *See id.* at 906-07 (giving example of individual confined to wheelchair as compared to individual who can alleviate impairment by putting on eyeglasses).

137. *Id.* at 907.

138. *Id.*

139. *See id.* at 906-07 (concluding that corrective lenses should not be consideration when deciding if impairment substantially limits major life activity). The court first determined whether the EEOC guidelines were a reasonable construction of the ADA and worthy of the court's deference. *Id.* at 904-05. The language of the EEOC and the legislative history of the Act convinced the court that the EEOC's position on the issue of mitigating measures was reasonable. *Id.* at 905. The court supplemented its conclusion with the policy argument stated in the text of this Note. *See supra* notes 129-138 and accompanying text (outlining policy argument).

140. *See* Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 861 (1st Cir. 1998) (expressing policy in support of EEOC guidelines regarding mitigating measures).

141. 136 F.3d 854 (1st Cir. 1998)

142. *See* Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 861 (1st Cir. 1998) (supporting EEOC interpretive guidelines on issue of mitigating measures). In *Arnold*, the court had to determine if Arnold had a disability under the ADA and, if he did, whether the United Parcel Service

cannot afford medication that may fully alleviate her symptoms in her untreated state.[143] On the other hand, courts will evaluate in her treated state an individual who can afford the medication and uses it.[144] Under this rationale, courts will treat less favorably under the ADA individuals who are more financially secure.[145] Congress did not, according to the court in *Arnold*, intend this inequitable result.[146] The *Arnold* court suggests that the only equitable remedy is to evaluate all claimants' impairments in their unmedicated states.[147]

After analyzing the legislative history of the ADA and the policy considerations involved in its enactment, these courts have concluded that the suggestions of the EEOC interpretive guidelines properly interpret the ADA.[148] Thus, according to these courts, a court should disregard mitigating measures when evaluating impairments.[149] Because of this broad interpretation of the ADA, individuals with impairments aided by medication or other assistive devices who bring their claims in these courts can expect to have the opportunity to present their claim fully.[150] Not all courts, however, have accepted the EEOC's position on the issue of mitigating measures.

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(UPS) denied him employment because of his disability. *Id.* at 856. Arnold suffered from insulin-dependent diabetes which he controlled through daily injections of insulin and a regimen of diet and exercise. *Id.* Arnold alleged that he is disabled under the ADA because, according to his doctor's reports, he would die without his medication. *Id.* The court evaluated the legislative history of the ADA, the plain statutory language of the ADA that addresses the "substantially limiting" requirement, and the policy considerations for and against the courts' consideration of mitigating measures in the evaluation of a claimant's impairment. *Id.* at 857-863. The court concluded that all of these sources support the theory that courts should disregard mitigating measures when evaluating a claimant's impairment. *Id.* at 863. In addition, the court noted that the EEOC interpretive guidelines support this application of the ADA. *Id.* at 863-64. The court realized that the EEOC interpretive guidelines do not have controlling weight but concluded, nonetheless, that because the guidelines are reasonable and consistent with the remedial purpose of the ADA, they were worthy of the court's deference. *Id.* at 864. As a result of its evaluation, the court concluded that it should not consider mitigating measures when evaluating impairments for an ADA claim. *Id.* at 866. The *Arnold* court, however, limited its holding to the particular medical condition in question in this claim, diabetes mellitus. *Id.*

143. *Id.* at 861.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *See* cases cited *supra* note 87 (listing cases in which courts have agreed with EEOC's position on mitigating measures).

149. *See* cases cited *supra* note 87 (listing court decisions which adhere to EEOC interpretive guidelines on issue of mitigating measures).

150. *See, e.g.*, Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 866 (1st Cir. 1998) (remanding claim to lower court to determine ADA claim on presented facts); Matczak v.

### *B. Courts Should Consider Mitigating Measures: Non-Deferential Treatment of the EEOC Interpretive Guidelines*

Similar to the courts that have explicitly followed the EEOC's position on mitigating measures, the courts of appeals and district courts that have chosen not to adhere to the EEOC interpretive guidelines have done so only after a thorough evaluation of both the language of the ADA and its legislative history.[151] These courts, however, have concluded that the EEOC's interpretive guidelines are not a reasonable construction of the ADA.[152] In support of their decisions to disregard the EEOC's position on mitigating measures, these courts consistently have put forth two basic arguments: (1) the language of the EEOC interpretive guidelines regarding mitigating measures directly conflicts with the plain language of the ADA[153] and (2) the EEOC's directions to evaluate the effects of an impairment without considering the measures used to alleviate its effects conflict with other provisions of the EEOC interpretive guidelines.[154]

#### *1. Conflict Between the Language of the EEOC Interpretive Guidelines and the Plain Language of the ADA*

To accept that the EEOC interpretive guidelines are a reasonable construction of the ADA, courts must find that the guidelines do not contradict

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Frankford Candy and Chocolate Co., 136 F.3d 933, 937-38 (3d Cir. 1997) (same); Harris v. H & W Contracting Co., 102 F.3d 516, 521 (11th Cir. 1996) (same).

151. *See* Sutton v. United Air Lines, Inc., 130 F.3d 893, 902 (10th Cir. 1997) (finding EEOC interpretive guidelines provision on mitigating measures were neither consistent with text of ADA nor with other provisions of interpretive guidelines); Gilday v. Mecosta County, 124 F.3d 760, 767 (6th Cir. 1997) (same); Ellison v. Software Spectrum, Inc., 85 F.3d 187, 191 n.3 (5th Cir. 1996) (same); Wilking v. County of Ramsey, 983 F. Supp. 848, 853-54 (D. Minn. 1997) (same); Hodgens v. General Dynamics Corp., 963 F. Supp. 102, 107-08 (D.R.I. 1997) (same); Gaddy *ex. rel.* Gaddy v. Four B Corp., 953 F. Supp. 331, 336-37 (D. Kan. 1997) (same); Moore v. City of Overland Park, 950 F. Supp. 1081, 1087-88 (D. Kan. 1996) (same); Murphy v. United Parcel Serv., Inc., 946 F. Supp. 872, 879-81 (D. Kan. 1996) (same), *aff'd*, 141 F.3d 1185 (10th Cir. 1998).

152. *See* cases cited *supra* note 151 (listing cases in which courts explain their rationale for disagreeing with EEOC interpretive guidelines on issue of mitigating measures).

153. *See* cases cited *supra* note 151 (listing cases in which courts found EEOC interpretive guidelines in conflict with plain language of ADA).

154. *See* Sutton v. United Air Lines, Inc., 130 F.3d 893, 903 (10th Cir. 1997) (evaluating legislative history of ADA as well as language included in Act itself in course of considering appropriate method of evaluating mitigated impairments); Gilday v. Mecosta County, 124 F.3d 760, 767 (6th Cir. 1997) (same); Hodgens v. General Dynamics Corp., 963 F. Supp. 102, 107-08 (D.R.I. 1997) (same); Murphy v. United Parcel Serv., Inc., 946 F. Supp. 872, 880-81 (D. Kan. 1996) (same), *aff'd*, 141 F.3d 1185 (10th Cir. 1998).

the ADA's plain language.[155] Not all courts have found this to be true.[156] To many, the EEOC guidelines directly contradict the language of the ADA.[157] If such a conflict exists, then the guidelines are neither reasonable nor worthy of judicial deference.[158]

In *Gilday v. Mecosta County*,[159] for example, a divided United States Court of Appeals for the Sixth Circuit found that the EEOC's position on mitigating measures directly contradicts the ADA's requirement that an impairment be substantially limiting.[160] The claimant in *Gilday* suffered from diabetes, which he controlled with a prescribed regime of medication, diet,

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155. *See* DAVIS & PIERCE, *supra* note 36, at 239-43 (discussing necessary requirements for court to find agency interpretation is reasonable construction of statute).

156. *See Sutton*, 130 F.3d at 902 (finding EEOC guidelines directly at odds with plain language of ADA); *Gilday*, 124 F.3d at 767 (same); *Hodgens*, 963 F. Supp. at 107-08 (same); *Murphy*, 946 F. Supp. at 880-81 (same).

157. *See* Sutton v. United Air Lines, Inc., 130 F.3d 893, 902 (10th Cir. 1997) (finding EEOC guidelines directly at odds with plain language of ADA); Gilday v. Mecosta County, 124 F.3d 760, 767 (6th Cir. 1997) (same); Hodgens v. General Dynamics Corp., 963 F. Supp. 102, 107-08 (D.R.I. 1997) (same); Murphy v. United Parcel Serv., Inc., 946 F. Supp. 872, 880-81 (D. Kan. 1996) (same), *aff'd*, 141 F.3d 1185 (10th Cir. 1998).

158. *See* DAVIS & PIERCE, *supra* note 36, at 239-43 (explaining that courts do not have to adhere to unreasonable agency interpretations of statute); Anthony, *supra* note 36, at 58 (explaining deference due non-congressionally mandated agency interpretations).

159. 124 F.3d 760 (6th Cir. 1997).

160. *See* Gilday v. Mecosta County, 124 F.3d 760, 766 (6th Cir. 1997) (deciding mitigating measures should be part of evaluation of impairment's substantially limiting impact). In *Gilday*, the Court of Appeals for the Sixth Circuit considered whether Gilday presented sufficient evidence of a disability to avoid summary judgment on his claim. *Id.* at 761. In particular, the court had to decide if a diabetic who controls the symptoms of his disease with medication can still satisfy the requirements of a disability under the ADA. *Id.* Kevin Gilday was an emergency medical technician for 16 years until Mecosta County terminated him for "conduct unbecoming a paramedic" and several instances of rudeness to co-workers and patients. *Id.* Gilday alleged that Mecosta County terminated him because of his diabetic condition. *Id.* Mecosta County, he alleged, should have accommodated his diabetic condition by permitting him to be in a less chaotic atmosphere. *Id.* Such accommodation, he claimed, would have prevented the sudden alterations in his blood sugar that often resulted in his hostile behavior. *Id.* Thus, Gilday requested that the court adhere to the EEOC interpretive guidelines and consider his diabetes in its unmedicated state, the state in which it is substantially limiting. *Id.* Judge Kennedy, writing the majority opinion on this issue, concluded that the EEOC's interpretation is in direct conflict with the ADA and therefore is not a reasonable construction of the statute. *Id.* at 767. The ADA requires that an impairment be substantially limiting to be a disability. *Id.* The EEOC's method of evaluation allows coverage of an individual whose impairment does not actually substantially limit her activities. *Id.* This, Judge Kennedy reasoned, is an impermissible construction of the ADA. *Id.* This issue divided the court with Judges Kennedy and Guy agreeing that the EEOC's interpretation was not a permissible one. *Id.* at 768. All three judges, however, concurred that in this case, a material issue of fact did remain. *Id.* at 766. Thus, the court remanded Gilday's claim for further proceedings. *Id.*

and exercise.[161] In determining the summary judgment issue, all three judges on the panel concurred that a material issue of fact remained.[162] The judges did not, however, concur on the issue of how to evaluate a medicated impairment under the ADA.[163]

Judge Kennedy, joined by Judge Guy, concluded that the court must evaluate an individual's impairment in light of the mitigating measures the individual uses to alleviate its effects.[164] Judge Kennedy pointed to a direct conflict between the EEOC interpretive guidelines and the ADA to support her conclusion.[165] Under the express terms of the ADA, an impairment does not rise to the level of a disability unless it substantially limits a major life activity.[166] The related provision of the EEOC interpretive guidelines suggests that courts partake in the substantially limiting evaluation without consideration of mitigating measures.[167] If a court chooses to follow the EEOC's recommendation, an impairment that does not substantially limit an individual because of the medication used to treat it may still constitute a disability under the ADA.[168] This interpretation, according to Judge Kennedy, essentially eliminates the substantially limiting requirement of the ADA.[169] Judge Kennedy concluded that the EEOC's interpretive guidelines are clearly at odds with the statutory language of the ADA.[170]

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161. *See id.* at 761 (describing Gilday's condition). Gilday suffered from non-insulin dependent diabetes. *Id.* He treated this condition with oral medication, blood sugar monitoring, and a restricted diet. *Id.*

162. *Id.* at 766. With or without consideration of mitigating measures, all three judges on the panel agreed that, in this case, the plaintiff had presented a material issue of fact regarding the existence of a disability. *Id.* In other words, Judges Kennedy and Guy found that Gilday's impairment in its aided state may still substantially limit a major life activity. *Id.*

163. *See id.* (showing contrasting opinions among judges). The majority opinion of the court remanded the claim for further consideration. *Id.* All three judges concurred that, with or without consideration of mitigating measures, Gilday had presented a material issue of fact regarding the substantially limiting nature of his impairment. *Id.* Judge Moore wrote the opinion for the court on this issue. *Id.* at 766. Judge Kennedy, however, wrote the opinion for the court on the issue of mitigating measures, finding that courts should consider mitigating measures when evaluating the limiting effects of an impairment. *Id.*

164. *Id.* at 766-68.

165. *Id.* at 767.

166. *See id.* at 766-67 (citing 42 U.S.C. § 12102(2)(a) (1994)) (discussing ADA's definition of disability).

167. *See id.* at 767 (citing 29 C.F.R. app. § 1630.2(j) (1997)) (discussing assistance of EEOC regulations and interpretive guidelines).

168. *Id.*

169. *Id.*

170. *Id.*

Judge Kennedy recognized that the ADA's legislative history appears to support the EEOC's position.[171] However, she noted that when the actual text of the statute is unambiguous, there is no need to look to the legislative history for clarification.[172] According to Judge Kennedy, the statutory language on this issue was clear: an impairment must actually substantially limit a major life activity in order to rise to the level of a disability.[173] Judge Kennedy concluded, and Judge Guy concurred, that courts should not adhere to the EEOC interpretive guidelines on the issue of mitigating measures.[174]

### 2. *Internal Inconsistencies of the EEOC Interpretive Guidelines*

An agency's interpretation of a statute is unreasonable if the interpretation itself is internally inconsistent or is inconsistent with other agency positions on that statute.[175] In such situations, courts are justified in disregarding agency interpretations.[176] Many courts have determined that the EEOC's position on mitigating measures does not coincide with its interpretation of other aspects of the ADA including, in particular, what constitutes a substantially limiting impairment.[177] This internal inconsistency has led these courts to disregard the EEOC interpretive guidelines and to formulate for themselves the correct method of evaluating claims aided by medication.[178]

The United States Court of Appeals for the Tenth Circuit, in *Sutton v. United Air Lines, Inc.*,[179] addressed this internal tension in the EEOC interpre-

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171. *Id.*

172. *See id.* (explaining when courts should use legislative history to interpret statutes) (citing Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994)).

173. *Id.*

174. *Id.*

175. *See* DAVIS & PIERCE, *supra* note 36, at 108 (describing when courts should follow agency's interpretation).

176. *See id.* (stating that courts do not have to follow unreasonable agency interpretation); Anthony, *supra* note 36, at 54-58 (same). If an agency interpretation is internally inconsistent, the courts can determine that it is an unreasonable interpretation and not worthy of deference. *Id.*

177. *See* Sutton v. United Air Lines, Inc., 130 F.3d 893, 902 (10th Cir. 1997) (finding EEOC's position on mitigating measures does not coincide with its position on "substantially limiting" requirement); Hodgens v. General Dynamics Corp., 963 F. Supp. 102, 108 (D.R.I. 1997) (same); Murphy v. United Parcel Serv., Inc., 946 F. Supp. 872, 881 (D. Kan. 1996) (finding EEOC's position on mitigating measures contradicts its own example of individual who satisfies "regarded as" disabled prong of disability definition), *aff'd*, 141 F.3d 1185 (10th Cir. 1998).

178. *See Sutton*, 130 F.3d at 902 (disregarding EEOC position on mitigating measures); *Hodgens*, 963 F. Supp. at 108 (same); *Murphy*, 946 F. Supp. at 881 (same).

179. 130 F.3d 893 (10th Cir. 1997).

tive guidelines.[180] The claimants in *Sutton* contested United Air Lines's (United) decision not to hire them.[181] The parties stipulated that United failed to hire the claimants because of their uncorrected visual acuity levels.[182] In deciding whether to dismiss the case for failure to state a claim, the court directly addressed the issue of mitigating measures.[183]

The *Sutton* court concluded that it should evaluate vision impairments and other correctable impairments in light of the assistive devices that the

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180. *See* Sutton v. United Air Lines, Inc., 130 F.3d 893, 901-02 (10th Cir. 1997) (deciding that individuals who suffer from vision impairment that is correctable with lenses are not disabled for purposes of ADA because, with lenses, they are not substantially limited in major life activity). In *Sutton*, two regional commercial airline pilots brought a claim against United Air Lines (United) for violation of the ADA following United's failure to hire them because of their uncorrected vision level. *Id.* at 895. According to United's policy, a pilot must have uncorrected vision of 20/100 or better in each eye. *Id.* The plaintiffs in this action were twin sisters who both have uncorrected vision of 20/200 in their right eyes and 20/400 in their left eyes. *Id.* Both, however, had corrected vision of 20/20. *Id.* The plaintiffs argued that, according to the EEOC interpretive guidelines, the court should evaluate their vision in its uncorrected state. *Id.* With such an evaluation, the court would most likely have found that their vision impairment substantially limited the major life activity of seeing. *Id.* Thus, they argued, they had a disability under the ADA and were entitled to the ADA's protection. *Id.* The court disagreed with the plaintiffs' argument and in turn disregarded the EEOC interpretive guidelines on the matter. *Id.* at 901. The court found that it should not adhere to the portion of the EEOC interpretive guidelines that addresses the issue of mitigating measures in the "substantially limiting" test because: (1) it is in direct conflict with the ADA and (2) it is internally inconsistent with other portions of the EEOC's interpretive guidelines. *Id.* at 902. The ADA requires that, in order to rise to the level of a disability, an impairment must substantially limit the individual in a major life activity. *Id.* If a court does not consider mitigating measures in the assessment of the impairment, it cannot truly evaluate the actual impact of the disability. *Id.* According to the court, Congress did not intend this type of assessment. *Id.* Additionally, the court pointed out that the EEOC itself mentions within another section of its own interpretive guidelines that the impact of an impairment is not contingent on the name of the diagnosis but rather on the actual effect that the impairment has on the individual's life. *Id.* (quoting 29 C.F.R. app. § 1630.2(j) ¶¶ 1-2 (1997)). Thus, even within its own guidelines, the EEOC recognizes that the hypothetical effects of an impairment that may arise without the use of the mitigating measures are not the effects that the court should analyze for purposes of determining who has a disability under the ADA. *Id.* In accordance with this rationale, the court affirmed the district court's decision to dismiss the action and found the claimants, whose corrected vision was 20/20, were not individuals with disabilities under the ADA. *Id.*

181. *Id.* at 895.

182. *See id.* (discussing plaintiffs' allegations of ADA violation). The claimants both suffered from a visual impairment of 20/200 in their right eyes and 20/400 in their left eyes. *Id.* United's policy required pilots to have an uncorrected visual acuity of 20/100 or better. *Id.*

183. *See id.* at 901 (explaining that its decision on mitigating measures issue will have determinative effect on case). The court recognized the existing division among courts on this issue, especially within the Tenth Circuit. *Id.* at 901 nn.7-8. As a result, it attempted to evaluate thoroughly the issue and create a precedent for the district courts within the Tenth Circuit to follow. *Id.* at 901-03.

claimant used to alleviate the impairment's effects.[184] In reaching this conclusion, the court first looked to the EEOC interpretive guidelines.[185] Upon examination, the court discovered that the guidelines themselves were inconsistent on this issue.[186] In particular, the court noted that the EEOC's position on mitigating measures contradicts its position on what constitutes a "substantially limiting" impairment.[187] In its interpretive guidelines, the EEOC explained that Congress intended the determinative factor of a substantially limiting analysis to be the actual effect that an impairment has on an individual.[188] The court found that the EEOC specifically stated that the diagnosis or name of an impairment should not be dispositive on the issue of whether it substantially limits an individual.[189] The actual effect is most important.[190] Additionally, the EEOC advocated a case-by-case analysis to assess the actual impact of the impairment on the individual.[191]

The *Sutton* court noted that the EEOC continued its explanation of the "substantially limiting" requirement in a contradictory fashion.[192] The EEOC stated that in the evaluation of an impairment's limiting effect mitigating measures should not be a consideration.[193] In suggesting this, the court reasoned, the EEOC recommended that courts evaluate the effects of an impairment that *might* occur without medication – in other words, the hypothetical impact of an impairment.[194] This method of evaluation, the *Sutton* court reasoned, is totally inconsistent with the EEOC's prior statement that the actual effect on the individual's life is the determinative factor in assessing whether or not the impairment is substantially limiting.[195] Because of this underlying tension within the EEOC guidelines, the *Sutton* court did not adhere to the recommendations contained in the guidelines.[196] Instead, the

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184. *See id.* at 902 (deciding to evaluate claimants' visual impairment in its corrected state).

185. *See id.* (evaluating EEOC guidelines on mitigating measures).

186. *See id.* (stating tension in EEOC guidelines undermines the guidelines' credibility).

187. *Id.*

188. *Id.* (citing 29 C.F.R. app. § 1630.2(j) (1997)).

189. *Id.* (citing 29 C.F.R. app. § 1630.2(j) (1997)).

190. *Id.* (citing 29 C.F.R. app. § 1630.2(j) (1997)).

191. *See id.* (citing 29 C.F.R. app. § 1630.2(j)) (discussing EEOC's preference for case by case analysis of ADA claims).

192. *Id.*

193. *See id.* (citing 29 C.F.R. app. § 1630.2(j) (1997)) (discussing EEOC's position on mitigating measures).

194. *See id.* (pointing out inevitable result of adherence to EEOC's position: courts will permit hypothetical limits of impairments to raise impairment to level of disability).

195. *Id.*

196. *Id.*

*Sutton* court applied what it considered to be the plain language of the ADA: an impairment must substantially limit a major life activity.[197] This plain language, the court concluded, necessarily dictates an evaluation of an impairment in its medicated state.[198]

The *Sutton* court, along with several district courts, concluded that the underlying tension of the EEOC interpretive guidelines made the EEOC's position an unreasonable construction of the ADA.[199] As a result, these courts chose not to adhere to the agency's instructions to disregard mitigating measures in their evaluations.[200] Instead, these courts concluded from the plain language of the ADA that courts should incorporate mitigating measures into the evaluation of an impairment.[201]

The courts described in this section have concluded that courts should incorporate into their impairment analysis mitigating measures which the claimant uses to alleviate the symptoms of her impairment.[202] According to these courts, the plain language of the ADA and certain sections of the EEOC regulations dictate such a decision.[203] This conclusion has placed these courts directly at odds with the courts that have chosen to disregard mitigating measures in impairment evaluations, creating a division among the circuits and confusion among litigants. Clearly, this issue must be resolved.

### *IV. A New Approach: A Multi-Factored Guideline to the Mitigating Measures Analysis*

After evaluating the legislative history, the plain language of the ADA, and the information disseminated by the EEOC, courts are still in disagreement about whether they should disregard mitigating measures when evalu-

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197. *Id.*

198. *Id.*

199. *See id.* (finding internal inconsistencies within EEOC interpretive guidelines); *see also* Hodgens v. General Dynamics Corp., 963 F. Supp. 102, 107-08 (D.R.I. 1997) (same); Murphy v. United Parcel Serv., Inc., 946 F. Supp. 872, 880 (D. Kan. 1996) (same), *aff'd*, 141 F.3d 1185 (10th Cir. 1998).

200. *See* cases cited *supra* note 151 (listing cases in which courts decided EEOC interpretive guidelines were not reasonable construction of ADA and therefore not worthy of court's deference).

201. *See* cases cited *supra* note 87 (listing cases in which courts adhere to EEOC interpretive guidelines).

202. *See* cases cited *supra* note 151 (listing cases in which courts disregarded EEOC's position on mitigating measures).

203. *See* cases cited *supra* note 151 (listing cases in which courts disregarded EEOC's position on mitigating measures).

ating an ADA claim.[204] It is unclear which courts are right: the courts in which mitigating measures are not a consideration or the courts that find the use of mitigating measures an integral part of the impairment analysis. An evaluation of the decisions on either side of the disagreement demonstrates that neither approach is entirely correct.

One commentator, Professor Catherine J. Lanctot, builds upon the notion that neither the EEOC's position on mitigating measures nor the position of the courts in opposition to the EEOC's position is correct.[205] As a solution, Lanctot proposes the creation of a "per se disability" list.[206] According to Lanctot, certain impairments, such as insulin-dependent diabetes or the HIV infection, should constitute per se disabilities for purposes of an ADA claim evaluation.[207] The instance of these impairments alone satisfy independently the threshold question of whether or not an individual has a disability, regardless of whether the individual uses mitigating measures.[208] According to Lanctot, an evaluation of these per se disabilities should incorporate the use of mitigating measures for the limited purposes of determining the individual's qualifications for the position in question, an evaluation that takes place after a determination that the individual has a disability.[209] It is at that point in the court's analysis, Lanctot suggests, that an individual should present her use of mitigating measures to show that, with the assistance of the mitigating measure, she is a qualified individual with a disability.[210]

Although this approach may be helpful in a court's analysis of impairments that are included in a per se disability list, this proposal is too limited in its scope to be a useful solution to the overall problem of mitigating measures. Lanctot limits her proposal to the analysis of what she considers "per se disabilities."[211] She does not address whether courts should consider

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204. *See supra* Part III (discussing confusion among Courts of Appeals as well as district courts regarding mitigating measures).

205. *See* Lanctot, *supra* note 7, at 333 (discussing need to recognize certain impairments as per se disabilities which would eliminate need for courts to analyze these impairments under "substantially limiting" test).

206. *See id.* (proposing list of per se disabilities).

207. *See id.* at 333-36 (stating need to recognize per se disabilities such as diabetes and HIV infection).

208. *See id.* (describing proposal for "per se disability" list). Lanctot suggests that because prejudice against individuals is not fact-specific for certain disabilities, the evaluation of these same disabilities should not be fact-specific. *Id.* at 337.

209. *Id.* at 337.

210. *Id.*

211. *See id.* (discussing per se disabilities).

mitigating measures when evaluating impairments that do not make her list of per se disabilities. Furthermore, Lanctot fails to note Congress's and the EEOC's original hesitation in making a list of automatically included disabilities.[212] Both the EEOC and Congress recognized the importance of individualized analyses of disabilities.[213] Categorization of impairments, Congress reasoned, precludes courts from performing this desired individual analysis.[214] Thus, Lanctot's per se disability list is not likely to be an approach that Congress would favor. Even if Congress accepted Lanctot's proposal, her approach is still too limited to solve the general problem when evaluating any claimant who uses mitigating measures.

A solution to the mitigating measures issue that would be a useful tool for the courts should do the following: (1) address all situations in which mitigating measures might play a role; (2) comply with the purpose of Title I of the ADA; and (3) be easily applied by the courts. An approach to the mitigating measures issue that satisfies these criteria and that, if used, might remedy the division in the Courts of Appeals is the following multi-factored guideline that incorporates a three-part test. The multi-factored guideline allows courts to determine, on a case-by-case basis, if they should include a particular mitigating measure in the impairment evaluation.[215] It works by directing courts to evaluate each mitigating measure's reliability, effectiveness, and potential for unreliability and ineffectiveness for the claimant.

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212. *See* 29 C.F.R. app. § 1630 (1997) (explaining that nature of disability necessitates case by case evaluation). In her evaluation, Lanctot cites to individuals who attempted to have such a list of specific disabilities incorporated into the ADA. *See* Lanctot, *supra* note 7, at 333 (citing H.R. REP. No. 101-485, pt. 2, at 51 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 33).

213. *See* 29 C.F.R. app. § 1630 (stating that "the case by case approach is essential").

214. *Id.* The Supreme Court also hesitates to recognize "per se" disabilities. In *Bragdon v. Abbott*, the Supreme Court evaded the task of determining if HIV is a per se disability. Bragdon v. Abbott, 118 S. Ct. 2196 (1998). Rather, the court found that the effects of the disorder substantially limited the claimant in the major life activity of reproduction. *Id.* Thus, the Court avoided the need to determine if HIV, and potentially many other impairments, are "per se" disabilities.

215. *See* 29 C.F.R. app. § 1630.2(j) (outlining factors for courts to consider when determining if impairment is substantially limiting). The multi-factored guideline is structured after and can be compared to the three-part analysis the EEOC created for courts to assist them in deciding whether or not the effects of an impairment are substantially limiting. *Id.* According to the EEOC regulations, when evaluating the limiting effects of an impairment the courts should consider the following three factors: "(1) the nature and severity of the impairment, (2) [t]he duration or expected duration of the impairment, and (3) [t]he permanent or long term impact, or the expected permanent or long term impact of, or resulting from, the impairment." *Id.* Both this three-part analysis and the proposed multi-factored guideline provide courts a method of evaluation which permits them to consistently rule on issues that are inherently case specific.

Courts should consider each factor equally; no one factor should determine independently whether a court should consider the mitigating measure in the impairment evaluation.

This approach is rooted in the basic premise that some, but not all, mitigating measures should be a part of a court's impairment analysis.[216] In general, courts should include mitigating measures that are so infallible and reliable that, because of them, the underlying impairment essentially never impacts the claimants. On the other hand, courts should not include in their impairment evaluations those mitigating measures that are not fully effective or reliable. These mitigating measures more easily allow for a surfacing of the symptoms of the underlying impairment. The factors incorporated into the three-part guideline should ease the courts' analysis of the distinction between those types of mitigating measures. The factors address the attributes of the mitigating measure itself as applied to a specific individual's impairment. In particular, the courts should consider the following factors when evaluating a mitigating measure: (1) effectiveness of the mitigating measure; (2) reliability of the mitigating measure; and (3) potential unreliability and ineffectiveness of the mitigating measure. These three factors should enable the courts to distinguish between mitigating measures that should be a part of the impairment analysis and those that should not.

### *A. Effectiveness of the Mitigating Measure*

When evaluating the specific treatment used to limit the effects of an underlying impairment, the court should first look at the effectiveness of the mitigating measure for the claimant. How effective is this mitigating measure? Does it alleviate all or most of the individual's symptoms? If the individual uses a mitigating measure that is not truly effective in alleviating symptoms, a court should not include it in the impairment evaluation. But if the mitigating measure alleviates all of the effects of the underlying impairment, a court should evaluate the impairment in its medicated state. For example, a court should disregard corrective eye wear when evaluating an individual's vision impairment if the individual can demonstrate that, even with the corrective lenses, the individual still suffers from the effects of the underlying impairment.[217] Another example is an individual who

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216. *See id.* (stating that courts should disregard *all* mitigating measures). The multi-factored approach is not as broad. The multi-factored approach necessarily implies that courts should disregard only *some* mitigating measures.

217. *See* Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir. 1997) (evaluating vision impairment in its unmedicated state), *cert. denied*, 118 S. Ct. 693 (1998); Fallacaro v. Richardson, 965 F. Supp. 87, 91 (D.D.C. 1997) (same); Wilson v. Pennsylvania State Police Dept., 964

suffers from insulin-dependent diabetes. Although the individual may be able to regulate blood sugar with the insulin, she may, in certain situations, still not be able to control the effects of the diabetes.[218] Therefore, for this individual, the insulin treatment is not totally effective. Courts should not disqualify such an individual from ADA coverage because of inconsistently effective insulin treatment. If the treatment is not effective, courts should evaluate the impairment in its unmedicated state.

### *B. Reliability of the Mitigating Measure*

A second factor to consider is the reliability of the mitigating measure. What is the likelihood that the mitigating measure will become an insufficient method of alleviating the claimant's symptoms? Again, consider a claimant with a vision impairment who wears corrective lenses.[219] How frequently has the claimant's impairment been substantially limiting because, for example, something knocked her glasses off? How likely is this occurrence? If it is very likely, then it would be unreasonable to consider the claimant's vision in its corrected state. The mitigating measure she uses is not reliable enough. In the case of the insulin dependent diabetic considered above, the reliability of the treatment is closely related to the effectiveness of such a treatment.[220] It is possible that the insulin may not be effective in certain situations. In that case, the insulin is neither effective nor reliable and the courts should not evaluate the diabetes in its medicated state.

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F. Supp. 898, 901 (E.D. Pa. 1997) (same). *But see* Sutton v. United Air Lines, Inc., 130 F.3d 893, 902 (10th Cir. 1997) (concluding that courts should evaluate vision impairments in corrected state); Cline v. Fort Howard Corp., 963 F. Supp. 1075, 1080-81 n.6 (E.D. Okla. 1997) (same). In the above cases, the courts would have to determine on a case-by-case basis if the individual's corrective eye wear should be a part of the impairment evaluation. The multi-factored guideline would prevent the inconsistency that resulted under the influences of the EEOC interpretive guidelines.

218. *See* Gilday v. Mecosta County, 124 F.3d 760, 766 (6th Cir. 1997) (evaluating ADA claim of non-insulin dependent diabetic). The court in *Gilday* evaluated an insulin dependent diabetic who claimed that, even with treatment, certain stressful situations caused a fluctuation in his blood sugar level. *Id.* at 761. This, he alleged, resulted in the display of the normally controlled adverse effects of his impairment. *Id.* Under the multi-factored guideline approach, the court would evaluate Gilday's impairment in its unmedicated state. The mitigating measure Gilday used was not effective at all times nor was it a reliable treatment. *Id.*

219. *See supra* Part IV.A (applying effectiveness factor to claimant with vision impairment).

220. *See supra* note 160 (discussing Gilday v. Mecosta County, 124 F.3d 760 (6th Cir. 1997)).

### *C. Potential for Ineffectiveness or Unreliability of the Mitigating Measure*

A final factor that the courts should consider is the potential that the mitigating measure will become ineffective or unreliable in the future. For this evaluation, the court must consider the mitigating measure as it has worked for the general population. Does this mitigating measure traditionally lose its effectiveness or become unreliable after a certain time period? Do individuals often become immune to its ameliorative effects? This factor is a synthesis of the first two factors and involves an assessment of hypothetical factors. Although courts generally do not favor hypothetical approaches, it is necessary to evaluate fully the characteristics of the mitigating measure. If a particular mitigating measure has traditionally been effective in eliminating symptoms of an impairment but for only a limited time period, courts should not treat it as if it eliminates the underlying impairment. Similarly, if individuals typically become immune to the ameliorative effects of the medication, a court should not include the medication in the impairment evaluation.

This multi-factored guideline can resolve the problem of mitigating measures that presently divides the circuits. This approach is fair for both the plaintiff and the employer, is consistent with the provisions of the ADA, and is easy for courts to apply. The multi-factored guideline demands that courts, in accordance with the ADA and the EEOC interpretive guidelines, give individual attention to each claim. This individualized analysis protects plaintiffs by preventing courts from imposing blanket exclusions to coverage. Courts cannot evaluate a claim in its medicated state if it bases its decision to do so on general information about a mitigating measure and its effects on particular impairments. Similarly, an employer has a benefit under the multi-factored guideline that she did not have under the EEOC's interpretive guidelines: courts will, in some instances, consider mitigating measures when evaluating an impairment. Finally, this approach is not difficult for the courts to apply. As case law applying these guidelines develops, the multi-factored guideline will provide a workable framework for the courts. As a result, courts will become a more predictable and fair forum for ADA claimants and employers.

## *V. Conclusion*

Eight years after Congress enacted the ADA, courts are still uncertain as to exactly who this anti-discrimination statute covers. The courts are clearly fractured on this issue, particularly regarding individuals who alleviate the effects of their impairment with medical devices. For these individu-

als, the court in which they bring their claim could be the determinative factor in their claim's success or failure. Because Congress did not intend this result, the Supreme Court or Congress needs to resolve the persistent issue of how courts should treat mitigating measures.

The multi-factored guideline to mitigating measures is the best approach. It allows for an individualized evaluation of the mitigating measures involved in each plaintiff's claim but within a specific framework. Application of this framework will eventually create a standard by which courts, claimants, and employers can predictably evaluate the results of their claim. The multi-factored guideline will allow courts to bypass some of the ambiguous language of the ADA and provide, as Congress intended, a "clear, strong, consistent, enforceable standard addressing discrimination against individuals with disabilities."[221]

221. 42 U.S.C. § 12101(b)(2) (1994).