NOTES

THE AMERICANS WITH DISABILITIES ACT: ADVOCATING JUDICIAL DEFERENCE TO THE EEOC'S MITIGATING MEASURES GUIDELINES

I. INTRODUCTION

In 1990, Congress enacted the Americans with Disabilities Act ("ADA" or "the Act")[1] "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[2] Congress promulgated the ADA to expand the Rehabilitation Act of 1973, which prohibits discrimination against persons with disabilities in the federal sector and in federally funded programs.[3] Congress designed the ADA to extend the Rehabilitation Act's protection to the private and non-federally funded public sectors.[4]

The ADA protects individuals with disabilities from discrimination in employment, housing, education, public accommodations, transportation, voting, and access to public services.[5] Title I of the ADA protects "qualified individuals with disabilities"[6] from disability-based discrimination by "covered entities"[7] in re-

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[1] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1994) (codified as amended in scattered sections of 42 and 47 U.S.C.).

[2] 42 U.S.C. § 12101(b)(1) (1994).

[3] *See* 29 U.S.C. §§ 791, 794 (1994). In enacting and amending section 504 of the Rehabilitation Act, Congress "made a commitment to the handicapped, that, to the maximum extent possible they shall be fully integrated into the mainstream of life in America." S. REP. No. 890, at 39 (1978).

[4] The ADA's legislative history indicates that Congress intended the relevant caselaw developed under the Rehabilitation Act to be generally applicable under the ADA. *See* Pritchard v. Southern Co. Servs., 92 F.3d 1130, 1132 n.2 (11th Cir. 1996).

[5] *See* 42 U.S.C. § 12101(a)(3). This Note almost exclusively deals with Title I of the ADA which pertains to discrimination in employment.

[6] The term "qualified individual with a disability" is not defined in the ADA's text. The Equal Employment Opportunity Commission ("EEOC"), however, did define who is a qualified individual with a disability in the regulations accompanying the ADA. *See infra* note 15 and accompanying text. An individual with a disability who satisfies the requisite skill, experience, education, and other job-related requirements necessary to perform the job she holds or desires, and who with or without reasonable accommodation can perform the essential functions of such position is a "qualified individual with a disability" under the ADA. *See* 29 C.F.R. § 1630.2(m). In general, the term "essential functions" means "the fundamental job duties of the employment position the individual with a disability holds or desires." *Id.* § 1630.2(n). This definition does not include the marginal functions of the employment position. *See id.*

[7] The term "covered entity" means an employer, employment agency, labor organiza-

gard to job application procedures, hiring, advancement, discharge, compensation, job training, and other terms, conditions, and privileges of employment.[8] Congress intended for the ADA "to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities."[9]

Further, the ADA creates an affirmative duty for employers to make "reasonable accommodations"[10] for individuals with disabilities.[11] Thus, under the ADA, an employer acts in a discriminatory fashion if he fails to make a reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability, unless the employer can demonstrate that the accommodation would impose an "undue hardship"[12] on the operation of business.[13]

Not every person with an impairment meets the ADA's definition of a disabled individual.[14] In many situations, the language of the ADA does not answer the question of whether a claimant qualifies as a disabled individual under the statute. After Congress ratified the ADA, the Equal Employment Opportunity Commission ("EEOC") promulgated interpretive regulations and guidelines to address some of the statute's ambiguities.[15]

While the ADA has received praise for its noble goals, it has also been criti-

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tion, or joint labor-management committee." 42 U.S.C. § 12111(2). In general, "the term 'employer' means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year and any agent of such person. . . ." *Id.* § 12111(5)(A).

[8] *See id.* § 12112(a).

[9] 29 C.F.R. app. § 1630.

[10] The term "reasonable accommodation" can include making facilities used by employees readily accessible to and usable by individuals with disabilities, job restructuring, part-time or modified work schedules, reassignment to vacant positions, acquisition or modification of equipment or devices, modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations. *See* 42 U.S.C. § 12111(9).

[11] *See id.* § 12112(b)(5)(A).

[12] In general, the term "undue hardship" means action requiring significant difficulty or expense, when considered in light of the nature and cost of the accommodation, the overall financial resources of the covered entity, the number of persons employed at the facility in question, and the effect on expenses, resources, and operation of the facility. *See id.* § 12111(10).

[13] *See id.* § 12112(b)(5)(A).

[14] The determination as to whether an individual is "disabled" is a threshold issue; if a claimant does not meet the ADA's definition of disability, then she is not protected by the ADA against discrimination. *See* Soileau v. Guilford of Maine, Inc., 105 F.3d 12, 15 (1st Cir. 1997). An individual who meets the ADA's criteria for coverage has a right not to be discriminated against in employment on the basis of her disability, as long as she is qualified for the job, with or without a reasonable accommodation. *See supra* notes 9-13.

[15] The EEOC issued interpretive guidelines concurrently with the regulations in order to ensure that qualified individuals with disabilities understand their rights and in order to facilitate and encourage compliance by covered entities. *See* 29 C.F.R. app. § 1630.

cized for its ambiguous terms and definitions.[16] These ambiguities raised much debate about the ADA's coverage and fostered somewhat of a judicial uprising against the EEOC's regulations and guidelines.[17]

Federal courts have struggled recently with the question of who qualifies as an individual with a disability under the ADA. In other words, "should a court, in determining whether [a claimant] is 'an individual with a disability,' consider her untreated medical condition or her condition after treatment with ameliorating medications?"[18] For example, the circuit courts of appeal are split on the analysis required when determining ADA protection for a claimant who uses medication, assistive or prosthetic devices, or other mitigating measures to ameliorate the effects of her impairment. The First, Third, Seventh, Eighth, Ninth, and Eleventh Circuits hold that the disability determination should be made without regard to mitigating measures.[19] On the other hand, the Fifth, Sixth, and Tenth Circuits hold that use and effectiveness of mitigating measures should be taken into consideration when determining whether a claimant is disabled under the ADA.[20]

This Note examines the question of whether a claimant's use of mitigating measures should play a role in determining whether she qualifies for the ADA's protection. This Note advocates judicial deference to the EEOC's guideline regarding the use of mitigating measures which states that "[t]he existence of an impairment is to be determined without regard to mitigating measures. . . ."[21] The EEOC's mitigating measures guideline warrants judicial deference because it broadens the protective reach of the ADA, consistent with the congressional intent to eliminate discrimination against individuals with disabilities.

The "starting point for interpretation of a statue 'is the language of the statute itself.' "[22] Thus, the analysis of whether mitigating measures play a part in the

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[16] *See* Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 107 U. COLO. L. REV. 107, 108 (1997).

[17] *See id.*

[18] Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 858 (1st Cir. 1998) (holding that in light of the legislative history and broad remedial purposes of the ADA, Congress intended a reviewing court to evaluate a claimant's disability based on her underlying medical condition *without* considering the ameliorative effects of any mitigating measures).

[19] *See Arnold*, 136 F.3d 854; Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933 (3d Cir. 1997); Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997); Holihan v. Lucky Stores, Inc., 87 F.3d 362 (9th Cir. 1996); Harris v. H & W Contracting Co., 102 F.3d 516 (11th Cir. 1996); Roth v. Lutheran Gen. Hosp., 57 F.3d 1446 (7th Cir. 1995).

[20] *See* Sutton v. United Airlines, Inc., 130 F.3d 893 (10th Cir. 1997); Gilday v. Mecosta County, 124 F.3d 760 (6th Cir. 1997); Ellison v. Software Spectrum, Inc., 85 F.3d 187 (5th Cir. 1996) (noting "had Congress intended that substantial limitation be determined without regard to mitigating measures, it would have provided coverage . . . for impairments that substantially limit a major life activity.").

[21] 29 C.F.R. app. § 1630.2 (h).

[22] Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 835 (1990) (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).

disability determination must begin with the language of the ADA.[23]

II. DEFINING THE TERM "DISABILITY"

Deciding the proper role for mitigating measures in the disability determination first requires an examination of the definition of disability set forth by Congress in the ADA. The ADA's definition of the term disability has three parts.[24] An individual must satisfy at least one of these parts to qualify for ADA protection.[25] The ADA's definition of disability covers individuals who: (1) have a physical or mental impairment that substantially limits one or more of their major life activities; (2) have a record of such an impairment; or (3) are regarded as having such an impairment.[26] To establish a prima facie case of disability under the ADA, however, an individual must show not only that her impairment constitutes a disability under the ADA's definition, but also that she is qualified for the job that she seeks or has lost.[27]

While the definition of a disabled individual might initially seem clear from the ADA's text, the definition is actually quite ambiguous.[28] The statute itself does not define the terms "impairment," "substantially limits," or "major life activity."[29] The federal regulations interpreting the ADA, however, provide guidance as to the physical and mental impairments that qualify an individual for the Act's protection.[30] A "physical impairment" is any physiological disorder, condition, or anatomical loss that affects the neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-uninary, hemic, lymphatic, skin, or endocrine system.[31] A "mental impairment" is any mental or psychological disorder, such as mental

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[23] If the language of the statute is plain, that is if the language admits no more than one possible meaning, then the sole function of the courts is to enforce the statute according to its terms. *See* Caminetti v. United States, 242 U.S. 470, 485 (1917).

[24] *See* 42 U.S.C. § 12102(2).

[25] *See id.*

[26] *See id.* The ADA defines a disability in substantially the same terms as the Rehabilitation Act defines an individual with a handicap (amended to individual with a disability after inception of the ADA). *See* 29 U.S.C. § 706(8). In addition, the standard used to determine a violation of Title I of the ADA is the same standard used to determine violations of the Rehabilitation Act. *See* Fallacaro v. Richardson, 965 F. Supp. 87, 91 n.4 (D.D.C. 1997) "[T]he EEOC's 'no mitigating measures' interpretation is eminently reasonable, consistent with the language and purpose of the Rehabilitation Act and supported by the legislative history of the ADA." *Id.* at 93.

[27] *See* 42 U.S.C. § 12112.

[28] If the text of a statute is not unambiguously clear, courts are obliged to turn to other sources to discern the legislature's meaning. *See* Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 858 (1st Cir. 1998).

[29] Further, each of these terms could be interpreted in more than one way. *See id.* at 859.

[30] Note that the EEOC promulgated these regulations in conjunction with the implementation of the ADA. *See supra* note 15.

[31] *See* 29 C.F.R. § 1630.2(h)(1).

retardation, organic brain syndrome, emotional or mental illness, or specific learning disability.[32]

Once an individual establishes that her physical or mental limitation meets the ADA's definition of an impairment, she must then establish that her impairment substantially impacts one of her major life activities.[33] The federal regulations also provide guidance as to when a "substantial limitation" on a "major life activity exists."[34] Functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working[35] are all major life activities.[36] The regulations further provide that courts should consider certain factors when determining whether an impairment substantially limits a major life activity.[37] These factors include: (1) the nature and severity of the impairment, (2) the duration or expected duration of the impairment, and (3) the permanent or long term impact, or the expected permanent or long term impact of, or resulting from, the impairment.[38] Therefore, when an impairment significantly restricts the duration, manner, or condition under which an individual can perform a particular major life activity, as compared to an average person in the general population, her impairment is deemed substantially limiting.[39]

A. *The Courts Disagree on How to Regard the Ameliorative Effects of Mitigating Measures*

The ADA's text does not answer the question of whether a claimant who uses mitigating measures to ameliorate the effects of her impairment, nonetheless has "a physical or mental impairment that substantially limits one or more [of her] major life activities."[40] For example, how should the courts treat a diabetic who uses insulin to control her diabetes? Did Congress intend to deny ADA coverage to diabetics who take advantage of medical treatment?

In defining disability, the ADA's drafters did not write "impairment plus treatment" or "impairment after treatment" or "treated impairment;" they simply wrote "impairment."[41] A reasonable person could interpret the plain statutory

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[32] *See id.* § 1630.2(h)(2).

[33] *See* 42 U.S.C. § 12102(2).

[34] *See* 29 C.F.R. § 1630.2(i), (j).

[35] A person is substantially limited in the major life activity of working if she is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." *Id.* § 1630.2(j)(3)(i). Under this broad definition of substantial limitation, a plaintiff need not demonstrate that her impairment restricts her ability to perform all jobs. *See id.* § 1630.2(j)(3)(ii).

[36] *See id.* § 1630.2(i).

[37] *See id.* § 1630.2(j).

[38] *See id.*

[39] *See id.* app. § 1630.2(j).

[40] 42 U.S.C. § 12102(2).

[41] *See id.* § 12102(2); Sicard v. City of Sioux City, 950 F. Supp. 1420, 1436 (N.D. Iowa 1996)(holding that whether plaintiff's myopia substantially limits one or more of his

language to require an evaluation either before or after ameliorative treatment.[42] The word "impairment" could mean "impairment after the underlying condition is treated with ameliorative therapy,"[43] or the word "impairment" could mean "impairment that results from the underlying condition in the absence of any ameliorative treatment."[44] On its face, the language of the ADA gives no indication as to which interpretation Congress intended.[45] Thus, it is necessary to turn to an alternative method of statutory construction.[46]

The EEOC's interpretive guidelines[47] specifically address the "mitigating measures" question. "The existence of an impairment is to be determined *without regard to* mitigating measures."[48] In support of this position, the EEOC's compliance manual provides several illustrative examples.[49] First, the availability of an auxiliary aid, such as a hearing aid, to alleviate the effects of a condition has no bearing on whether the condition is an "impairment."[50] It is the scope of the condition itself, not its origin or capacity for being corrected, that determines whether a particular condition is an impairment.[51]

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major life functions must be determined without regard to his use of corrective lenses).

[42] *See* Arnold 136 F.3d at 859.

[43] *See id.* Courts which disagree with the EEOC's guidelines give this interpretation to the word "impairment." *See infra* note 60. Under this interpretation, a claimant would have to prove that she is "substantially limited" in a major life activity even with ameliorative medication in order to qualify for ADA protection. *See Arnold,* 136 F.3d at 860. Thus, an employer could avoid liability for discrimination by excluding the plaintiff from the ADA's coverage, without first giving the applicant an opportunity to show that she is qualified for the job (with or without a reasonable accommodation) with ameliorative medication. *See id.* at 863.

[44] *See Arnold,* 136 F.3d at 859. This is the interpretation that the EEOC and the Justice Department give to the term "impairment." *See id.* The Justice Department is charged with enforcing the ADA's prohibition of discrimination based on disability on the part of state and local governments and has interpreted the term "impairment" in the same way as the EEOC. *See* 28 C.F.R. Part 35, App. A § 35.104 (1997) ("disability should be assessed without regard to the availability of mitigating measures").

[45] *See Arnold,* 136 F.3d at 858.

[46] *See supra* note 28.

[47] *See supra* note 15. The EEOC published its interpretive guidelines in an appendix to the Federal Regulations. *See* 29 C.F.R. app. § 1630. While interpretive guidelines ordinarily do not carry the same weight as regulations, the EEOC's guideline on mitigating measures deserves special deference. *See infra* notes 63-114 and accompanying text.

[48] 29 C.F.R. app. § 1630.2(h) (emphasis added).

[49] *See* EEOC COMPLIANCE MANUAL, EEOC-CM-902, § 902.5.

[50] *See id.*

[51] *See id.* The Eighth Circuit recognized this principle in determining that ADA protection extended to a plaintiff whose glaucoma caused blindness in one eye despite the fact that the plaintiff's vision could be corrected to 20/20. *See* Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir. 1997). Specifically, the court held:

> The manner in which Doane must sense depth and use peripheral vision is significantly different from the manner in which an average, binocular person performs the same visual activity. Doane's brain has mitigated the effects of his impairment, but

Another example illustrates that an individual who, because of an impairment, can only walk for very brief periods of time is substantially limited in the major life activity of walking.[52] An individual who uses artificial legs is also substantially limited in the major life activity of walking because she is unable to walk without the aid of a prosthetic device.[53] Similarly, a diabetic who, without insulin, would lapse into a coma is substantially limited because she cannot perform major life activities without the aid of medication.[54] The EEOC's interpretation reflects the sensible position that the use of a prosthetic aid or medication does not eliminate the underlying disability although it may, as a practical matter, reduce or even eliminate the disability's *effects*.[55]

The EEOC also recognizes that a person with an impairment who depends on a mitigating measure to ameliorate the effects of her impairment may nonetheless still have limitations on her major life activities.[56] The ADA, therefore, provides protection for individuals who without corrective measures would be unable to perform a major life activity. For example, an average person does not need to wear a hearing aid as a precondition to hearing a conversation; a person who does require one, therefore, may have a substantial limitation on her ability to hear.[57] "To put a condition on the activity of . . . hearing, limits that ability, in the same way that putting a condition on the exercise of a right impairs that right."[58]

While many courts follow the EEOC's guidelines when determining whether a person's impairment rises to the level of a disability under the ADA,[59] other courts assert that the EEOC's guidelines are not true regulations but mere interpretive guidelines, and thus not on par with the ADA's statutory language.[60] The

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our analysis of whether he is disabled does not include consideration of mitigating measures. His personal, subconscious adjustments to the impairment do not take him outside of the protective provision of the ADA.

See id.

[52] *See* 29 C.F.R. app. § 1630.2(j).

[53] *See id.*

[54] *See id. See also* Sarsycki v. United Parcel Service, 826 F. Supp. 336, 340 (W.D. Okla. 1994) (holding that without insulin plaintiff would be unable to perform major life activities). It is generally understood that an insulin-dependent diabetic would be likely to suffer a coma or worse if unable to administer insulin as needed. *See* 4 AUSMAN & SNYDER'S MEDICAL LIBRARY § 5:139(a) (1989).

[55] *See* Fallacaro v. Richardson, 965 F. Supp. 87, 93 (D.D.C. 1997).

[56] *See id.*

[57] *See* Gilday v. Mecosta County, 124 F.3d 760, 763 (6th Cir. 1997).

[58] *Id.*

[59] *See, e.g.*, Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir. 1997); Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996) (stating simply that "[u]nder the EEOC regulations, we are not to consider mitigating measures"); *Fallacaro*, 965 F. Supp. at 93.

[60] *See, e.g.*, Wilking v. County of Ramsey, 983 F. Supp. 848 (D. Minn. 1997) (holding that the EEOC's mitigating measures guideline is in direct conflict with the language of the ADA). The court in *Wilking*, however, reached its conclusion without acknowledging

remainder of this Note will show that the EEOC's mitigating measures guideline commands judicial deference because it is a logical interpretation of the ADA,[61] consistent with both statutory language and legislative intent.[62]

III. CONGRESS CHARGED THE EEOC WITH INTERPRETING THE PROVISIONS OF THE ADA

The EEOC is the sole arm of the federal government with an exclusive focus on eradicating employment discrimination.[63] Congress charged the EEOC with issuing regulations to implement Title I of the ADA.[64] Under this charge, the EEOC has promulgated regulations as well as interpretative guidelines concerning discrimination in the workplace against individuals with disabilities.[65] Congress often formulates regulatory statutes in relatively broad terms and leaves it to the responsible agency to fill in the details by promulgating substantive rules.[66] "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the mak-

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contrary precedent of the Eighth Circuit. *See supra* note 51. *Cf.* Murphy v. United Parcel Service, 946 F. Supp. 872 (D. Kan. 1996) (holding that plaintiff's high blood pressure should be evaluated in its medicated state); Schluter v. Industrial Coils, 928 F. Supp. 1437 (W.D. Wisc. 1996) (holding that in medicated state, insulin-dependent diabetic was not disabled under the ADA); Coghlan v. H.J. Heinz Co., 851 F. Supp. 808 (N.D. Tx. 1994) (holding that diabetes should be evaluated in its medicated state because the EEOC's guidelines are not binding regulations but simply a statement of what the agency thinks the statute means).

[61] *See Harris*, 102 F.3d at 521. The limitation without regard to medication still needs to substantially impair one or more major life functions in order to be considered a disability under the ADA. Therefore, the EEOC's policy of looking at the individual prior to the use of any mitigating measures does not alter the standard practice that a finding of disability be made on an individual basis. *See* Sicard v. City of Sioux City, 950 F. Supp. 1420 (N.D. Iowa 1996).

[62] *See supra* note 68 and accompanying text. *Accord* Harris v. H & W Contracting Co., 102 F.3d 516, 521 (11th Cir. 1996) (holding that the ADA interpretive guidelines are based on a permissible construction of the statute). Courts which disagree with the EEOC's interpretative guidelines contend that their acceptance would render meaningless the statutory requirement that for an impairment to be considered a disability under the ADA it must substantially limit a major life activity. *See, e.g., Schluter*, 928 F. Supp. at 1445.

[63] *See* Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1979), *reprinted in* 5 U.S.C. app. at 1366 (1988).

[64] *See* 42 U.S.C. §§ 12116-12117. "Not later than one year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out [Title I]." 42 U.S.C. § 12116. When Congress delegates rule-making authority, the agency often has broad authority to promulgate legislative rules implementing the statute. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984).

[65] *See Coghlan*, 851 F. Supp. at 811.

[66] *See Chevron*, 467 U.S. at 843.

ing of rules to fill any gap left, implicitly or explicitly, by Congress."[67] Therefore, unless it is arbitrary, capricious, or manifestly contrary to the statute, a reviewing court must give the EEOC's interpretation of the ADA controlling weight.[68]

A. *The EEOC's Interpretive Guidelines Command Greater Deference than Ordinary Interpretive Guidelines*

The EEOC promulgated its policy on mitigating measures in an interpretive guideline.[69] While the "Interpretive Guidelines" provided by the EEOC in the appendix to the federal regulations are not the law,[70] courts should afford them a greater degree of deference than ordinary interpretive guidelines. Courts afford the deferential standard established in *Chevron*[71] to legislative rules which have endured "notice-and-comment" procedures prior to their general adoption and publication.[72] Though not regulations, the EEOC guidelines interpreting the ADA were subject to public notice and comment.[73]

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[67] Morton v. Ruiz, 415 U.S. 199, 231 (1974). Congress did not include a method for dealing with mitigating measures in the ADA's text. Further, Congress intended the EEOC's ADA regulations to have the force and effect of law. *See* 42 U.S.C. § 12117 (1993).

[68] *See Chevron*, 467 U.S. at 844. If the EEOC's policy choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, a reviewing court should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned. *See id.* at 845. Further, the authority to issue legislative rules, in the context of the statutory scheme of the ADA, carries with it the authority to interpret the law in a manner binding on the reviewing courts. *See* Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 57 (1995).

[69] *See* 29 C.F.R. app. § 1630.2(h).

[70] *See* Sekula v. Fed. Deposit Ins. Corp., 39 F.3d 448, 457 (3d Cir. 1994). Generally, interpretive rules are not intended to alter legal rights, but rather to state the agency's view of what existing law requires. *See id.* Although courts may find such interpretations persuasive and treat them as binding, judges have the discretion to substitute their own judgment on questions of statutory interpretation addressed in guidelines and not regulations. *See* Batterton v. Francis, 432 U.S. 416, 424 n.9 (1977). The main reason for this is that typically interpretive guidelines have not been subjected to "notice-and-comment," but instead have been "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." Shalala v. Guernsey Memorial Hosp., 514 U.S. 87, 99 (1995) (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 302 n.31 (1979) (quoting Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947)).

[71] 467 U.S. 837.

[72] *See Guernsey Memorial Hosp.*, 514 U.S. at 99. Interpretive rules, which are not subject to public notice and comment procedures, merely clarify or explain regulations, and are not meant to alter legal rights. *See* Appalachian States Low-Level Radioactive Waste Comm'n v. O'Leary, 93 F.3d 103, 112-13 (3d Cir. 1996).

[73] *See* Wilson v. Pennsylvania State Police Dept., 964 F. Supp. 898, 902 n.4 (E.D. Pa.

B. *The EEOC's Mitigating Measures Interpretation Is Consistent with Legislative Intent*

The Supreme Court has long recognized that an agency's interpretation of a statute, which Congress entrusted it to administer, commands "considerable weight" and will not be disturbed, unless it appears from the statute or legislative history that Congress intended a different interpretation.[74] A review of the relevant House and Senate reports reveals that the EEOC's mitigating measures guideline is consistent with the Act's legislative history.[75]

The legislative history behind the ADA demonstrates that Congress intended "impairment" to mean untreated impairment.[76] Three congressional reports specifically refer to the fact that an individual's use of mitigating measures does not have an impact on whether her underlying disability will qualify for the ADA's protection.[77] In promulgating the mitigating measures guideline, the EEOC not only relied on the Act's legislative history, but also directly mimicked the language of both the House and Senate Reports.[78]

House Report No. 101-485(II) states that whether a person has a disability should be assessed without regard to the availability of mitigating measures,

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1997) (citing 56 Fed. Reg. 8578 (1991) (notice of proposed rule-making, to be codified in appendix to 29 C.F.R. pt. 1630, proposed Feb. 28, 1991); 56 Fed. Reg. 35726 (1991) (final rule to be codified in an appendix to 29 C.F.R. pt. 1630)). The "notice-and-comment" procedures are those found in the Administrative Procedures Act, 5 U.S.C. § 553 (1996). *See Guernsey Memorial Hosp.*, 514 U.S. at 90. The Administrative Procedures Act mandates that before an agency makes written findings describing the regulation's basis and purpose, it must publish commentary on the proposed rule. *See* 5 U.S.C. § 553(b)(3), (c).

[74] *See Chevron*, 467 U.S. at 844-45. In deferring to an agency's interpretation of the law, the Court is not abdicating its constitutional duty to say what the law is. Rather, the Court is simply applying the law as it is made by the authorized law-making entity. If Congress has granted law-making authority to an agency, and a reviewing court does not defer to that agency's interpretation, the court would be overstepping the boundaries of legislative supremacy. *See* Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 27-28 (1983).

[75] *See* S. REP. NO. 101-116 (1989), *reprinted in* A&P S. REP. 101-116; H.R. REP. NO. 101-485(II) (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 303; H.R. REP. NO. 101-485(III) (1990), *reprinted in* 1990 U.S.C.C.A.N. 445.

[76] *See* Sicard v. City of Sioux City, 950 F. Supp. 1420, 1438 (N.D. Iowa 1996).

[77] *See* S. REP. NO. 101-116 (1989), *reprinted in* A&P S. REP. 101-116; H.R. REP. NO. 101-485(II) (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 303; H.R. REP. NO. 101-485(III) (1990), *reprinted in* 1990 U.S.C.C.A.N. 445. This language directly refutes the opinion of courts such as *Hodgens* v. *General Dynamics Corp.*, which held that "in the absence of any indication that Congress intended the determination of disability to be based upon what an individual's ability to function might be if he abandoned reasonable treatment measures, the plain language of the statute requires that the determination be based upon the individual's ability to function taking into account the ameliorative effects of medication." 963 F. Supp. 102, 108 (D.R.I. 1997).

[78] *See Sicard*, 950 F. Supp. at 1437.

such as reasonable accommodations or auxiliary aids.[79] As an example, the Report cites a person who is hard of hearing and, as a result, substantially limited in the major life activity of hearing even though the use of a hearing aid might correct her hearing loss.[80] In addition, the report states that the "first prong" of the definition of disability[81] covers individuals with impairments such as epilepsy or diabetes if the untreated condition substantially limits one of the individual's major life activities.[82]

Similarly, House Report No. 101-485(III) states that impairments should be assessed without considering whether mitigating measures would turn an otherwise substantially limiting impairment into a less-than-substantial limitation.[83] Senate Report No. 101-116 provides that "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids."[84] The EEOC's interpretive guideline, therefore, clearly reflects congressional intent to establish that a plaintiff has a qualifying disability if she has a substantially limiting impairment, without regard to mitigating measures.[85] Accordingly, reviewing courts should afford the EEOC's mitigating measures guideline substantial deference.[86]

C. *The EEOC Has Correctly Interpreted the ADA with Regard to the Role of Mitigating Measures in the Disability Determination*

The EEOC's mitigating measures guideline correctly interprets the ADA and, therefore, commands judicial deference. The mitigating measures guideline goes beyond mere clarification of an existing rule.[87] The ADA's text and the regula-

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[79] H.R. REP. NO. 101-485(II), *reprinted in* 1990 U.S.C.C.A.N. at 334.

[80] *See id.*

[81] Having "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2). *See also supra* notes 25-26 and accompanying text.

[82] *See* H.R. REP. NO. 101-485(II), *reprinted in* 1990 U.S.C.C.A.N. at 334. *See also* Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933 (3d Cir. 1997) (holding that an epileptic who controls his disability with medication can maintain an employment discrimination action under the ADA).

[83] H.R. REP. NO. 101-485(III), *reprinted in* 1990 U.S.C.C.A.N. at 451.

[84] S. REP. No. 101-116 at 23.

[85] *See* 29 C.F.R. app. § 1630.2(j).

[86] *See* Shalala v. St. Paul-Ramsey Medical Ctr., 50 F.3d 522, 527 n.4 (8th Cir. 1995) (considering the validity of the reasoning behind the agency's interpretation in order to determine how much deference to give the interpretation).

[87] If the statutory scheme would have been fully operative without the regulations and the regulation only published standards to be used in agency adjudication, the agency's rules would be deemed merely interpretive. *See* American Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1108-09 (D.C. Cir. 1993). The ADA, however, would not be fully operative without the EEOC's interpretive guidelines. The statute's text is completely silent on the question of mitigating measures. The EEOC's guidelines are necessary for establishing procedures for how to deal with potential claimants whose disabilities are under the control of medication or some other mitigating measure.

tions accompanying it are silent as to whether a court should take account of mitigating factors in determining whether a plaintiff's impairments are disabling. In *Chevron,*[88] the Supreme Court held:

> [When] Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous regarding the specific issue, the question for the court is whether the agency's answer is a permissible construction of the statute.[89]

The EEOC's mitigating measures guideline is a permissible construction of the ADA. The guideline states that the determination of whether an individual qualifies for ADA protection depends on whether her "impairment" substantially limits one of her major life activities, without regard to mitigating measures such as medicines, or assistive or prosthetic devices.[90] This interpretation is "the most natural and reasonable reading of the statute, and hence is certainly a permissible construction of the statute."[91]

It is not necessary for the reviewing court to conclude that the agency's construction is the only reasonable interpretation of the statute, or that the court would have reached the same conclusion.[92] For deference to be afforded to the agency's interpretation, it is only necessary for the reviewing court to determine that the agency's interpretation is reasonable and is not contrary to congressional intent.[93]

Judges, who are not experts in the field, and are not part of either political branch of the government, do not have the responsibility of assessing the wisdom of an agency's policy decision.[94] While agencies are not directly accountable to the people, the Chief Executive, who appoints agency directors, is directly accountable to the people.[95] It is entirely appropriate for the EEOC to make policy choices regarding competing interests, which Congress itself either inadvertently did not resolve, or intentionally left to the agency to resolve in light of everyday realities.[96]

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[88] 467 U.S. 837.

[89] 467 U.S. at 843. "[O]f course, no deference is due to agency interpretations at odds with the plain language of the statute itself." Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 171 (1989).

[90] *See* 29 C.F.R. app. § 1630.2(h),(j).

[91] Sicard v. City of Sioux City, 950 F. Supp. 1420, 1435 (N.D. Iowa 1996).

[92] *See* West Coast Truck Lines, Inc. v. Weyerhaeuser Co., 893 F.2d 1016, 1023 (9th Cir. 1990).

[93] *See id.* In addition, "close cases of interpretation of an administrative regulation must be resolved in favor of the administrator's interpretation. . . ." Cook v. Dir., Office of Workers' Compensation Programs, 816 F.2d 1182, 1187 (7th Cir. 1987).

[94] *See Chevron*, 467 U.S. at 865.

[95] *See id.*

[96] *See id.* at 865-66. The EEOC is charged with balancing the competing interests of employers and the disabled workforce. Its efforts at attaining this balance should be af-

Courts that disagree with the EEOC's reasoning about the ameliorative effects of medications or devices, such as eyeglasses, read out of the statute the requirement that the impairment "substantially limit" one or more of the plaintiff's major life activities.[97] These courts reach this decision based on the argument that it is difficult to see how an ameliorated condition, a condition that no longer affects an individual's ability to function normally, is an impairment, much less an impairment that substantially limits a major life activity.[98] These courts find that the use of the present tense in the term "substantially limits" connotes the requirement of an existing limitation as opposed to a hypothetical one.[99] Essentially these courts require that the corrected impairment substantially limits a major life activity before they will find a person disabled under the ADA.

The EEOC's guideline, however, does not read "substantially limits" out of the statute. Instead, the EEOC's interpretation places "substantially limits" in proper relation to the term impairment.[100] In other words, in order for a claimant to qualify for ADA protection, her untreated impairment must substantially limit at least one of her major life functions.[101] If Congress had meant for the analysis to examine what could happen if the claimant did not treat her condition, it could have explicitly said so.[102] Furthermore, the EEOC's policy considers all plaintiffs at the same point in time, before any mitigating measures enter the equation, and thus avoids creating a different standard for plaintiffs who take medication or use prosthetic devices to control their condition.[103]

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forded the same deference that the Court afforded the EPA in *Chevron*. In *Chevron*, the Supreme Court held that the EPA's definition of the term 'source' was a permissible construction of the Clean Air Act which seeks to accommodate progress in reducing air pollution with economic growth. *See id.* at 866.

[97] *See, e.g.*, Schluter v. Industrial Coils, 928 F. Supp. 1437, 1445 (W.D. Wisc. 1996); Coghlan v. H.J. Heinz Co., 851 F. Supp. 808 (N.D. Tx. 1994); Hodgens v. General Dynamics Corp., 963 F. Supp. 102 (D.R.I. 1997) (holding that an individual who takes medication that prevents a physical or mental condition from substantially limiting any major life activities is not disabled within the meaning of the ADA).

[98] *See, e.g., Schluter*, 928 F. Supp. at 1445; *Coghlan*, 851 F. Supp. at 813; *Hodgens*, 963 F. Supp. at 107.

[99] *See Schluter*, 928 F. Supp. at 1445. The court held that in order to make out a prima facie case of disability, the plaintiff would have to show that her diabetes substantially limits her in a major life activity by showing that it affects her in fact, rather than how it would affect her hypothetically if she were unable to obtain insulin. *See id.*

[100] *See* Sicard v. City of Sioux City, 950 F. Supp. 1420, 1436 (N.D. Iowa 1996).

[101] The EEOC guideline does not suggest that individuals who control their impairments with medication or corrective devices are per se disabled; it merely suggests that the use of an ameliorative device does not negate the possibility that the impairment substantially limits a major life function. *See* Wilson v. Pennsylvania State Police Dept., 964 F. Supp. 898, 906 n.8 (E.D. Pa. 1997). There will naturally be times when a claimant's untreated impairment does not substantially affect one or more of her life functions. These claimants do not qualify for ADA protection.

[102] *See Hodgens*, 963 F. Supp. at 107.

[103] *See* Gilday v. Mecosta County, 124 F.3d 760, 764 n.5 (6th Cir. 1997). Consider the

The *Sutton*[104] court, which also disagreed with the EEOC's interpretation, used the portion of the guidelines that discuss whether an individual is disabled under the "regarded as" prong of the ADA to support its position.[105] The court reasoned that because the guidelines use an employee who has controlled high blood pressure as an example of a *not* substantially limiting impairment,[106] the EEOC recognized that it is the actual effect on the individual's life that is important in determining whether an individual is disabled under the ADA.[107] As previously discussed, the EEOC does in fact look to the actual effect of an impairment on an individual's life *before* determining whether he or she is disabled under the ADA.[108]

Further, it is possible for an individual to have a "disability" under both the first[109] and third[110] prongs of the ADA.[111] An individual could have both an impairment that substantially limits a major life activity and be "regarded as" having such an impairment.[112] One does not preclude the other.[113] The ADA protects individuals against discrimination based on both actual disability and being regarded as having a disability.[114]

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following hypothetical: If we consider the ameliorative effects of mitigating measures in determining qualification for ADA protection, the ADA would protect someone who could not afford treatment for her impairment from discrimination in hiring. But, once hired and able to obtain treatment under the employer's health plan, she would lose the ADA's protection because she would no longer be "disabled." The employer could then fire her on the basis of disability without fear of ADA liability. *See* Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 862 (1st Cir. 1998).

[104] 130 F.3d 893 (10th Cir. 1997).

[105] *See* 42 U.S.C. § 12102(2)(C). An individual is covered under this prong of the ADA when her employer regards her as having a substantially limiting impairment but in fact her impairment is not substantially limiting. *See* 29 C.F.R. § 1630.2(l)(1).

[106] The guidelines state that if an employer reassigns an employee, who has controlled high blood pressure, to less strenuous work because of unsubstantiated fears that the employee will suffer a heart attack if she continues to perform strenuous work, the employer would be regarding the employee as disabled. *See* 29 C.F.R. app. § 1630.2(l) para. 6. Because this employee is getting protection under the 'regarded as' portion of the statute, however, her blood pressure is in fact not disabling. The *Sutton* court suggests that under this example, the employee is not actually disabled because in the controlled state, her impairment does not substantially limit a major life activity. *See Sutton*, 130 F.3d at 902.

[107] *See Sutton*, 130 F.3d at 902.

[108] *See supra* notes 100-01 and accompanying text.

[109] The first prong covers individuals who "actually have" disabilities. *See supra* notes 25-26 and accompanying text.

[110] The third prong covers individuals who are "regarded as having" disabilities. *See supra* notes 25-26.

[111] *See* Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 860 (1st Cir. 1998).

[112] *See id.*

[113] *See id.*

[114] *See id.*

D. *Courts in the Past Have Granted the EEOC Deference in Rule-making*

Courts have generally afforded wide deference to the EEOC's interpretive regulations.[115] In addition, this would not be the first time that courts relied on the EEOC's interpretive guidelines to make a decision concerning the scope of the ADA. The Fifth Circuit relied on a review of the EEOC's interpretive guidelines to support the proposition that while a given disability may limit one employee, it does not necessarily limit another.[116] Similarly, the First Circuit relied on the EEOC's published appendix to the ADA's regulations to establish the permissible scope of pre-employment inquiries concerning disabilities.[117] Likewise, in addressing the issue of whether a plaintiff's impairment substantially limits one or more major life functions, courts should follow the EEOC's interpretive guideline and conduct their inquiry without regard to the plaintiff's use of mitigating measures.

IV. POLICY CONSIDERATIONS

In recent years, courts faced with what is incorrectly perceived to be a rise in disability claims overall[118] have become increasingly intolerant of what they perceive to be attempts by minimally impaired individuals to manipulate the law.[119] This course of action from the judiciary is not only unacceptable, but also contrary to the congressional purpose of the ADA.[120]

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[115] *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986). As an administrative interpretation of Title VII by the enforcing agency, the EEOC's guidelines, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Id.* (quoting General Electric Co. v. Gilbert, 429 U.S. 125, 141-42 (1976)).

[116] *See* Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 164 (5th Cir. 1996).

[117] *See* Grenier v. Cyanamid Plastics, Inc., 70 F.3d 667, 672 (1st Cir. 1995).

[118] In actuality, "the EEOC's statistics show that from the time of the ADA's effective date in July 1992, the percentage of ADA charges filed has been no greater than the percentage of charges filed under the other anti-discrimination laws enforced by the Commission." Paul Miller, *The Americans with Disabilities Act In Texas: The EEOC's Continuing Efforts in Enforcement,* 34 HOUS. L. REV. 777, 790 (1997).

[119] *See, e.g.,* Roth v. Lutheran General Hospital, 57 F.3d 1446, 1460 (7th Cir. 1995). The *Roth* court recognized "that the Rehabilitation Act and the Americans with Disabilities Act are important legislation that seek to integrate disabled individuals into the economic and social mainstream, and to ensure that the truly disabled will not face discrimination. . . ." *Id.* The court, however, also stressed the importance of distinguishing between extending statutory protection to the truly disabled individual and allowing individuals with marginal impairment to use disability laws as bargaining chips to gain competitive advantage. *See id.*

[120] The ADA is a broad remedial statute designed to eliminate discrimination against individuals with disabilities. *See* 42 U.S.C. § 12101. Remedial legislation, such as the ADA, "should be construed broadly to effectuate its purposes." Tcherepin v. Knight, 389 U.S. 332, 336 (1967). Further, Congress intended for the ADA to extend to a large number of Americans. The first finding Congress listed in the Act's preamble is "some

The EEOC's interpretive guideline regarding mitigating measures is legitimate. The intent and spirit of the ADA to help individuals with substantial physical or mental impairments overcome traditional barriers to employment is embodied in the EEOC's interpretive guidance.[121] The EEOC's definitions of "impairment" and "substantially limits" suggest that "the existence or availability of mitigating measures does not negate the fact that a person has a disability and may be subject to discrimination and physical barriers to employment."[122]

In addition, the theory underlying the ADA requirement that employers make reasonable accommodations for disabilities is that many individuals can overcome their disabilities through technology or other assistance.[123] When a person with a disability overcomes the effects of her condition with an ameliorative device, she will rarely require any sort of accommodation.[124] This achievement, however, should not leave her subject to discrimination based on her underlying disability.[125] It is hard to imagine that Congress wished to protect workers who leave it to their employer to accommodate their impairments but deny protection to those who take it upon themselves to overcome their disabilities.[126] Adherence to such a policy would create a disincentive to self-help.[127]

Courts that disagree with the EEOC's mitigating measures interpretation reason that granting ADA coverage to a plaintiff who uses eyeglasses or insulin to correct her impairment extends the disability laws beyond their scope.[128] This,

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43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older." Arnold v. United Parcel Serv., 136 F.3d 854, 862 (1st Cir. 1998)(citing 42 U.S.C. § 12101(a)(1)).

[121] Even with such a broad view of "disability," employers' concerns and interests are more than adequately protected through other provisions of the Act. *See Arnold*, 136 F.3d at 861. For example, the claimant must still be "qualified" for the job she seeks. *See supra* note 6. In addition, the Act only requires employers to make "reasonable accommodations" to help a qualified individual complete her job functions. *See supra* note 10.

[122] Hendler v. Intelecom USA, Inc., 963 F. Supp. 200, 206 (E.D.N.Y. 1997) (holding that the use of medical treatment does not make an individual any less disabled).

[123] *See* Gilday v. Mecosta County, 124 F.3d 760, 764 (6th Cir. 1997) (citing 42 U.S.C. §§ 12102(1), 12111(9)).

[124] *See id.*

[125] *See id.* For example, a hearing-impaired employee could invoke ADA protection if her employer fired her for wearing a hearing aid in spite of the company's strict dress code, believing that hearing aids project a poor image. *See id.* With the protection of the ADA, this person could request a waiver of the dress code so that she could wear her hearing aid. *See id.*

[126] *See id.* at 764 n.5. The purpose of the ADA is to prohibit discrimination against qualified individuals with disabilities who are able to perform the essential functions of their job with or without reasonable accommodation. *See* Krocka v. Riegler, 958 F. Supp. 1333 (N.D. Ill. 1997) (holding that the fact that the plaintiff, who suffers from depression, alleges that he is able to perform his duties as a police officer so long as he takes Prozac does not imply that he does not suffer a substantial impairment of a major life activity).

[127] *See Gilday*, 124 F.3d at 764 n.5.

[128] *See* Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986) (stating that the Rehabilitation Act's purpose, to assure that truly disabled yet capable individuals are protected from

however, is not the case because the ADA's coverage is not without limit. "[T]he mere use of a mitigating measure does not automatically prove the presence of a disability; some individuals may use medication, prosthetic devices, or auxiliary aids to alleviate impairments that are not substantially limiting."[129] Moreover, the EEOC guidelines do not act as a per se list of covered disabilities.[130] Triers of fact still have the opportunity to evaluate the merits of individual claims.[131] Recent decisions show that courts are not restrained in rejecting clearly meritless disability claims.[132]

A. *Individuals Who Use Mitigating Measures Still Have Life-limiting Impairments*

Courts that require a plaintiff to show how her impairment actually limits her in a major life activity, rather than how it would affect her hypothetically if she were unable to continue using corrective measures,[133] are missing part of the big picture. The fact that an individual can mitigate or correct her impairment does not affect the underlying nature of her disorder or condition.[134] If the underlying disorder or condition worsens or considerably diminishes an individual's physical or mental capacity, then courts should consider the disorder an impairment regardless of whether the individual uses corrective measures to compensate.[135] For example, as the court discussed in *Hendler v. Intertelecom USA, Inc.*,[136] reviewers should not undermine the magnitude of a physical impairment, such as a lost limb, simply because prosthetic devices can minimize the impact of the impair-

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discrimination, would be debased if individuals with minor or commonplace impairments could invoke the statute's protections).

[129] Roth v. Lutheran General Hospital, 57 F.3d 1446, 1454 (7th Cir. 1995) (quoting EEOC Compliance Manual 902.5 (March 1995)).

[130] *See* 29 C.F.R. app. § 1630.2(j). The determination of whether an individual is a qualified individual with a disability should be made on a case-by-case basis. "The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual." *Id.*

[131] *See* Shiflett v. GE Fanuc Automation Corp., 960 F. Supp. 1022, 1029 (W.D. Va. 1997) (holding that making the disability determination of the plaintiff's undedicated state will not open the door to expansive employer liability under the ADA).

[132] *See, e.g.*, Fenton v. Pritchard Corp., 926 F. Supp. 1437, 1445 (D. Kan. 1996) (rejecting claim that individual who easily lost his temper was disabled within the meaning of the ADA).

[133] *See* Schluter v. Industrial Coils, 928 F. Supp. 1437, 1445 (W.D. Wis. 1996). The court determined that in order for a diabetic plaintiff to be considered disabled under the ADA, she must prove that her insulin controlled diabetes substantially limits one or more of her major life functions. *See id.*

[134] "Individuals who need wheelchairs, artificial limbs, hearing aids, and other prosthetic devices clearly have impairments which may substantially limit their major life activities." Fallacaro v. Richardson, 965 F. Supp. 87, 93 (D.D.C. 1997).

[135] *See* Roth v. Lutheran Gen. Hosp., 57 F.3d 1446, 1454 (7th Cir. 1995).

[136] 963 F. Supp. 200.

ment.[137] The individual who wears a prosthetic is no less disabled and no less subject to discriminatory treatment because she has made use of the best available medical treatment.[138]

Consider, for example, the plaintiff who applies for a job that has a mandatory vision requirement. The department she applies for requires an uncorrected vision of 20/200 and a corrected vision of 20/20 in one eye and 20/30 in the other. The Plaintiff has an uncorrected vision of 20/600 in both eyes and a corrected vision of 20/20 in both eyes. The Defendant employer turns the plaintiff down for the job because her uncorrected vision does not meet the department's standard.[139] At the same time, the defendant contends that the plaintiff is not a handicapped individual within the meaning of the Rehabilitation Act because her vision is completely correctable.[140] In ruling on this case, the Court stated, "the very fact that [the department] has a requirement for uncorrected as well as corrected vision recognizes that the availability of corrective eyewear does not make a visual disability irrelevant."[141] Therefore, it makes little sense to deprive ADA protection to an individual who has a visual impairment merely because she can accommodate for her disability. An individual who has a visual impairment is not non-disabled as a matter of law simply because corrective eyewear technology can correct her vision.[142]

In *Arnold v. United Parcel Service, Inc.*,[143] UPS would have hired plaintiff Arnold as a 'cover mechanic' but for his inability to obtain a commercial vehicle license, due to his insulin-dependent diabetes.[144] Arnold however, had successfully controlled his diabetes for twenty-three years, and argued that he would have been able to complete the essential functions of the 'cover mechanic' position, if UPS was willing to give him a reasonable accommodation.[145] "UPS argue[s] that the statutory language of the ADA plainly and unambiguously requires consideration of the impairment as treated with all ameliorative medications. . . ."[146] Under UPS's interpretation, Arnold did not even qualify for ADA protection because with the use of insulin, Arnold did not meet the ADA's definition of disabled individual.[147] In finding that Arnold qualified for ADA

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[137] *See id.* at 206.

[138] *See id.*

[139] *See Fallacaro*, 965 F. Supp. at 93.

[140] *See id.*

[141] *Id.*

[142] *See id.*

[143] 136 F.3d 854.

[144] *See id.* at 857, 862. Commercial vehicle licenses are a requirement for the cover mechanic position and are issued by the Department of Transportation ("DOT"). DOT regulations preclude insulin-dependent diabetics from obtaining the DOT certification required to operate commercial vehicles. *See id.*

[145] *See id.* at 862. Ordinarily, whether an individual could complete the essential functions of the job with or without a reasonable accommodation would be a factual question for the court to determine. *See id.*

[146] *Id.* at 859.

[147] *See id.* at 862.

protection, the court stated: "UPS's interpretation fails because 'by confus[ing] the disease with its treatment,' it conflates two separate parts of the ADA."[148] Whether a person's impairment meets the ADA's definition of disability is a question completely distinct from whether an individual has the qualifications to perform the essential functions of a job with or without reasonable accommodation.[149] In this situation, UPS would still have the opportunity to prove that Arnold does not have the necessary qualification for the position because he is unable to obtain a commercial vehicle license and there is no reasonable accommodation that UPS can make. It is, however, inherently unfair to deny Arnold ADA protection because he is fortunate enough to be able to control his diabetes with insulin.

B. *Uniformity of Decisions*

The unbalanced coverage of ADA claims does a great disservice to individuals with disabilities and to the public at large. The failure of the circuit courts of appeal to uniformly accept the EEOC's regulations and guidelines interpreting the ADA is one of the main reasons for the imbalance in ADA coverage. The question of the level of deference due the EEOC's statutory interpretations was raised in the petition for certiorari in *Garcia v. Spun Steak Co.*[150] Over the dissents of Justices Blackmun and O'Connor, the Court denied certiorari.[151] Due to the split among the circuit courts, however, the question of deference to the EEOC's statutory interpretations undoubtedly will come before the Supreme Court again in the future.[152]

The deference due to the EEOC's mitigating measures guideline is an appropriate issue for the Court to address given the overwhelming split among the circuits.[153] It is inherently unfair for the circuit courts to flout congressional intent, ignore the EEOC's interpretation, and by judicial fiat decide who may receive the ADA's protection.[154] Currently, because of the differing interpretations on the role of mitigating measures in the disability determination process, an insulin-dependent diabetic will qualify for ADA protection in the First Circuit, but not

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[148] *Id.* at 862-63 (citing Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933, 937 (3d Cir. 1997)).

[149] *Arnold*, 136 F.3d at 861-62.

[150] Petition for Writ of Certiorari at 17-19, Garcia v. Spun Steak Co. (No. 93-1222). In the case before the Ninth Circuit, the Court held that courts may consider EEOC guidelines, but the guidelines are not binding. *See* Garcia v. Spun Steak Co., 998 F.2d 1480, 1489 (9th Cir. 1993).

[151] *See* Garcia v. Spun Steak Co., 114 S. Ct. 2726 (1994) (mem.).

[152] *See* White, *supra* note 68 at 55 n.24.

[153] In writing the majority opinion in *Bragdon v. Abbott*, Justice Kennedy noted the dispute over the role for mitigating measures in assessing the substantiality of an individual's limitation. 118 S. Ct. 2196, 2206 (1998) ("We need not resolve this dispute in order to decide this case, however.").

[154] *See supra* note 19.

in the Sixth Circuit.[155] The need for a uniform standard in determining ADA protection is critical. Fortunately, the EEOC's guidelines interpreting the ADA already provide the framework for determining whether a claimant is an individual with a disability under the Act.[156] Now it is only a matter of getting the circuit courts to follow these guidelines. "Until the threshold issue of ADA coverage is resolved, the ADA will never have the transformative effect its supporters optimistically anticipated in 1990."[157]

V. CONCLUSION

The ADA is a broad remedial statue, designed "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[158] It is consistent with Congress' broad remedial goals in enacting the ADA to interpret the words "individual with a disability" broadly, so that the Act protects more people from discrimination. In stating that "[t]he determination of whether a condition constitutes an impairment must be made without regard to mitigating measures,"[159] the EEOC's guidelines are a vehicle for achieving the goals Congress intended in 1990 when it ratified the ADA.

Sheryl Rebecca Kamholz

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[155] *See Arnold*, 136 F.3d 854; Gilday v. Mecosta County, 124 F.3d 760 (6th Cir. 1997).

[156] *See* 29 C.F.R. app. § 1630.

[157] 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).

[158] *See* 42 U.S.C. § 12101(b)(1).

[159] 29 C.F.R. app. § 1630.2(j).