

## Recent Developments in Health Law

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### Harvard Law & Health Care Society

#### Disability & ADA: Supreme Court Clarifies the Meaning of Disability Under ADA

In a recent trilogy of decisions, the U.S. Supreme Court resolved doubt in the interpretation of the Americans with Disabilities Act of 1990 (ADA),<sup>1</sup> but created considerable controversy. The ADA was enacted to prohibit discrimination against individuals on the basis of their disabilities. The Court ruled that in determining whether an individual is "disabled" within the meaning of the ADA, courts should take into account any corrective or mitigating measures—whether artificial or the body's own—that bear on the individual's condition. The Court's rulings in *Sutton v. United Airlines, Inc.*,<sup>2</sup> *Albertson's, Inc. v. Kirkingburg*,<sup>3</sup> and *Murphy v. United Parcel Service*<sup>4</sup> placed substantial emphasis on the text of the ADA, rather than its legislative history, and particularly on the congressional finding (as incorporated into the stat-

ute) of the number of disabled Americans. In each case, the court decided that the plaintiff was not disabled and therefore refused to invoke the discrimination protections offered by the Act.

The primary issue addressed in the cases is: In determining whether an individual is disabled under the ADA, should reference be made to corrective measures? Corrective measures are those that mitigate an individual's impairment. They may be artificial (such as eyeglasses, corrective lenses, or medication), or the body's own (such as the brain's ability to develop subconscious mechanisms for coping with visual impairment). *Sutton*, the lead case, answered this question for artificial corrective measures, and it is in this case that the Court, although divided, outlines its rationale for the decisions.

The Court concludes that "if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act."<sup>5</sup>

#### The ADA and regulations

The ADA protects employees from workplace discrimination. The terms of the statute, however, restrict the class of individuals to whom protection is provided. Specifically, the ADA provides that no covered entity "shall discriminate against a qualified individual with a disability because of the disability ... in regard to job application procedures, the hiring, advancement, or

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discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”<sup>6</sup> “Disability” is defined as:

- (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.<sup>7</sup>

Although no agency has been delegated authority to interpret the term *disability*, the Equal Employment Opportunity Commission (EEOC) has issued regulations to provide additional guidance regarding its proper interpretation.<sup>8</sup> These regulations borrow the definition of disability from the ADA (above) and interpret elements of that definition. Under the regulations, “substantially limits” means, among other things, “unable to perform a major life activity that the average person in the general population can perform” or “significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.”<sup>9</sup> Major life activities include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Both parties in *Sutton* accepted these regulations as valid, and the Court declined to consider what deference they are due, if any.

### *Sutton v. United Airlines, Inc.*

#### *Facts*

*Sutton* concerned twin sisters, each of whom suffered from severe myopia. They sought employment as pilots with United Airlines but were rejected because they did not meet the airline’s

minimum uncorrected visual acuity requirement of 20/100 or better. Without corrective lenses, neither can “effectively ... see to conduct numerous activities such as driving a vehicle, watching television or shopping in public stores.” With corrective measures, both have vision of 20/20 or better and are able to function “identically to individuals without a similar impairment.”<sup>10</sup>

The plaintiffs filed a disability discrimination suit under the ADA, alleging that, due to their severe myopia, they have a substantially limiting impairment (under subsection (A) of the definition of disability (the “first ground”)) or are regarded as having such an impairment (under subsection (C) (the “second ground”)), and are thus disabled under the Act.

#### *Lower court decisions*

The U.S. District Court for the District of Colorado dismissed the plaintiffs’ complaint for failure to state a claim on which relief could be granted. It reasoned that the plaintiffs were not actually substantially limited in any major life activities because they could fully correct their visual impairments, and thus were not disabled under the ADA.

The district court also determined that the plaintiffs had not made allegations sufficient to support their claim that they were “regarded” by United Airlines as having an impairment that substantially limits a major life activity. According to the court, because the major life activity at issue was “working,” the plaintiffs would need to allege that the airline regarded them as having impairments that foreclose generally the type of employment involved to support their claim. However, the plaintiffs had failed to do this: they had alleged only that the airline regarded them as unable to satisfy the requirements of a particular job as global airline pilots. The district court’s judgment was affirmed by the U.S. Court of Appeals for the Tenth Circuit.<sup>11</sup>

#### *The Supreme Court’s reasoning*

In an opinion by Justice O’Connor, the Supreme Court affirmed 7-2 the lower court’s decision. The Court reached its conclusion on the primary issue (and the plaintiffs’ first ground) based on the text of the ADA, and on three separate provisions in particular. The majority saw no need to consider the Act’s legislative history, because it found no ambiguity in the text of the Act.

The Court looked first to the definition of disability: “a physical or mental impairment that *substantially limits* one or more of the major life activities” of an individual.<sup>12</sup> Because the phrase “substantially limits” is in the present indicative form, it should be read “as requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability.”<sup>13</sup> Accordingly, the Court held, a “disability” exists only where an impairment “substantially limits” a major life activity, not where it “might,” “could,” or “would” be substantially limiting if mitigating measures were not taken.<sup>14</sup> Thus, a person whose physical or mental impairment is corrected by mitigating measures cannot be considered disabled under the ADA because the impairment does not substantially limit a major life activity.

Second, the Court emphasized that whether a person has a disability involves an individualized inquiry. This is required by the definition of disability, which provides that disabilities are to be evaluated “with respect to an individual” and to be determined based on whether an impairment limits “the major life activities of such individual.”<sup>15</sup> Judging persons in their uncorrected or unmitigated state would require courts and employers to speculate about a person’s condition and would, in many cases, force them to make a disability determination based on general information about how uncorrected impairment usually affects individuals, rather than on the individual’s actual condition. This would create a system, according to the ma-

majority, in which persons are treated as members of a group with similar impairments and runs directly counter to the individualized inquiry mandated by the ADA.<sup>16</sup>

Finally, the Court ascertained Congress's intention from findings enacted as part of the ADA. Section 12101(a)(1) provides that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing...." This finding gives content to the ADA's terms, and specifically to the term disability. While the exact source of the 43 million figure is unclear, the Court argued that it reflects an understanding that those with disabilities that have been corrected (by medication or other devices) are not disabled and thus are not afforded protection under the ADA. The Court thus dismissed this ground of the plaintiffs' action.

The Court also rejected the plaintiffs' second ground—that the airline had regarded them as having a substantially limiting impairment. The plaintiffs contended that United Airlines regarded them as substantially limited in the major life activity of working. However, the Court explained that when the major life activity under consideration is that of working, the statutory phrase "substantially limits" requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs ("one must be precluded from more than one type of job, a specialized job, or a particular job of choice.")<sup>17</sup> Thus, if positions utilizing an individual's skills are available, one is not precluded from a substantial class of jobs. Here, the plaintiffs had only alleged that the airline regarded them as precluded from the position of global airline pilot—and not from other positions utilizing their skills, such as regional pilots and pilot instructors. The Court thus concluded that the plaintiffs had not properly alleged that the airline regarded them as having an impairment within subsection (C) of the definition of disability.

The Court left open the possibil-

ity that the plaintiffs could have succeeded had they argued that, due to their impairments, they were regarded as substantially limited in the major life activity of seeing and not working.

### *Dissenting opinions*

Justice Stevens delivered the main dissenting opinion. Rather than focus on the terms of the ADA, the minority turned to its legislative history to determine Congress's purpose in passing the law and relied on reports from both houses of Congress. The Senate Report, from which Stevens quoted, states 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."<sup>18</sup> Other reports express similar sentiments. Based on these reports, Justice Stevens concluded that the inquiry into whether a disability exists should be made without regard to mitigating or corrective measures.<sup>19</sup>

The minority also took issue with what it regarded as the Court's "mantra regarding the Act's 'individualized approach,'" the second of the Court's three arguments. Addressing the Court's reasons, Stevens asserted that disregarding corrective measures in the determination of disability does not defeat the individualized inquiry requirement of the Act. Rather, viewing a person in her unmitigated state simply requires examining that individual's abilities in a different state, not the abilities of every person who shares a similar condition.

The minority also criticizes the Court's reliance on Congress's finding that 43 million Americans are disabled. It questioned the validity of this finding, the source of which is uncertain, and was critical of the notion that the Court would base statutory interpretation on a congressional finding.

### *Albertson's, Inc. v. Kirkingburg*

In the second case, the Court unanimously rejected the plaintiff's appeal.

A truck driver for a grocery store chain, the plaintiff had been terminated after he failed a vision test. He suffered from amblyopia—an uncorrectable condition that left him with monocular vision. His vision did not satisfy basic acuity standards set by the federal Department of Transportation (DOT) for commercial drivers.

In rejecting the claim, the Court amplified its reasoning in *Sutton*, clarifying the meaning of "substantially limits." The Court emphasized the fundamental statutory requirement that only impairments causing substantial limitations on an individual's ability to perform major life activities constitute disabilities. Those claiming the Act's protection must prove a disability by offering evidence that the extent of the limitation on a major life activity caused by their impairment is substantial. It is not sufficient to show simply that the manner in which the plaintiff performs a major life activity is "different" from the average person in the general population.

Furthermore, the Court confirmed that mitigating measures must be taken into account in judging whether an individual has a disability for the purposes of the Act. Expanding on *Sutton*, the Court explained that such measures include both artificial aids, like medications and devices, and the body's own systems. In this case, the plaintiff's brain had developed subconscious mechanisms for coping with his visual impairment, and this corrective measure, even though it was not accomplished by artificial aids, should have been taken into account by the court below. The Court saw "no principled basis for distinguishing between measures undertaken with artificial aids ... and measures undertaken, whether consciously or not, with the body's own systems."<sup>20</sup>

### *Murphy v. United Parcel Service*

The third decision provides another illustration of the Court's approach in *Sutton*, but without expansion.

Murphy had been employed as a mechanic, a position that required he drive commercial motor vehicles. He was terminated because his employer, United Parcel Service (UPS), believed his blood pressure exceeded the requirements imposed by DOT for drivers of commercial motor vehicles. Murphy brought suit in the U.S. District Court for the District of Kansas, alleging that his dismissal violated the ADA. The district court granted judgment to UPS, and the U.S. Court of Appeals for the Tenth Circuit affirmed.

A divided Supreme Court affirmed the appellate court's decision, and reiterated its reasoning from *Sutton*. The Court was split here as it had in *Sutton*, with Justice O'Connor again delivering the lead opinion. An individual's impairment should be evaluated in its mitigated state, she explained, and because, with medication, Murphy's hypertension did not significantly restrict his activities, and because he could function normally and engage in activities that other persons normally do, he did not have an impairment that substantially limited him in any major life activity. He was thus denied the protection of the ADA.

Murphy's argument that UPS had "regarded" him as substantially impaired was also rejected, for the same reasons as in *Sutton*. Murphy had failed to establish that he was regarded as precluded from more than a particular job; he was generally employable in mechanic jobs that did not involve driving a commercial motor vehicle or DOT certification.

### Conclusion

It is now clear that a suit under the ADA as to whether an individual is disabled must include reference to any measures that mitigate the individual's impairment. These measures may be artificial, like corrective lenses or medication, or be the body's own, like the brain's ability to develop subconscious mechanisms for coping with visual impairment. This means that to deter-

mine whether an individual is disabled, courts will look at defendants' corrected or mitigated conditions. The use of corrective devices will not necessarily relieve one's disability. Some impairments remain "substantially limiting" despite ameliorative measures. And even highly effective measures may not prevent an individual's impairment from substantially limiting *all* the individual's major life activities.

Furthermore, when alleging that one is "regarded" as having an impairment that substantially limits the major life activity of work, one must show he/she is regarded as precluded from a broad class of jobs for which he/she is skilled. Such an allegation relating to a particular job only is insufficient.

Andrew Tuch

### References

1. American with Disabilities Act of 1990, 104 Stat. 328, 42 U.S.C. § 12101 et seq. (1994).
2. *Sutton v. United Airlines, Inc.*, 119 S. Ct. 2139 (1999).
3. *Albertson's, Inc. v. Kirkingburg*, 119 S. Ct. 2162 (1999).
4. *Murphy v. United Parcel Service*, 119 S. Ct. 2133 (1999).
5. *Sutton*, 119 S. Ct. at 2146.
6. 42 U.S.C. § 12112(a) (1994).
7. *Id.* § 12102(2).
8. See 29 C.F.R. § 1630.2(g) (1998).
9. *Id.* § 1630.2(j).
10. *Sutton v. United Airlines, Inc.*, 119 S. Ct. 2139, 2143 (1999).
11. *Sutton v. United Airlines*, 130 F.3d 893 (1997).
12. 42 U.S.C. § 12102(2)(A) (emphasis added).
13. *Sutton*, 119 S. Ct. at 2146.
14. *Id.*
15. 42 U.S.C. § 12102(2).
16. *Sutton*, 119 S. Ct. at 2147.
17. *Id.* at 2152.
18. S. Rep. No. 101-116, at 23 (1989).
19. *Sutton*, 119 S. Ct. at 2155.
20. *Albertson's v. Kirkingburg*, 119 S. Ct. 2162, 2169 (1999).

### Antitrust: Third Circuit Rejects Exception to Noerr-Pennington Doctrine Creating Split

### Among Circuits

On July 27, 1999, the U.S. Court of Appeals for the Third Circuit held, in *Armstrong Surgical Center Inc. v. Armstrong County Memorial Hospital*, 185 F.3d 154 (3rd Cir. 1999), that Pennsylvania's Armstrong County Memorial Hospital (ACMH) and nineteen of its staff physicians had not violated anti-trust law by persuading a state regulatory agency to bar the construction of a competing surgical center, the Armstrong Surgical Center (ASC). According to the Noerr-Pennington doctrine, private parties initiating a state action and state actors are not subject to anti-trust liability. With *Armstrong*, the Third Circuit expanded the doctrine's protection to include parties who deceive state regulators in order to preserve a monopoly on outpatient surgery.

In 1991, ACMH was the only hospital with operating rooms in Armstrong County, with the closest independent surgical center approximately fifty miles away. ASC planned to build an independent facility to compete directly (at a significantly lower cost) in the market for operative services.

Pennsylvania state law requires that the Pennsylvania Department of Health (DOH) issue a certificate of need before approving the construction of a new surgical facility. See Pa. Stat. Ann. tit. 35, § 448.701 (a)(2) (West 1999). To preserve its monopoly, ACMH sought to influence DOH's decision regarding its approval of ASC. The staff physicians falsely represented to DOH that they planned a boycott of ASC. ACMH also claimed that it was building its own outpatient surgical center. However, that center's construction had ceased and was not expected to resume. DOH denied a certificate of need to ASC, reasoning that a new center would be duplicative of current facilities and, because of the planned boycott, ineffective.

ASC filed a complaint under the Sherman Act, 15 U.S.C. §§ 1, 2 (West Supp. 1998). The Act prohibits "re-