The Need to Restore the Intent of the ADA- Focusing on the Discrimination and Not the Disability

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It is unfortunate but there has been - and probably always will be – discrimination. In an effort to alleviate certain forms of discrimination, Congress enacted Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 (ADEA). However, these two Acts did not provide any protection for the disabled. In 1990, Congress passed the Americans with Disability Act (ADA).1 This legislation was to provide disabled Americans with equal protection much like Title VII and ADEA.

Although the ADA has been credited with providing great progress in the areas of public accommodation and public services for the disabled,2 statistics show that the Act has failed the disabled in the area of employment law.3 In 1999, the Supreme Court issued a trilogy of cases that effectively narrowed the protection provided by the Act by requiring that corrective or mitigating factors be considered when evaluating whether a plaintiff has a disability.4 As much as the trilogy of cases clarified the Court’s interpretation of the Act, it also created splits in the circuits over more complicated issues dealing with the mitigating or corrective measures. Because courts interpret the Act narrowly, the ADA fails to provide the protection that Congress intended when enacting the ADA.

In November 2006, the house introduced a bill with the intent to restore Congress’s initial intent to the ADA. However, the proposed bill was limited and was not enacted during the legislative session. It is time for Congress to pass new legislation that not only restores the intent of the ADA but also provides some much needed guidance for the courts so that the protection provided is similar to that provided by Title VII and the ADEA.

As mentioned above, Americans with physical or mental impairments had little recourse in the event of discrimination due to their disability prior to the enactment of the ADA.5 The ADA prohibits “discrimination by public entities against qualified individuals with a disability.”6 Congress intentionally left the language of the Act very broad and intended

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6 42 U.S.C. §§12112 (2), 2132, 12182 (West 2006) (public entities are defined as “an employer, employment agency, labor organization, or joint labor-management committee”).
ADA to mirror the Rehabilitation Act. In fact, Congress adopted the definition of “disability” that was the same as the definition of “handicap” under the Rehabilitation Act. Congress used this definition because the courts gave the definition a broad interpretation and there was little controversy surrounding the definition.

In a growing number of ADA cases, courts have been dismissing suits on summary judgment due to the plaintiff’s failure to meet the court’s requirements for demonstrating that he or she was disabled. In order to demonstrate a disability under the Act, an individual must have “a physical or mental impairment that substantially limits” at least one of an individual’s “major life activities” or must show that he or she has a “record of such impairment,” or is “regarded as having such an impairment.” In *Bragdon v. Abbott*, the Supreme Court announced a three part test to determine whether an impairment constitutes a disability under the ADA. *Bragdon* required courts to first ask if the condition is a physical or mental impairment; second, whether the condition affects a major life activity; and third, whether the condition substantially limits that activity.

With the test established in *Bragdon*, many courts began to focus on whether the plaintiff had a disability as defined by the Act. The circuit courts were split on whether the plaintiff’s disability should be evaluated prior to or with corrective measures. Corrective measures such as medication, prosthetic devices, mechanical devices and self-accommodating measures are used to lessen the effect of the impairment. Many times corrective measures allow a disabled individual to work or function in society.

In 1999, the Court issued three decisions that settled the split in the circuits and effectively narrowed the coverage of the ADA. In the first, *Sutton v. United Airlines Inc.*, the Court concluded that mitigating or corrective measures must be taken into account when determining whether the individual is substantially limited in a major life activity. In other words, if a corrective measure helps lessen the impairment, then the

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8 Id. (Congress changed the term “handicapped” to “disabled” due to modernization of terminology.)
13 Id.
14 Debra Burke & Malcolm Abel, Article, *Ameliorating Medication and ADA Protection: Use It and Lose It or Refuse If and Lose It?*, 38 Am. Bus. L.J. 785, 794-795 (2001). The First, Second, Seventh, Eighth, Ninth and Eleventh Circuits evaluated the disability without corrective measures. The Sixth and Tenth Circuits utilized the view the Supreme Court adopted, which evaluated the disability with mitigating or corrective measures. The Fifth Circuit developed a hybrid approach.
17 Sutton, 527 U.S. 489.
individual would have to prove that in his or her corrected state, the impairment still substantially limits a major life activity.\textsuperscript{18}

At first glance, it seems reasonable to consider the plaintiff’s impairment in his or her corrected state. However, as to reinforce the narrow interpretation of the ADA, the Supreme Court in its decision in \textit{Toyota Motor Manufacturing, Kentucky, Inc. v. Williams} established that major life activities need to be interpreted “strictly to create a demanding standard for qualifying plaintiffs as disabled.”\textsuperscript{19} Not only did the plaintiff have to be evaluated in his corrected state but the Court instructed all courts to create a demanding standard for qualifying as disabled. Additionally, the Court further increased the plaintiff’s burden by requiring that “an impairment’s impact must also be permanent or long term” to constitute a disability.\textsuperscript{20} Lastly, the \textit{Sutton} court established a high evidentiary burden when making a claim under the third prong- being “regarded as” disabled. When a plaintiff contends the employer regarded him or her as being disabled, the plaintiff has to show that the employer thought the plaintiff could not only perform his or her job but a broad range of jobs.\textsuperscript{21} The Court effectively raised the bar for what constitutes a substantial limitation on a major life activity.

The narrow reading of the statute has lead to absurd results. Many ADA claims are dismissed due to the plaintiff being “too functional” after corrective measures. The absurdity is that a plaintiff may be determined to be “too functional” to be protected by the ADA: however, the employer can prohibit the plaintiff from utilizing the necessary corrective measures at work.\textsuperscript{22} There are plaintiffs who have diabetes, mental illness, breast cancer, carpal tunnel syndrome, multiple sclerosis, amputations, cirrhosis of the liver, asthma and osteoporosis who are found to be “too functional” to warrant protection by the ADA.\textsuperscript{23} Over ninety percent of Title I ADA claims in trial court and eighty-four percent in appellate courts return a judgment in favor of employers.\textsuperscript{24} In analyzing the Seventh Circuit ADA decisions in 2000, one researcher found that of the 117 cases brought only three plaintiffs prevailed on the merits of their cases.\textsuperscript{25} Additionally, when all thirteen federal circuits were analyzed 96.4% of the cases yielded a verdict for the employer, as compared with only 3.6% for the employee.\textsuperscript{26}

\textsuperscript{18} \textit{Albertson’s, Inc.} 527 U.S. at 565 (recognizing that a plaintiff’s ability to self-compensate for his disability is considered a mitigating or corrected measure).
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Sutton}, 527 U.S. 489.
\textsuperscript{22} Kera Croteau, Notes & Comments, \textit{Lack of Unity in ADA Decision Leave Bipolar Suffers Unprotected and Employers Confused}, 37 U. Tol. Rev. 1059, 1062 (Summer 2006); see also \textit{Sutton}, 527 U.S. at 498 (Stevens, J. dissenting) (the dissent argues that the majority’s opinion is counterintuitive that the protection of the ADA should disappear when an individual makes themselves more employable by overcoming their physical or mental impairments).
\textsuperscript{23} See id.
\textsuperscript{25} Joyce, supra note 5, at 1390 (citing Amy L. Allbright, \textit{2000 Employment Decisions Under the ADA Title I--Survey Update}, 25 MENTAL AND PHYSICAL DISABILITY L. REP. 508, 510 (2001)).
\textsuperscript{26} \textit{Id.} at n.15 (citing Allbright, supra note 28, at 509).
The Catch-22 of taking the corrective measures into account is demonstrated with particular clarity in cases in which the plaintiff has a learning disability or has achieved professional success. Plaintiffs with learning disabilities are often given accommodations throughout school. With these accommodations, many plaintiffs with learning disabilities achieve academic success. Even though the Supreme Court ruled that self-accommodation must be taken into consideration, there is a split as to whether the plaintiff’s academic success should be used in determining whether a plaintiff is substantially limited in the major life activity of reading or learning. Some courts have held that a plaintiff who is able to attain a medical degree or law degree cannot be substantially limited in reading or learning, even though these individuals were given accommodations in order to achieve the academic success. These courts have reasoned that with corrective measures, the individual is not disabled under the Act, even though the academic achievement was gained with the use of accommodations. However, other courts have created exceptions for plaintiffs who have learning impairments. These courts find that an individual is disabled under the ADA, even though he or she has achieved professional or academic success. In Emory v. AstraZeneca Pharm., the court stated, “[w]hat a plaintiff confronts, not overcomes, is the measure of substantial limitation under the ADA.” Another court stated that “[w]hen evaluating claims brought under the ADA, ‘the focus is not whether the individual has the courage to participate in the major life activity despite her impairment, but rather, on whether she faces significant obstacles when she does.’”

The Sutton trilogy has lead to plaintiffs receiving no protection from the ADA even when they are discriminated against because of the corrective measures they take in order to function with their disability. Additionally, some courts refuse ADA protection to students with learning disorders because these students had achieved academic success. These decisions have also created other even more complicated issues. Questions such as whether a plaintiff must make an accommodation, if there is one available, in order to be protected by the ADA. The courts that have addressed this issue have differing opinions. The Seventh Circuit only considers the actual measures taken and the consequences of those measures. However, other courts have ruled that a plaintiff’s failure to use

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28 See Albertson’s, Inc., 527 U.S. at 565 (recognizing that a plaintiff’s ability to self-compensate for his disability is considered a mitigating or corrected measure).
29 See Gallagher, supra note 15 (referring to Wong v. Regents of Univ. of Calif., 379 F.3d 1097 (9th Cir. 2004)).
30 Fordyce, supra note 10, at 1046 (discussing Emory v. AstraZeneca Pharm., 401 F.3d 174, 181 (3d Cir. 2005)).
31 Id. (discussing Gillen v. Fallon Ambulance Serv., 283 F.3d 11, 22 (1st Cir. 2002)).
33 Id.
mitigating measures can defeat their disability discrimination claim.\textsuperscript{35} From this issue, there are other questions as to what happens if the individual cannot afford the corrective measure, chooses not to have the corrective measure due to adverse consequences caused by it or chooses not to have the corrective measure due to cultural issues. All of these issues stem from the Court’s narrow interpretation of the statute, and its failure to give the disabled the same protection as provided by Title VII and the ADEA.

In September 2006, the House held hearings on restoring the intent of the ADA. In the 109\textsuperscript{th} Congress, a bipartisan bill was introduced to restore the ADA to Congress’s original intent. The bill was named the Americans with Disability Act Restoration Act of 2006. Although the bill was not enacted before the end of the session, it demonstrated that Congress is aware of the need to address the narrow interpretation by the courts. The proposed bill was intended to remove the court’s focus from the disability and place it on the discrimination.\textsuperscript{36} In order to accomplish this goal, the committee proposed that the wording of the Act be changed from discrimination “against an individual with a disability” to discrimination “on the basis of a disability.”\textsuperscript{37} The wording of the current Act focuses on an individual with a disability. The proposed wording was intended to be more consistent with the Civil Rights Act of 1964 and other civil rights laws, which prohibit discrimination “on the basis of race, color, religion, and sex.”\textsuperscript{38} This change would focus on the discrimination rather than on the disabled.\textsuperscript{39}

In addition to the change in focus, the committee proposed that the Act needed to be change so that mitigating measures are not considered when evaluating whether an individual has a physical or mental impairment.\textsuperscript{40} In other words, the committee proposed that mitigating factors should not be used to insulate an entity from liability for discrimination.\textsuperscript{41} By this proposal, the authors of the bill intended to nullify the Sutton trilogy. Along the same lines, the purposed bill took aim at the Supreme Court’s decision in Toyota Motor Mfg., Ky., Inc. The purposed bill specifically instructed that the duration of an impairment is not to be taken into account when determining the existence of a physical or mental impairment.\textsupersoftsuperscript{42} Another issue addressed by the bill was the definition of “perceived physical or mental impairment.” The bill defined a perceived impairment as “not having” an impairment “but being regarded as having, or treated as having, a

\textsuperscript{35} Sever, 381 F. Supp. 2d. at 415(citing Johnson v. Maynard, No. 01 Civ. 7393 (AKH), 2003 WL 548754, at *4 (S.D.N.Y. Feb. 25, 2003) (the plaintiff’s failure to take medication that would allow her to function normally prevented her from establishing that she was substantially limited in a major life activity); Tangires v. Johns Hopkins Hosp., 79 F. Supp. 2d 587, 596 (D. Md.), aff’d, 230 F.3d 1354, 2000 WL 1350647 (4th Cir. 2000) (plaintiff not substantially limited because she failed to take medications as recommended by physician). \textsuperscript{36} H.R. 6258, 109\textsuperscript{th} Cong. (2006). \textsuperscript{37} Id. \textsuperscript{38} Id. \textsuperscript{39} Bipartisan Legislation Introduced to Restore ADA Protections, http://www.accessible-devices.com/legislation.html. \textsuperscript{40} H.R. 628, 109\textsuperscript{th} Cong. (2006). \textsuperscript{41} Id. \textsuperscript{42} Id.
physical or mental impairment." Again, change would conflict with the Supreme Court’s interpretation.

To this date, no legislation has been reintroduced into either the House or Senate because the last Congressional session was cut short waiting for the new members to take their places. However, advocates for restoring the ADA believe that due to the strong support of Congressional members, the restoration of the ADA will be reintroduced in both houses of Congress during this session.

Since the bill was not passed during the last session, Congress has been given another opportunity to consider additional issues not addressed by the previous proposed bill. One issue that was not addressed by the proposed bill is the “direct threat” defense. Direct threat defense allows an employer to discriminate on the basis of a disability when the disabled individual presents a direct threat to others. The Supreme Court has recently interpreted the direct threat defense to apply when there is a direct threat to the disabled individual, even though the language of the Act only applies to others. Another issue not addressed by the last bill was what constitutes a “prevailing party.” The Act allows for attorney fees to the “prevailing party.” The Supreme Court ruled that the “catalyst theory,” utilized by other civil right laws, does not apply to the ADA. Under the Supreme Court’s decision, attorney fees can only be awarded when the party prevails in judicial proceedings. Lastly, the bill did not address, and needs to address, the preference issue. In other words, does the ADA require employers to show preference to the disabled?

The ADA has provided great improvements for the disabled under Titles II and III. However, there is a great need to make some corrections to the current judicial interpretation of the ADA. When evaluating statistics from other suits, it has been shown

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43 Id.
44 The 2007 Disability Policy Seminar, Restoration of the Americans with Disabilities Act (ADA) 2 (2007), available at http://209.190.209.4/NetCommunity/Document.Doc?&id=108. “To date, in the 110th Congress no legislation has been introduced, but ADA champions in the Senate, Senators Edward M. Kennedy (D-MA) and Tom Harkin (D-IA), and in the House Representatives Hoyer, Sensenbrenner and Conyers, are seeking support among their colleagues for legislation that will restore the ADA’s integrity and the Congress’ intent.”
45 Id.
46 National Council on Disability, Righting the ADA (2004), available at http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm. In Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002) the Supreme Court upheld that an employer can refuse to hire an applicant because their performance on the job would endanger their health even though the language of the ADA only recognizes a “direct-threat” defense for dangers posed to other workers. In Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598 (2001) the Supreme Court rejected the “catalyst theory” that most lower courts had applied in determining the availability of attorney’s fees and litigation costs to plaintiffs in cases under the ADA. The Court made this ruling even though other civil rights statutes, and under other federal laws that authorize such payments to the prevailing party, utilize this theory.
47 See Chevron U.S.A., 536 U.S. 73.
48 See Buckhannon, 532 U.S. 598.
49 Id.
that plaintiffs should have a win rate of approximately fifty percent in litigated disputes.50 Yet statistics show that plaintiffs succeed in barely two percent of the ADA claims litigated.51 “Only plaintiffs in prisoner rights cases fare as poorly as ADA claimants.”52 From these statistics it has been concluded that the judicial construction of the ADA has rendered the statute incapable of fulfilling its mission.53 The need to address judicial interpretation of the ADA has been recognized by the House, and advocates for restoring the intent of the ADA believe that legislation will be reintroduced in both the House and Senate during this term.54 Even if the reintroduced bill does not address any additional issues, the change in the wording, which should cause the focus to be on discrimination not disability and instruction that the Act be interpreted very broadly, should aid plaintiffs in withstanding summary judgment. This will cause the Act to be more in line with Title VII and the ADEA, which is what Congress originally intended.

April 2007

50 Michael D. Reisman, Note, Traveling “To the Farthest of the ADA, ” or Taking Aim at Employment Discrimination on the Basis of Perceived Disability?” 26 CARDOZO L. REV. 2121, 2149 (April 2005) (referencing George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. LEGAL STUD. 1, 4-5 (1984)).
51 Id.
52 Kaiser, supra note 3 at 739.
53 Reisman, supra note 50, at 2126.
54 See supra, note 45.