The Elusive Protected Class - Who Is Worthy under the Americans with Disabilities Act

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THE ELUSIVE PROTECTED CLASS – WHO IS WORTHY UNDER THE AMERICANS WITH DISABILITIES ACT?

I. Introduction

Imagine that your office takes on two new clients, both claiming disability discrimination in employment.1 Interestingly, both clients have similar learning disabilities.2 In spite of their various limitations, these individuals have each worked hard and succeeded in many personal and professional endeavors.3 After much persistence, they acquired promising positions in their established fields.4 Upon beginning their new jobs, the clients each explained their learning disabilities to their respective supervisors and asked for various accommodations to allow them to perform the essential responsibilities of their new positions.5 Client A requested more time to complete projects, a special computer program to help with organization and a voice recorder so that he could “take notes” orally.6 Unlike Client A, Client B took medication to help him compensate for his disabil-

1. For a brief background discussion of the Americans with Disabilities Act ("ADA"), see infra notes 12-15 and accompanying text.

2. The term “learning disability” is not synonymous with “disability” as defined under the ADA. See Frances M. Nicastro, Note, The Americans with Disabilities Act: Determining Which Learning Disabilities Qualify for Reasonable Accommodations, 26 J. LEGIS. 355, 370 (2000) (distinguishing learning disabilities from disabilities under ADA). This Casebrief uses the term “learning disability” in its general common meaning in educational practice. The Department of Education defines “specific learning disability” as:

a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

34 C.F.R. § 300.7(c)(10)(i) (1999). Some characteristics of learning disabilities include “a significant discrepancy between aptitude and actual achievement . . . academic deficiencies or decreases in motivation level, memory, attention span, social skills, perceptual skills, or other cognitive abilities.” See Nicastro, supra note 2, at 370. For a greater discussion of the statutory definition of “disability” under the ADA, see infra notes 26-48 and accompanying text.

3. For a discussion of the Third Circuit’s stance on the relationship between personal achievements and ADA protection, see infra notes 90-104 and accompanying text.

4. For a comparison to the facts of Emory v. AstraZeneca Pharm., which is highlighted in this Casebrief, see infra notes 73-89 and accompanying text.

5. For a discussion of reasonable accommodations under the ADA, see infra notes 46-48 and accompanying text.

6. For examples of reasonable accommodations, see infra note 46 and accompanying text.
ity. While the medication helped him cope with his limitations to a certain degree, Client B still needed extra time to accomplish his assignments and consequently requested deadline extensions. Unfortunately for both clients, their employers refused to provide them with the requested accommodations and subsequently fired them for failing to perform their work efficiently. Hoping to find an answer for these clients, you turn to the Americans with Disabilities Act only to find its umbrella of protection is not wide enough to cover both clients; only Client A is likely to be deemed worthy of protection under the Act.

Unlike race, sex, color, national origin, religion or even age, "disability" is not defined to be all-inclusive. It is the elusive protected class, causing practitioners and clients alike to struggle to fit into its awkward-shaped box. Enacted in an effort to address the "serious and pervasive social problem" of disability discrimination, the Americans with Disabilities Act of 1990 ("ADA") aimed to prevent unfair treatment of those with disabilities in areas such as employment, housing, public accommodations, education and access to public services. While the theory behind

7. For examples of mitigating measures, such as medication, see infra notes 49-72 and accompanying text.
8. For examples of reasonable accommodations, see infra note 46 and accompanying text.
9. For a discussion of employer’s liability for discrimination of disabled individuals, see infra notes 46-48 and accompanying text.
11. This Casebrief will address the differentiation between individuals who use artificial mitigating measures such as medication and individuals who develop cognitive coping skills to self-accommodate their limitations. See infra notes 105-38 and accompanying text.
12. Title VII of the Civil Rights Act of 1964 protects all individuals from discrimination in employment "because of [the] individual’s race, color, religion, sex, or national origin." 42 U.S.C.A. § 2000e-2(a) (West 2006). The Age Discrimination in Employment Act of 1967 ("ADEA") protects persons at least forty years of age. See 29 U.S.C.A. § 631(a) (West 2006) (defining ADEA’s protected class). Litigation under these statutes tends to focus on the merits of the discrimination, not on whether the plaintiffs are included within the protected classes as is the case with the ADA. See John D. Ranseen & Gregory S. Parks, Test Accommodations for Postsecondary Students, 11 PSYCHOL. PUB. POL’Y & L. 83, 88 (2005) (noting that "ADA litigation has focused extensively on the issue of inclusion"); Julie McDonnell, Note, Sutton v. United Air Lines: Unfairly Narrowing the Scope of the Americans with Disabilities Act, 39 BRANDEIS L.J. 471 (2000-01) (comparing ADA to other anti-discrimination statutes).
13. For a discussion of the complicated nature of the ADA’s statutory language, see infra notes 26-48 and accompanying text.
this statute's protection was broad, courts have continuously narrowed its scope by interpreting its ambiguous terms.\textsuperscript{15} In recent years, the Supreme Court has brought some clarity—as well as much frustration—to the definition of "disability," holding that mitigating or corrective measures should be taken into account when evaluating plaintiffs' claims.\textsuperscript{16} Subsequently, a cloud of confusion has developed in interpreting what measures constitute mitigation under the ADA.\textsuperscript{17} In \textit{Emory v. AstraZeneca Pharmaceuticals},\textsuperscript{18} the Third Circuit gave plaintiffs a glimmer of hope by asserting that learned accommodations and achievements do not negate a claim of disability.\textsuperscript{19}

This Casebrief identifies the Third Circuit's stance towards cognitive coping mechanisms and self-accommodation in defining "disability" under the ADA, as distinguished from artificial mitigating measures.\textsuperscript{20} Part II examines the history and development of the ADA and its protected class.\textsuperscript{21} Part III analyzes \textit{Emory} and its reasoning in applying ADA protection to self-achieving individuals.\textsuperscript{22} Part IV considers the Third Circuit's stance in light of Supreme Court decisions on mitigation\textsuperscript{23} and highlights unanswered questions on the scope of ADA protection.\textsuperscript{24} Finally, Part V emphasizes the impact of the \textit{Emory} decision for disabled plaintiffs in the

\textsuperscript{15} See J.J. Knauff, Article, \textit{Dissecting Disabilities: A Student's Duty to Mitigate Maladies}, 2001 BYU ED\textsc{uc}. & L.J. 85, 94 (2001) (discussing ambiguous nature of ADA); see also Fishman, \textit{supra} note 14, at 2022 (noting ambiguity).


\textsuperscript{17} See, e.g., Gillen v. Fallon Ambulance Serv., 283 F.3d 11, 30-31 (1st Cir. 2002) (detailing compensating efforts of genetic amputee with only one completely functioning arm); Nordwall v. Sears Roebuck, 46 F. App'x 364, 367-68 (7th Cir. 2002) (discussing diabetes mitigation by use of insulin shots and dietary monitoring); Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 308-09 (3d Cir. 1999) (addressing possibility of ADA protection in light of lithium treatments).

\textsuperscript{18} 401 F.3d 174 (3d Cir. 2005).

\textsuperscript{19} See id. at 181 (focusing on obstacles plaintiff confronts in determining applicability of ADA).

\textsuperscript{20} For a discussion of the Third Circuit's analysis of ADA protection and distinction of cognitive coping skills from mitigating measures, see \textit{infra} notes 90-152 and accompanying text.

\textsuperscript{21} For a general discussion of the ADA and its developing interpretations, see \textit{infra} notes 26-72 and accompanying text.

\textsuperscript{22} For a discussion of the Third Circuit's analysis in \textit{Emory}, see \textit{infra} notes 73-118 and accompanying text.

\textsuperscript{23} For a discussion distinguishing the Third Circuit's analysis in \textit{Emory} from the Supreme Court's stance on artificial mitigation, see \textit{infra} notes 119-38 and accompanying text.

\textsuperscript{24} For a discussion of the existing gaps in the analysis of the ADA's protected class, see \textit{infra} notes 139-52 and accompanying text.
Third Circuit and provides suggestions for practitioners whose clients fall through the ADA's cracks.  

II. HISTORY AND DEVELOPMENT OF THE ADA

A. Statutory Language

Finding that approximately forty-three million Americans have at least one physical or mental disability and recognizing a history of isolation and segregation in this country, Congress created the ADA to serve as a "national mandate for the elimination of discrimination" against disabled individuals. The ADA's protection extends to qualified individuals with a disability, defining "disability" 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." With many ill-defined, ambiguous terms, the ADA has led to an array of litigation, causing courts to struggle with interpreting its phrases.

25. For a summary of the Third Circuit's stance on mitigating measures and self-accommodation, see infra notes 153-62 and accompanying text.

26. See 42 U.S.C.A. § 12101 (West 2006) (emphasizing increasing number of disabled persons as population grows older and need for prevention of discrimination). In its legislative findings, Congress stated that despite improvements, disability discrimination continued to be "a serious and pervasive social problem," particularly in areas such as "employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting and access to public services." See id. § 12101(a)(2-3) (asserting congressional findings leading to ADA enactment). Ultimately, Congress recognized that the "continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous." See id. § 12101(a)(9). Under the ADA, no covered entity can engage in discrimination against a disabled individual "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." See id. § 12112(a).


1. Physical or Mental Impairment

While not defined by the ADA, the Equal Employment Opportunity Commission ("EEOC") has issued regulations defining impairments.29 The phrase "physical or mental impairment" encompasses:

(1) [a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal . . . cardiovascular, reproductive, digestive . . . and endocrine; or (2) [a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.30

Though seemingly inclusive, proving that one has an impairment is only the first step in achieving protection under the ADA.31

2. Major Life Activity

The EEOC regulations also provide a list of possible major life activities, including "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."392 In its ADA 145-46 (3d Cir. 1998) (interpreting "qualified individual"); Colwell v. Suffolk County Police Dep't, 158 F.3d 635, 641-45 (2d Cir. 1998) (applying three-step process for determining disability as set forth in Bragdon); see also Fishman, supra note 14, at 2022 (noting ambiguous nature of ADA); Knauff, supra note 15, at 94 (same).

29. See 29 C.F.R. § 1630.2(h) (2005) (establishing EEOC's position in defining impairments). The definition of "impairment" is "sufficiently broad to ensure that no serious question of application arises in the vast range of cases." See Samuel L. Bagenstos, Subordination, Stigma, and "Disability", 86 VA. L. Rev. 397, 407-08 (2000) (addressing "impairment" term of disability definition). Some conditions, such as pregnancy, obesity and genetic predisposition to disease, implicate greater consideration of the expansive nature of "impairment." See id. (indicating conditions which "press the boundaries of the 'impairment' concept"). Congress did not intend the ADA to cover "minor, trivial impairments," "mere physical traits, such as eye or hair color," nor "any nonphysical, nonmental impairments, such as 'environmental, cultural, and economic disadvantages.'" See Mary Cossley, The Disability Kaleidoscope, 74 NOTRE DAME L. Rev. 621, 635-36 (1999) (citing S. Rep. No. 101-116, at 22 (1989)) (discussing ADA's definition of "impairment").


31. For a complete discussion of ADA's protected class as established by statute, see supra notes 26-30 and infra notes 32-48.

32. 29 C.F.R. § 1630.2(i) (2005) (defining major life activity). The regulations provide an illustrative list of activities which may constitute major life activities; they do not conclusively define "major life activity." See Bagenstos, supra note 29, at 410-11 (discussing ambiguity of "major life activity" term). One commentator explains that each of the listed activity's importance to an individual's life makes it an illustrative "major life activity." See id. (asserting possible connection between activities listed). The first seven daily activities listed are "essential to sur-
interpretations, the Supreme Court has recognized several activities not listed, thus noting the purely illustrative nature of the EEOC regulation list. For example, in *Bragdon v. Abbott*, a woman with Human Immunodeficiency Virus ("HIV") sued her dentist under the ADA after he insisted on filling her cavity at a hospital where the woman would have to pay an additional fee. In acknowledging HIV as her disability, the Court accepted reproduction as a major life activity in which she was substantially limited. Later, in *Toyota Motor Manufacturing v. Williams*, the Court defined "major life activities" as "those activities that are of central importance to daily life." In *Toyota*, the Court granted the employer's

vival and to taking advantage of most economic and social opportunities in our society." *Id.* (examining listed activities). The last two activities, "learning" and "working", though not necessarily performed daily, are "an important part of [a person's] personal development and self-actualization—and indeed [his or her] personhood itself..." *Id.* (same).

33. See, e.g., *Sutton v. United Air Lines*, 527 U.S. 471, 491-92 (1999) (finding that major life activity of working requires substantial limitation in broad class of jobs, not single position); *Bragdon v. Abbott*, 524 U.S. 624, 639 (1998) (noting that "reproduction is a major life activity for the purposes of the ADA"); see also *Pack v. Kmart Corp.*, 166 F.3d 1300, 1305 (10th Cir. 1999) (recognizing major life activity of sleeping); *Cohen*, *supra* note 30, at 62 (discussing activities that courts have previously accepted or rejected as major life activities); *Knauff*, *supra* note 15, at 92 (addressing EEOC regulations regarding major life activities).


35. *See id.* at 628-29 (stating facts and procedural history of case). Upon discovering the plaintiff's cavity, the dentist informed the plaintiff of his policy against filling cavities of patients with HIV. *See id.* at 629 (reporting facts). While he offered to fill the cavity at a hospital with no additional fee for his services, the plaintiff would have to pay for the use of the hospital facilities. *See id.* (same). The plaintiff filed suit under the ADA, alleging disability discrimination in a place of public accommodation. *See id.* (noting procedural history and defining "public accommodation" to include "professional office of a health care provider").

36. *See id.* at 638 (stating that "[r]eproduction falls well within the phrase ‘major life activity’ "). Plaintiff's claim asserted that the HIV virus "placed a substantial limitation on her ability to reproduce and to bear children." *Id.* at 637 (defining plaintiff's major life activity). In his opinion, concurring in the judgment in part and dissenting in part, Chief Justice Rehnquist questions the Court's acceptance of reproduction as a major life activity. *See id.* at 659 (Rehnquist, J., concurring in part, dissenting in part) (analyzing Court's acceptance of reproduction as major life activity). He compares reproduction to other important life decisions, such as "who to marry, where to live, and how to earn one's living," none of which are considered major life activities. *See id.* at 660 (discussing reproduction). Rehnquist states that the common thread linking the activities on the illustrative list is that "the activities are repetitively performed and essential in the day-to-day existence of a normally functioning individual." *See id.* (expressing commonality between listed activities). According to Rehnquist, reproduction does not qualify under this common thread. *See id.* (disagreeing with Court's acceptance).


38. *Id.* at 197. *Toyota* involved a plaintiff with bilateral carpal tunnel syndrome and bilateral tendinitis who was terminated allegedly due to poor attendance. *See id.* at 187, 190 (noting facts of case). The plaintiff argued that her employer had failed to provide her with reasonable accommodations to allow her to perform her job. *See id.* at 187 (stating claim).
summary judgment motion because the plaintiff could not prove that her carpal tunnel syndrome substantially limited her in the major life activity of performing manual tasks and thus, she was not considered a member of the protected class.39 While arguments continue over what daily activities qualify under the statute, much litigation swarms around two words: "substantially limits."40

3. Substantially Limits

Each plaintiff seeking protection under the ADA must be individually assessed on a case-by-case basis to determine whether he or she has a disability; there are no per se disabilities under the statute.41 In comparison to an average person in the general population, a disabled individual, being substantially limited in a major life activity, must be unable to perform a major life activity or "significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity."42 The determination of whether an impairment is substantially limiting focuses on factors such as the nature and severity, the duration and the permanent or long term impact of the impairment.43 The Supreme Court, however, has maintained that "[t]he Act addresses substantial limitations on major life activities, not utter inabilities."44 Consequently, courts are required to engage in careful consideration of all

39. See id. (describing plaintiff's claim). Because she was not substantially limited in the performance of a class of manual activities, the Court held that she could not receive protection under the ADA. See id. at 193-94 (explaining plaintiff's failure to make viable claim).
40. See, e.g., id. at 196-97 (discussing "substantial limitations"); Bragdon, 524 U.S. at 641 (same); Furnish v. SVI Sys., 270 F.3d 445, 450-51 (7th Cir. 2001) (same); Russell v. Clark County Sch. Dist., No. 98-17194, 2000 U.S. App. LEXIS 17460, *3-4 (9th Cir. July 17, 2000) (evaluating plaintiff's limitations). For a greater discussion of the "substantially limits" requirement of the ADA, see infra notes 41-45 and accompanying text.
41. See Cohen, supra note 30, at 62 (discussing individualized assessment of whether impairment is "substantially limiting"); see also Toyota, 534 U.S. at 199 (stating that "[a]n individualized assessment of the effect of an impairment is particularly necessary when the impairment is one whose symptoms vary widely from person to person").
42. 29 C.F.R. § 1630.2(j)(1) (2006) (defining "substantially limits"); see Cohen, supra note 30, at 62 (same); Fishman, supra note 14, at 2022-23 (same); Knauff, supra note 15, at 90-91 (examining EEOC regulations on "substantially limits").
43. See 29 C.F.R. § 1630.2(j)(2) (2006) (listing factors for consideration in determining whether person is substantially limited in major life activity). The EEOC guidelines specifically propose that determinations of substantial limitations include consideration of "(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." Id.; see also Burke & Abel, supra note 27, at 790 (noting factors in "substantial limitation" analysis); Cohen, supra note 30, at 62 (same); Kimmel, supra note 27, at 752 (same).
44. Bragdon, 524 U.S. at 641 (discussing "substantial limitations"). "Substantially" indicates "'considerable' or 'to a large degree.'" Toyota, 534 U.S. at 196-97
surrounding circumstances and relevant factors in determining the degree to which the impairment of a particular individual limits his or her major life activity.\footnote{45}

4. A Qualified Individual with a Disability

Even after an individual establishes that he or she has a disability, to fall within the ADA protected class, the individual still must prove that he or she is “qualified,” meaning that the individual “can perform the essential functions of the employment position that such individual holds or desires” with or without reasonable accommodations.\footnote{46} An employer who fails to provide reasonable accommodations to a qualified individual may be liable under the ADA.\footnote{47} In evaluating whether a disabled individual is qualified, courts tend to defer to an employer’s determination of what constitutes the essential functions of the position.\footnote{48}

\footnote{45} Cf. Sutton v. United Air Lines, 527 U.S. 471, 483 (citing Bragdon, 524 U.S. at 641-42 (1998)) (explaining that “[w]hether a person has a disability under the ADA is an individualized inquiry”).

\footnote{46} See 42 U.S.C.A. § 12111(8) (West 2006) (defining “qualified individual with a disability”). Under the ADA, an employer must provide a disabled individual with reasonable accommodations if such accommodations would enable the individual to perform the essential functions of the job. See Fishman, supra note 14, at 2024-25 (“The ADA mandates that the employer make any reasonable accommodations necessary to . . . enable [the disabled individual] to enjoy the equal opportunities that are available to other employees.”). Reasonable accommodations in employment include “job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.” 42 U.S.C.A. § 12111(9) (West 2006). Under Title III of the ADA, reasonable accommodations in education may include extra time for examinations, adaptation of the manner in which examinations are given, large print or Braille examinations for visual impairments or even physical accommodations such as table height adjustments. See Knauff, supra note 15, at 93 (listing examples of reasonable accommodations for individuals with learning disabilities).

The Seventh Circuit has stated that an employee requesting a reasonable accommodation for his or her disability must “show that the accommodation is reasonable in the sense both of efficacious and or proportional to costs.” See Vande Zande v. Wis. Dep’t of Admin., 44 F.3d 598, 543 (7th Cir. 1995) (using cost-benefit analysis for determining reasonableness).

\footnote{47} See Fishman, supra note 14, at 2024-25 (explaining employer liability). The employer may assert a defense of undue hardship to avoid providing such accommodations. See id. at 2025 (recognizing that employer is not liable under ADA for failing to provide accommodations if it would pose “undue burden” on employer). Undue burden or hardship consists of actions involving “significant difficulty or expense.” 42 U.S.C.A. § 12111(10) (West 2006). For a discussion of “undue hardship” and its relation to “reasonable accommodation,” see U.S. Airways v. Barnett, 535 U.S. 391 (2002).

\footnote{48} See Fishman, supra note 14, at 2024 (noting judicial deference).
B. Sutton, Murphy and Albertson's: The Supreme Court's Stance on Mitigating Measures

Unlike those bringing suit under other anti-discrimination statutes, such as Title VII of the Civil Rights Act of 1964 or the Age Discrimination in Employment Act, plaintiffs have struggled to unravel the complicated ADA requirements necessary to prove that they are protected, often being dismissed on summary judgment before they even get to the merits of their claims. In 1999, the Supreme Court decided a trilogy of cases that sharply narrowed the scope of ADA protection, holding that mitigating or corrective measures must be taken into account in evaluating whether an individual is disabled.

In Sutton v. United Air Lines, twin sisters, both suffering from severe myopia, filed suit against United Air Lines after the airline refused to hire them as pilots due to their inability to meet the minimum vision requirement. In its analysis, the Court held that the sisters were not disabled due to their vision impairments.

49. See Cohen, supra note 30, at 60 (arguing that "[t]he ADA remains the only federal discrimination statute in which the protected class cannot easily be ident[i]fied"); see also Ranseen & Parks, supra note 12, at 88 (noting extensive focus of ADA litigation on "issue of inclusion"). For a discussion of other anti-discrimination statutes and their protected classes, see supra note 12 and accompanying text.

50. See, e.g., Toyota Motor Mfg., Ky. v. Williams, 534 U.S. 184, 187, 202 (2002) (reversing Sixth Circuit's denial of summary judgment, based on respondent's lack of substantial limitation in major life activity); Guzman-Rosario v. United Parcel Serv., 397 F.3d 6, 9-11 (1st Cir. 2005) (affirming district court's grant of summary judgment due to lack of evidence of substantial limitation); Sullivan v. Neiman Marcus Group, 358 F.3d 110, 117 (1st Cir. 2004) (affirming grant of summary judgment due to lack of showing of substantial limitation); Nordwall v. Sears Roebuck, 46 F. App'x 364, 368 (7th Cir. 2002) (affirming district court's grant of summary judgment as plaintiff was not substantially limited); cf. Collins v. Prudential Inv. & Ret. Servs., 119 F. App'x 371, 376, 381 (3d Cir. 2005) (affirming district court's grant of judgment as matter of law as plaintiff was only moderately limited).


52. See Sutton, 527 U.S. at 482-83 (considering mitigating measures in evaluating disability); Murphy, 527 U.S. at 521 (same); Albertson's, 527 U.S. at 565-66 (same); see also Burke & Abel, supra note 27, at 785 (stating holding of trilogy cases); Cohen, supra note 30, at 60 (citing Sutton, 527 U.S. at 494 (Ginsburg, J., concurring)) (explaining that "[t]he ADA 'does not reach the legions of people with correctable disabilities'"); Fishman, supra note 14, at 2014 (discussing outcome of Sutton). Mitigating measures are "devices used by an individual to combat the effects of his or her impairment, such as medicines or auxiliary aids." McDonnell, supra note 12, at 473-74 (defining mitigating measures). Examples of mitigating measures include hearing aids for the hearing impaired and insulin injections for diabetics. See id. at 474 (providing examples).


54. See id. at 475-76 (discussing facts and procedural history). Each twin's uncorrected visual was "20/200 or worse in her right eye and 20/400 or worse in her left eye." Id. at 475 (describing impairment). United Air Lines required its pilots
under the ADA because their impairment, corrected by the use of glasses or contacts, did not substantially limit a major life activity. The Court stated that the effects of mitigating measures, used by an individual to correct his or her mental or physical impairment, "must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act."  

Prior to Sutton, both the EEOC and the Department of Justice ("DOJ") had issued interpretive guidelines, calling for the assessment of disability without regard to mitigating measures. Seven circuit courts supported this interpretation, with only two courts, the Sixth and Tenth Circuits, holding otherwise. Even the ADA's own legislative history sup-

55. See id. at 488-89 (asserting holding of case). "[W]ith the use of corrective lenses, each [twin] has vision that is 20/20 or better." Id. at 475. Without the corrective lenses, the twins cannot see effectively in various activities; however, "with corrective measures, such as glasses or contact lenses, both function identically to individuals without a similar impairment." See id. (emphasizing practical effect of corrective measures).

56. See id. at 482 (concluding that evaluating individuals in hypothetical uncorrected states would be "impermissible interpretation" of ADA).

57. See Burke & Abel, supra note 27, at 793-94 (examining view of EEOC and DOJ prior to Supreme Court trilogy); Fishman, supra note 14, at 2026 (noting Supreme Court's rejection of EEOC guidance); McDonnell, supra note 12, at 477-78 (addressing guidelines of EEOC and DOJ). Prior to the Sutton trilogy, the EEOC guidelines stated "that 'the determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices.'" See Burke & Abel, supra note 27, at 794, 794 n.31 (quoting 29 C.F.R. pt. 1630 app. § 1630.29(j) (1999)). For example, under the guidelines, a diabetic requiring insulin shots would be substantially limited because he or she could not perform major life activities without the insulin. See id. (noting examples from EEOC regulation).

58. See Burke & Abel, supra note 27, at 794-95 (explaining federal appellate court divide on issue of determining protected status of qualified individual without regard to "ameliorating measures"); McDonnell, supra note 12, at 474 (explaining circuit split regarding mitigating measures prior to 1999); see also Sutton, 527 U.S. at 495-96 (Stevens, J., dissenting) (citing Arnold v. United Parcel Serv., 136 F.3d 854, 866 n.10 (1st Cir. 1998)) (claiming that if eight of nine Federal Courts of Appeals and all three Executive agencies issuing regulations or interpretive bulletins construe definition of disability without ameliorative measures, that should be rule). The Third Circuit adopted the view that protected status should be determined without regard to mitigating measures in Matczak v. Frankford Candy & Chocolate Company, 136 F.3d 933 (3d Cir. 1997). See Burke & Abel, supra note 27, at 794-95, 795 n.37 (referencing Matczak, 136 F.3d 933 (3d Cir. 1997)).

The First, Second, Seventh, Eighth, Ninth and Eleventh Circuits also endorsed evaluation of disabilities without regard to mitigation. See Burke & Abel, supra note 27, at 794-95, 795 nn.35-36 & 38-41 (referencing Arnold v. United Parcel Serv., 136 F.3d 854, 861 (1st Cir. 1998); Bartlett v. N.Y. State Bd. of Law Exam'rs, 156 F.3d 321, 329 (2d Cir. 1998), vacated, 527 U.S. 1031 (1999); Baert v. Euclid Beverage Ltd., 149 F.3d 626, 630 (7th Cir. 1998); Doane v. City of Omaha, 115 F.3d 624, 628 (8th Cir. 1997); Holihan v. Lucky Stores, 87 F.3d 362, 366 (9th Cir. 1996); Harris v. H & W Contracting Co., 102 F.3d 516, 529-21 (11th Cir. 1996)). Only the Sixth and the Tenth Circuits maintained the opposing view, later adopted by the
ported the interpretation of "disability" without considering mitigating efforts. Despite this, the Sutton Court interpreted the ADA on its face, considering its present tense language, its emphasis on individualized inquiry and the congressional findings on which it was based. While the dissent sounded the narrowing of ADA protection and the exclusion of particular groups from the statute's scope (such as those who use prosthetic limbs), the majority insisted that the "use of a corrective device does not, by itself, relieve one's disability"; rather, "one has a disability under [the first prong of the ADA] if, notwithstanding the use of a corrective device, that individual is substantially limited in a major life activity."  

Supreme Court, that mitigating measures were relevant to the disability determination. See Burke & Abel, supra note 27, at 795, 795 nn.42-43 (referencing Gilday v. Mecosta County, 124 F.3d 760, 766 (6th Cir. 1997) (Kennedy, J., dissenting, joined by Guy, J., discussing majority opinion on issue of mitigating measures)).

In contrast, the Fifth Circuit developed a hybrid approach to the issue, holding that "only serious impairments and ailments that are analogous to those mentioned in the EEOC Guidelines and the legislative history—diabetes, epilepsy and hearing impairments—will be considered in their unmitigated state.” See Burke & Abel, supra note 27, at 795 (quoting Washington v. HCA Health Servs. of Tex., 152 F.3d 464, 470 (5th Cir. 1998)).

59. See, e.g., Nicastro, supra note 2, at 366 (recognizing House and Senate committee reports as interpretive guides available to Court); see also McDonnell, supra note 12, at 478 (discussing ADA's legislative history). The Senate Labor and Human Resources Committee Report stated that disabilities "should be assessed without regard to the availability of mitigating measures" and the House Judiciary Committee Report reached the same result, assessing disability "without considering mitigating measures, such as auxiliary aids or reasonable accommodations." See id. at 478, 478 nn.51-52 (referencing S. Rep. No. 101-116, at 23 (1989) and H.R. Rep. No. 101-485(III), at 28 (1989), reprinted in 1990 U.S.C.C.A.N. 445, 451).

60. See, e.g., Fishman, supra note 14, at 2030-31 (examining Sutton Court's analysis). First, in looking at the plain language of the statute, the Court noted that the use of the present tense form of "substantially limits" suggests that individuals are to be considered in their present, not hypothetical, state. See id. at 2030 (focusing on form of statutory language). If an individual is using medication to cope with his or her impairment, he or she may not be presently "substantially limited" in a major life activity. See id. (discussing Court's analysis). Second, failing to consider ameliorative measures when assessing a medicated plaintiff's impairment would require courts to engage in guessing games to determine how the plaintiff is affected without such mitigation. See id. at 2030-31 (identifying Court's second argument). This would conflict with the requirement of individualized, case-by-case consideration. See id. (asserting second rationale for consideration of mitigating measures in disability analysis). Finally, the Court focused on the Congressional findings that forty-three million Americans have at least one disability. See id. at 2031 (noting Court's third argument). The Court rationalized that if Congress had intended the statute to cover individuals with correctable impairments; this number would have been much higher. See id. (comparing forty-three million disabled individuals with one hundred million having vision impairments alone). Based on these three analyses, the Court felt it unnecessary to consider the ADA's legislative history. See Sutton, 527 U.S. at 482 (disregarding need to evaluate legislative history).

61. See Sutton, 527 U.S. at 487-88 (responding to dissent's concerns about exclusion). The Court clarified its position on mitigating measures by stating that "[t]he use or nonuse of a corrective device does not determine whether an individu-
Subsequently, in **Murphy v. United Parcel Service**, the Court applied its mitigating measures analysis from **Sutton**, assessing the plaintiff in his medicated state when determining whether he was "substantially limited." The plaintiff, a mechanic suffering from high blood pressure, filed suit under the ADA after being dismissed from his employment for failure to meet the Department of Transportation ("DOT") standards for health certification. In his medicated state, the plaintiff could not prove that he was substantially limited in a major life activity and thus the Court held, pursuant to **Sutton**, that he could not bring a valid ADA claim of disability discrimination.

Finally, in **Albertson’s, Inc. v. Kirkingburg**, the Court considered a new twist on the mitigating measures framework. The plaintiff, suffering from amblyopia, a condition leading to monocular vision, sued his former employer for firing him as a commercial truck driver due to his failure to meet the DOT vision standards, despite his acquisition of a waiver from the DOT. In holding that the plaintiff was not disabled under the ADA, the Court focused on his body's own ability to compensate for his impairment. Considering this compensation as any other mitigating measure, the Court did not find the plaintiff to be substantially limited. The Court concluded that there is "no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the

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63. See Fishman, supra note 14, at 2027-28 (citing application of Sutton in Murphy v. United Parcel Serv., 946 F. Supp. 872, 881 (D. Kan. 1996)).
64. See McDonnell, supra note 12, at 475-76 (reciting facts and procedural history of Murphy). Upon later retesting, his high blood pressure was detected, and he was fired. See id. at 2028 (indicating adverse employment action).
65. See Fishman, supra note 14, at 2028 (discussing Court's application of Sutton holding to plaintiff in Murphy). According to the plaintiff's own physician, when medicated the plaintiff's high blood pressure does not substantially limit his abilities to perform major life activities. See Murphy, 527 U.S. at 519, 521 (evaluating plaintiff's disability in light of mitigation). The Court refused to consider the issue of evaluating a disability when a person is limited despite medication or experiences negative side effects as a result of taking the medication. See id. at 521 (leaving question open for consideration in future litigation).
67. See id. at 565 (addressing self-compensation by body systems).
68. See id. at 559-60 (describing facts of case).
69. See id. at 565 (questioning Ninth Circuit’s suggestion that plaintiff's ability to compensate be ignored in analysis). The Court recognized that his brain developed "subconscious mechanisms for coping with [his] visual impairment and thus his body compensate[d] for his disability." Id. (describing plaintiff's self-compensation for impairment).
70. See id. at 567 (requiring plaintiff with monocular vision to prove substantial limitation).
body's own systems." The Sutton trilogy, the name by which these three cases are often referred, ultimately clarified any discrepancies among the circuit courts as to the role of mitigation in the determination of disabilities: a court must consider mitigating measures, artificial or otherwise, in assessing whether an individual falls within the protected class of disability. 72

III. Emory v. AstraZeneca Pharmaceuticals: Recognizing Disabilities in Spite of Self-Achievement

A. Facts and Procedural Background

While the Supreme Court trilogy closed the door on many ADA claims, the Third Circuit in Emory v. AstraZeneca Pharmaceuticals73 reminds plaintiffs and practitioners that there is still room for protection, particularly for disabled individuals with many life accomplishments and successes. 74 Born with cerebral palsy, Mr. Alvin Emory had worked as a custodian for AstraZeneca for more than twenty-seven years.75 Over a period of twelve years, he made unsuccessful bids for ten different internal promotions, many of which he was not qualified for without accommodation.76 As a result of his cerebral palsy, Emory endured numerous physical impairments, including permanent partial paralysis on his right side and a deformed right hand, arm and leg.77 He also experienced mental limitations, being placed in Special Education classes at a young age.78 At work, Emory required verbal instructions and needed hands-on or a combina-

71. Id. at 565-66 (extending concept of mitigating measures). See Nicastro, supra note 2, at 364 (discussing Albertson's).
72. See Burke & Abel, supra note 27, at 796-97 (discussing how Court addressed significance of mitigating measures in interpretation of ADA).
73. 401 F.3d 174 (3d Cir. 2005).
74. See generally id. (finding genuine issue of material fact as to plaintiff's substantial limitations despite plaintiff's many life achievements).
75. See id. at 175 (discussing plaintiff's employment). Emory was the only employee at his plant who still held his custodial position after twenty-five years of employment. See id. (asserting capabilities and dedication of plaintiff).
76. See id. at 175-76 (noting plaintiff's application for "several permanent higher-paying jobs" that he was not qualified for without accommodation due to his impairments).
77. See id. at 175 (describing physical limitations). Emory's permanent impairment pervades 50% of his right upper extremity and 25% of his right lower extremity. See id. (detailing extent of physical impairment). Despite physical, occupational and speech therapy, Emory was incapable of lifting anything or performing activities that require the use of both hands. See id. at 175-76 (discussing limitations due to physical impairment). Due to his inability to open and close his right thumb, Emory has trouble with "right-handed gripping." See id. at 176 (reporting Emory's difficulty in performing manual tasks).
78. See id. (noting that "in 2003, Emory scored a Full Scale I.Q. of 77, placing him in the borderline range of intellectual performance and in the 6th percentile of the general population").
tion visual and verbal approach to training, as opposed to simply reading a manual.\textsuperscript{79}

Despite these limitations, "Emory ha[d], since adolescence, consistently endeavored to challenge himself and to participate in various civic and community activities."\textsuperscript{80} As a teenager, he served as a volunteer firefighter and also performed as a clown in the Shriners' Circus.\textsuperscript{81} Further, Emory joined a "team responsible for mediating local disputes" and recently was hired to perform part-time cleaning work for a local temple.\textsuperscript{82}

Emory, determined to advance at AstraZeneca, upon the promotion of another employee, took on a temporary role as "acting Second Shift Supervisor," serving in such capacity for two years.\textsuperscript{83} Hoping to improve his chances for promotion, Emory requested an assessment at a learning center, but his Human Resources Director refused.\textsuperscript{84} Furthermore, upon receiving a block of time from AstraZeneca for computer training, his instructor recommended to AstraZeneca that "voice-activated software" be installed for his use; however, no accommodations were ever made.\textsuperscript{85}

When Emory was overlooked for the permanent Second Shift Supervisor position, despite his two years of service as acting Second Shift Supervisor, Emory filed suit against AstraZeneca claiming violation of the ADA and the Delaware Handicapped Persons Act.\textsuperscript{86} To establish his disability claim, Emory asserted that he was substantially limited "in the major life activities of walking, learning and performing manual tasks."\textsuperscript{87} The district court, however, while recognizing that Emory was somewhat limited in some tasks, focused on his numerous civic endeavors and achievements,

\textsuperscript{79} See id. at 177 (noting need for accommodation of mental limitations). When applying for the mechanic position, Emory failed the required test on five occasions, even including once when he was given the test orally. See id. (discussing difficulty even with some accommodation).

\textsuperscript{80} Id.

\textsuperscript{81} See id. (describing activities).

\textsuperscript{82} See id. (discussing civic responsibilities).

\textsuperscript{83} See id. (examining temporary supervisory role). During this time, Emory faced much criticism and embarrassment at the expense of other supervisors. See id. at 177-78 (noting criticism for math, spelling and grammar mistakes, as well as taunts by supervisor who called him "Rainman").

\textsuperscript{84} See id. at 178 (recognizing denial for requested assessment).

\textsuperscript{85} See id. (discussing outside recommendation as to proper accommodation for Emory's limitations).

\textsuperscript{86} See id. (asserting final adverse employment action and subsequent legal action taken). Emory claimed "discrimination in the form of failure to promote and failure to provide reasonable accommodations." Id. (discussing claims filed with district court).

\textsuperscript{87} See id. (depicting Emory's claim for ADA protection).
holding that Emory’s limitations were not substantial.88 As a result, the
court granted summary judgment for AstraZeneca.89

B. The Third Circuit’s Perspective

While the district court’s decision seemed to indicate the end of pro-
tection for well-accomplished, impaired individuals, the Third Circuit rec-
ognized the inappropriate focus of the district court’s analysis and
reasserted the true purpose behind the ADA.90 According to the Third
Circuit, Congress enacted the ADA with the intent of providing disabled
individuals with “the opportunity to compete on an equal basis and to
pursue those opportunities for which our free society is justifiably fa-
mous.”91 The court, looking to the EEOC’s interpretive guidelines re-
garding the ADA and its amicus curiae brief filed in this case, noted that
affirming the district court’s ruling would undermine that very purpose of
equal opportunity.92

88. See id. at 178-79 (“Although Mr. Emory has some limitations in his ability
to grip, carry and manipulate objects and needs assistance in accomplishing some
household chores, childcare duties and activities involving his right side, his limita-
tions are not substantial or severe.”). While the district court recognized Emory’s
limitations in literacy, it held that these limitations also failed to be substantial,
“primarily because of the challenges Emory was courageous enough to undertake
and, in some instances, overcome.” See id. at 179 (focusing on Emory’s high school
graduation, updated computer skills, family mediator certification and firefighter
position). The court also noted that Emory consistently “earned positive perfor-
man-cce evaluations” during his employment with AstraZeneca. See id. (recognizing
effective performance during twenty-six year employment).

89. See id. at 178 (asserting procedural posture of case).

90. See id. at 180 (distinguishing district court’s ruling from congressional in-
tent behind ADA).

91. See id. (citing 42 U.S.C.A. § 12101(a)(9) (West 2006)) (recognizing intent
for broader scope of ADA protection). In passing the ADA, Congress wanted to
address the persistence of unfair discrimination against the disabled, not just to
“provide piecemeal protection to only those with the most tragic or obvious im-
pairments.” See id. (emphasizing true purpose for enactment, particularly in light
of district court’s contrary ruling).

92. See id. (examining EEOC’s position on “substantially limits” and ADA’s
scope). In its amicus curiae brief, the EEOC urged for a reversal of the district
court’s finding, asserting a concern that ignoring evidence of the substantial im-
 pact of Emory’s impairment on his daily life would “deprive [other] victims of the
ability to challenge discriminatory acts. . . .” See id. (expressing need for protection
of Emory in light of future plaintiffs). The EEOC’s interpretive guidelines define
“substantially limits” as an inability or significant restriction in the condition, man-
er or duration in which a person performs a major life activity compared to an
average unimpaired person. See id. (citing 29 C.F.R. § 1630.2(j)(1)) (providing
guidance in interpretation of ambiguous part of statute). For a discussion of “sub-
stantially limits” and the EEOC’s suggested factors for consideration, see supra
notes 41-45 and accompanying text.

In Emory, the Third Circuit treated the EEOC’s guidelines as significantly per-
suasive to its analysis. 401 F.3d at 180 (illustrating ample discussion of EEOC’s
stance). While Congress granted the EEOC “authority to issue non-legislative
guidelines for Title I [of the ADA] regarding employment discrimination[,]” these
regulations are only persuasive and not binding on the judicial branch. See Nicas-
The Third Circuit centered its analysis on its interpretation of the "substantially limits" requirement of the ADA.\textsuperscript{93} Deferring to the inquiry set forth in \textit{Taylor v. Phoenixville School District},\textsuperscript{94} the court compared the conditions, manner or duration under which an impaired individual is able to perform a major life activity with that of an "average person in the general population."\textsuperscript{95} In \textit{Taylor}, the Third Circuit reversed a district court's grant of summary judgment for the employer school district, noting the existence of a genuine issue of material fact as to whether the plaintiff's mental illness was substantially limiting her ability to think even though she was taking medication.\textsuperscript{96} In \textit{Emory}, the Third Circuit explored this comparison between the performance of an impaired individual versus that of an "average" person by examining the EEOC interpretive guidelines which echo the inquiry of \textit{Taylor}.\textsuperscript{97}

In reversing the district court's holding, the Third Circuit emphasized that "[w]hat a plaintiff confronts, not overcomes, is the measure of substantial limitation under the ADA."\textsuperscript{98} The court opined that sheer will power, planning abilities, cognitive coping skills and learned accommodations do not negate the fact that activities may still be substantially more difficult for an impaired individual when compared with one not suffering

\textsuperscript{93} See \textit{Emory}, 401 F.3d at 179-83 (analyzing degree of Emory's limitation in major life activities of performing manual tasks and learning). In making its determination, the Third Circuit considered Supreme Court cases, prior Third Circuit decisions, the stance of other circuits and the suggested guidelines from the EEOC. See id. (addressing various authorities for analysis).

\textsuperscript{94} 184 F.3d 296 (3d Cir. 1999).

\textsuperscript{95} See \textit{Emory}, 401 F.3d at 179-80 (citing \textit{Taylor}, 184 F.3d at 307) (noting essence of substantial limitation inquiry).

\textsuperscript{96} See \textit{Taylor}, 184 F.3d at 309 (recognizing sufficient evidence on issue of "substantially limited"). The plaintiff in \textit{Taylor} had worked for twenty years as the principal's secretary at an elementary school. See id. at 302 (describing employment relationship). After spending time in a psychiatric institution where she was diagnosed with bipolar disorder, the plaintiff continued to take lithium in order to control her mental illness. See id. at 302-03 (summarizing impairment and mitigating measure). Following her return to work, the plaintiff received nine disciplinary notices from her supervisor before being placed on probation and ultimately terminated. See id. at 304 (discussing adverse employment action). In questioning the plaintiff's substantial limitations, the Third Circuit stated that simply because the plaintiff "may not have experienced problems every day does not defeat her claim." See id. at 309 (reconsidering relationship between frequency of problems and "substantial limitation").

\textsuperscript{97} See \textit{Emory}, 401 F.3d at 180 (quoting EEOC interpretive guidelines on "substantially limits" and relevant factors). For a discussion of the role of the EEOC in ADA interpretation, see \textit{supra} note 92.

\textsuperscript{98} See id. at 181 (presenting appropriate focus for determining substantial limitation).
from such impairment. More specifically, the Third Circuit opened the
door for future plaintiffs with learning disabilities through its characteriza-
tion of learning as a major life activity. The court discussed the nature
and severity of Emory’s impairment, the permanency of his condition and
the significant impact on his life. Seeking guidance from the First Cir-
cuit, the Third Circuit considered Gillen v. Fallon Ambulance Service, in
which the court acknowledged a plaintiff’s substantial limitation in lifting
items notwithstanding her extraordinary efforts to compensate through
the use of various learned techniques. In conclusion, the Third Circuit
held that the ADA’s focus should not be “on whether the individual has
the courage to participate in the major life activity . . . , but, rather, on
whether [he] faces significant obstacles when [he] does so.”

C. Emory v. AstraZeneca Pharmaceuticals in Light of Mitigating
Measures in the Third Circuit

In Emory, the Third Circuit’s focus on obstacles encountered, as op-
posed to coping mechanisms employed, tends to distinguish the protection
available to individuals who compensate for their impairments by
means of learned accommodations from those who compensate through
artificial means such as medication. Just two months prior to the Emory

99. See id. (citing Ordahl v. Forward Tech. Indus., 301 F. Supp. 2d 1022, 1028-29 (D. Minn. 2004)) (recognizing possibility of disability despite self-accomplishment). In relating this principle to the facts in Emory, the Third Circuit noted: the fact that Emory has been able to become a productive member of society by having a family, working, and serving his community does not negate the significant disability-related obstacles he has overcome to achieve, nor does it undermine his inability, or significantly restricted ability, to learn and perform numerous manual tasks of central importance to daily life.

Id. (examining evidence of Emory’s will and perseverance offered by AstraZeneca).

100. See generally id. at 182-83 (analyzing substantial limitation on major life activity of learning).

101. See id. at 183 (applying each of three factors proposed by EEOC’s interpretive guidelines for determining whether individual is substantially limited). For further discussion of the “substantially limits” requirement and its relevant factors, see supra note 43 and accompanying text.

102. 283 F.3d 11 (1st Cir. 2002).

103. See Emory, 401 F.3d at 182 (citing Gillen, 283 F.3d at 22) (recognizing key question focusing on obstacles). In Gillen, the First Circuit found the plaintiff to be substantially limited in her ability to lift, asserting that her ability to lift more weight than others does not negate her disability because the “manner in which she lifts and the conditions under which she can lift will be significantly restricted because she only has one available limb.” 283 F.3d at 23 (addressing substantial limitation because of need for artificial mitigating measure).

104. See Emory, 401 F.3d at 183 (quoting Gillen, 283 F.3d at 22) (establishing focus for evaluating ADA claims in Third Circuit).

105. Compare Emory, 401 F.3d at 181 (overlooking substantial achievements due to developed cognitive coping skills in disability determination) with Sutton v. United Air Lines, 527 U.S. 471, 482 (1999) (analyzing individual in mitigated state).
decision, the Third Circuit highlighted its interpretation of
Sutton and mitigating measures in dicta in Collins v. Prudential Investment & Retirement Services.\textsuperscript{106} The plaintiff in Collins filed a disability discrimination claim, asserting that her Attention Deficit Hyperactivity Disorder ("ADHD")\textsuperscript{107} substantially impaired her ability to think, learn, concentrate and remember.\textsuperscript{108} While rejecting her claim on numerous grounds, the Third Circuit affirmed the district court's alternative holding that the plaintiff was not disabled in her medicated state.\textsuperscript{109} Further, the court emphasized that


\textsuperscript{108} See Collins, 119 F. App'x at 374 (specifying major life activities under ADA analysis). After thirteen months of training, Collins was fired from her job at Prudential due to her inability to perform the financial transactions component of her job. See id. at 372-73 (noting alleged adverse employment action). During the course of her employment, Collins received eleven months of training beyond the normal training period for a typical employee in her position, yet she was unable to master the required skills. See id. (recognizing Prudential's reasoning behind termination). Approximately two months after her termination, Collins was diagnosed with ADHD. See id. at 375 (asserting plaintiff's impairment).

\textsuperscript{109} See id. at 378-79 (addressing district court's discussion of mitigating measures under Sutton). Collins testified that she took Adderol and Ambien to correct her ADHD—Adderol to help her to focus and Ambien to help her sleep. See id. at 378 (discussing medication and evaluation of disability). Moreover, Collins emphasized the need for attention to timing in medicating, asserting that "she has to take Ambien to counteract Adderol and, therefore 'the medications actually make Collins more impaired than the general population.'" Id. (presenting example of need to correlate medication times to help in ability to focus and to eliminate trouble sleeping).

Regardless of this mitigating measures analysis, there were several flaws in Collins' claim that required the Third Circuit to affirm the district court's grant of judgment as a matter of law for Prudential Retirement and Investment Services. See id. at 372 (asserting procedural posture and holding of Third Circuit case). To support her claim, Collins simply relied on her own testimony, which the court found to be persuasive in illustrating her life successes, yet ineffective in demon-
"[t]he test for determining the effect of mitigating measures is not whether the mitigating measures constitute a cure." 110

While the Third Circuit seems to be promoting the same theme in both *Emory* and *Collins*—that disability determinations must focus not on the perfect outcome or the individual’s remarkable accomplishments, but on the difficult steps along the way—its factual analysis creates a disparity in protection. 111 Those who overcome obstacles through the use of learned coping skills arguably have a greater chance at protection than those who take medication to compensate for their impairments. 112 In fact, the use of medication seems to negate the very existence of obstacles in the eyes of the judiciary. 113 Moreover, the *Collins* court specifically emphasized the plaintiff’s significant accomplishments as proof that she was not substantially limited; 114 whereas just a few months later, the *Emory* court failed to mention *Collins* and insisted that the determination should not depend on the plaintiff’s achievements. 115

strating any substantial limitations. *See id.* at 375-76 (depicting difficulties caused by *Collins*’ ADHD as moderate at most). Moreover, the Third Circuit concluded that Prudential did not have notice of her impairment when it made the employment decision. *See id.* at 380-81 (discussing Prudential’s knowledge of disability because diagnosis occurred after termination).

110. *See id.* at 379 (rejecting *Collins*’ arguments and directing determination away from whether mitigation constitutes cure).

111. *Compare Emory* v. AstraZeneca Pharm., 401 F.3d 174, 181 (3d Cir. 2005) (“What a plaintiff confronts, not overcomes, is the measure of substantial limitation under the ADA.”) *with Collins*, 119 F. App’x at 378-79 (“The test for determining the effect of mitigating measures is not whether the mitigating measures constitute a cure.”).

112. *Compare Emory*, 401 F.3d at 183 (finding genuine issue of fact as to disability) *with Collins*, 119 F. App’x at 379 (affirming district court’s alternative ruling that *Collins* was not substantially limited in medicated state).

113. *Cf.* Sutton v. United Air Lines, 527 U.S. 471, 483 (1999) (“[A] person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not ‘substantially limit[t]’ a major life activity.”); Albertson’s, Inc. v. Kirkburg, 557 U.S. 555, 565-67 (1999) (emphasizing body’s ability to compensate for vision impairments); *Collins*, 119 F. App’x at 378-79 (characterizing ADHD impairment as not substantially limiting).

114. *See Collins*, 119 F. App’x at 376, 378, 378 n.7 (asserting that *Collins*’ testimony concerning her work, academic and community involvement contradicted claim of substantial limitation in major life activities of thinking, learning, remembering and concentrating). The Third Circuit stressed that *Collins* had been “gainfully employed since her teen years,” working as a supermarket cashier, a data processor, a bookkeeper and a tax preparer. *See id.* at 376 (noting work history). She also earned an associate degree in accounting, graduating *cum laude*. *See id.* (indicating academic success). Comparing *Collins*’ testimony to that of a plaintiff with multiple sclerosis who filed suit in a 2002 Third Circuit case, the court asserted that if *Collins* had not suffered from ADHD since childhood, “it would seem that the problems she had at Prudential would have plagued her for her entire life and would have prevented her from achieving the things she did before she was hired by Prudential.” *Id.* at 378 n.7 (contrasting *Collins* with plaintiff in Gagliardo v. Connaught Labs., 311 F.3d 565 (3d Cir. 2002)).

115. *See Emory*, 401 F.3d at 181 (noting that “the fact that Emory has been able to become a productive member of society by having a family, working and serving
These cases cause a plaintiff to walk a fine line in the search for ADA protection in the Third Circuit. They illustrate how the Third Circuit’s interpretation of two similar factual scenarios can lead to different results. Since the decisions of Emory and Collins, other cases within the Third Circuit jurisdiction have affirmed this nuanced distinction of ADA analysis.

IV. NUANCED DISTINCTIONS AND UNANSWERED QUESTIONS IN THE THIRD CIRCUIT

In recognizing Emory’s disability in light of his life accomplishments, the Third Circuit highlighted the very essence of Congress’s reasoning behind the ADA’s enactment: to provide disabled people “the opportunity to compete on an equal basis and to pursue those opportunities that our free society is justifiably famous.” Congress did not emphasize equal treatment; it emphasized equal opportunity. This goal requires employers to give their disabled employees the tools necessary to perform their job responsibilities just as the average employee is able to do. In Emory, the Third Circuit appreciated that this purpose could not be fulfilled by providing “piecemeal protection to only those with the most tragic or obvious impairments.”

While the Third Circuit did not specifically discuss mitigating measures in its Emory analysis, its ruling inherently distinguished an individual’s “force of will, learned accommodations and careful planning” from the subconscious mechanisms an individual’s brain develops to compen-

his community does not negate the significant disability-related obstacles he has overcome”.

116. For a discussion of the nuanced distinction between artificial mitigation and cognitive coping, see infra notes 119-38 and accompanying text.

117. For a comparison of the Third Circuit’s analyses in Emory and Collins, see supra notes 105-16 and accompanying text.


119. See Emory, 401 F.3d at 180 (citing 42 U.S.C.A. § 12101 (a) (9) (West 2006)) (addressing purpose behind ADA).

120. See § 12101 (a) (8) (noting the “Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals”).

121. See Fishman, supra note 14, at 2024-25 (“The ADA mandates that the employer make any reasonable accommodations necessary to . . . enable [the disabled individual] to enjoy the equal opportunities that are available to other employees.”).

122. See Emory, 401 F.3d at 180 (asserting that opposite finding with regard to substantial impact of Emory’s impairment would “deprive victims of the ability to challenge discriminatory acts, and thereby undermine the ADA’s purpose”).
sate for impairments. The Supreme Court in Albertson's, however, specifically stated that there is no distinction between artificial mitigating measures and "measures undertaken, whether consciously or not, with the body's own systems." By shifting the focus of its analysis to the obstacles that one encounters, the Third Circuit treated one's personal courage and persistent efforts in performing life's daily activities differently than the body's own coping mechanisms. This distinction is what separates the two individuals described in the introductory hypothetical; one is disabled under the ADA despite significant life achievements because he developed his own non-traditional skills for addressing his impairment, while the other is not disabled when evaluated in his medicated state because he is not deemed substantially limited. Though the Supreme Court narrowed the ADA's protection through its interpretation of mitigating measures, the Third Circuit created room for plaintiffs with learning disabilities to receive protection, regardless of their many life accomplishments.

The greater theoretical reasons behind the Third Circuit's interpretation are unknown and essentially unspoken. Perhaps the court realized the difficulty in quantitatively determining the benefits of cognitive coping measures as compared to the benefits of medication. Maybe the court is inherently making a value judgment, asserting that personal achievements are somehow arguably more deserving of protection than medica-


124. See Albertson's, 527 U.S. at 565-66 (analogizing artificial means and self-accommodation).

125. See Emory, 401 F.3d at 181-83 (analyzing plaintiff's substantial limitations in major life activities such as performing manual tasks and learning).

126. See introductory hypothetical, supra notes 1-11 and accompanying text.

127. For a discussion of the Supreme Court's trilogy, see supra notes 49-72 and accompanying text.

128. See Emory, 401 F.3d at 179-83 (interpreting limitations due to plaintiff's mental impairments in way that allows ADA protection). One commentator asserts that: 'self-accommodations' ought to be considered by the courts when they determine whether a claimant qualifies for reasonable accommodations under the statute. The cognitive coping mechanisms employed by a person with a learning disability, however, should not be classified by the courts as 'self-accommodations.' These mechanisms are better viewed as achievements.

Nicastro, supra note 2, at 355 (establishing premises for providing learning disabled individuals with reasonable accommodations).

129. See generally Emory, 401 F.3d at 174-83 (resting analysis on EEOC guidelines, ADA's purpose and standards set forth in other jurisdictions).

130. Cf. Nicastro, supra note 2, at 356 (establishing reasons why "cognitive coping mechanisms" of learning disabled individuals do not qualify as "self-accommodation").
tion.\textsuperscript{131} Perhaps in light of the Supreme Court's trilogy, the Third Circuit saw an opportunity to allow some individuals to avoid "walk[ing] [the] fine line between proving that a disability is severe but not so severe that it prevents essential work requirements if accommodations are provided"—a line that is particularly difficult for plaintiffs to walk when the court is required to consider mitigating measures.\textsuperscript{132} Looking at the bare bones arguments, maybe, as set forth in its opinion, the Third Circuit simply applied the statute, considering the language as well as the purpose, to the facts of Emory's case and came to the most just decision.\textsuperscript{133} Regardless of its underlying perspective, the Third Circuit appropriately granted plaintiffs, who are substantially limited in major life activities, the opportunity to realistically make that showing.\textsuperscript{134}

\textsuperscript{131} Cf. id. (addressing ethical considerations of distinguishing between cognitive coping and self-accommodation). Discounting the efforts of learning disabled individuals to reach certain successes by equating cognitive coping and self-accommodation, would "de-legitimate individual achievement." See id. (stressing importance of labeling such skills as accomplishments). "It is the most ethical approach to treating learning disabilities as they exist in their present state." \textit{Id.} at 370-71 (setting forth reasons not to "detach" mitigating measures in determining whether learning disabled individual has disability under ADA).

Some individuals, however, view learning disabilities more skeptically than physical impairments, believing such difficulties stem from "personal deviance or shortcomings." \textit{See} Ranseen & Parks, \textit{supra} note 12, at 97 ("An unwillingness to view LD/ADHD as disabilities in need of accommodation might be seen as additional confirmation of this societal bias."). Adopting this skeptical view, one commentator argues against providing special testing accommodations to learning disabled students in professional schools and suggests that students alleging disabilities misuse the ADA to receive extra opportunities to excel. \textit{See} Knauff, \textit{supra} note 15, at 85, 109-10 (describing hypothetical of ADA abuse in law school).

\textsuperscript{132} See Ranseen & Parks, \textit{supra} note 12, at 89 ("Seeking protection based on the ADA may force an individual to argue mutually exclusive possibilities regarding his or her disability—that it is both severe and not severe."). The Supreme Court's stance on mitigating measures creates a difficult situation for plaintiffs who require medication to compensate for their impairments. \textit{See} Kimmel, \textit{supra} note 27, at 749-50 (explaining negative impact of \textit{Sutton} trilogy decision on ADA claims of over fifteen million diabetics). For example, consider the case of a diabetic plaintiff who, in an effort to control her diabetes, needs to regularly maintain her blood sugar levels, eat and rest periodically and give herself insulin shots throughout the day. \textit{Cf. id.} at 761-62 (pointing to speculation after court's decision in Deschene v. Pinole Point Steel Co., 90 Cal. Rptr. 2d 15, 18 (Ct. App. 1999)). If she is evaluated in her medicated state, the court could likely find that she is not disabled, as she is not substantially limited in major life activities when she is able to take her medication. \textit{Cf. id.} (same). Without being disabled, she is not entitled to accommodations. \textit{Cf. id.} (same). If, however, her employer does not provide her the time during work hours to monitor her condition as needed, she may become substantially limited. \textit{Cf. id.} (same). This is a catch-22; essentially she is not disabled if she is given accommodations, but she is not necessarily given accommodations if she is not disabled. \textit{Cf. id.} (same). This plaintiff must walk this difficult path and show the court that she is substantially limited in spite of her medication, perhaps in conjunction with her medication. \textit{Cf. id.} (same).

\textsuperscript{133} \textit{See generally} Emory, 401 F.3d at 174-83 (presenting concern for providing disabled individuals with ADA protection).

\textsuperscript{134} \textit{Cf. id.} at 183 (quoting Gillen v. Fallon Ambulance Serv., 283 F.3d 11, 22 (1st Cir. 2002)) ("When evaluating claims brought under the ADA, 'the focus is
One commentator notes that "[t]he disabilities rights movement is fighting for the right to participate fully in society, 'recognition of disabled people as full human beings and elimination of physical and attitudinal barriers to their full participation in society.'" 135 If the Third Circuit had discounted Emory's showing of substantial limitations by emphasizing his accomplishments, it would have prevented such a goal from being achieved. 136 That decision would have sent a cautionary message to persons with learning disabilities that if they achieve too much, they may not be entitled to the very accommodations that allowed them to reach such heights in the first place. 137 "Such demoralization will not inspire individuals to continue to make efforts to be integrated into society." 138

While the Third Circuit encompassed many persons with learning disabilities within its umbrella of interpreted ADA protection, several questions remain unanswered. 139 First, what will result if an individual with an impairment, such as ADHD, refuses to take available medication? 140 Perhaps this will depend on the reason for the individual's refusal. 141 In the case of artificial mitigation, providing protection to a non-medicated individual who establishes a substantial limitation while denying such protection to a similarly-situated individual who chooses to mitigate will lead to

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136. For a discussion of the Third Circuit's analysis and why such achievements were not the focus of its determination, see supra notes 90-104 and accompanying text.


138. Nicastro, supra note 2, at 375 (asserting that failing to adopt perspective similar to Third Circuit would perpetuate stereotypes and discrimination).

139. For a discussion of the effect of the Third Circuit's analysis on scope of ADA protection, see supra notes 119-28 and accompanying text.

140. For a discussion of the refusal to medicate impairments and its repercussions on ADA protection, see generally Burke & Abel, supra note 27, at 785-817 (questioning duty to mitigate and potential loss of protection).

141. See Burke & Abel, supra note 27, at 805-06 (considering difficulties in mandating intake of available medication); Fishman, supra note 14, at 2033-40 (discussing cases where plaintiffs failed to mitigate). One commentator suggested that in evaluating a plaintiff's decision not to mitigate a correctable disability, the courts should consider factors such as recommendations of physicians; the cost of the recommended treatment, including insurance coverage; religious objections sincerely held; and the nature and severity of potential side effects and health risks associated with the use of the proposed treatment option, including possible allergic reactions, the potential for long-term addiction, and debilitating effects. Burke & Abel, supra note 27, at 813-14 (offering reasonableness approach to mitigating measures consideration).
inconsistent results. At the same time, however, there is often heightened debate, particularly regarding ADHD, concerning the propriety of prescription medication. Moreover, is it appropriate for the court to make value judgments on an individual’s personal medical decisions?

Along the same lines, what if an individual with a learning disability is unable to afford such medication? Because the purpose of the ADA is to assure equal opportunity, denying a plaintiff protection due to a lack of resources would seem unjust. Even in adopting this reasoning, however, the Third Circuit would still need to define the limits to this exception for financial difficulty. Further, while this may be relevant as to discrimination in hiring cases, once a plaintiff has begun working and is eligible for an employee health care plan, financial constraints would no longer serve as an excuse for failing to mitigate a correctable impairment.

Finally, due to the individualized nature of the ADA inquiry, is the Third Circuit’s focus in Emory applicable on a wider scale? For example, in cases where an individual has been significantly successful, reaching levels of professional education, at some point in the spectrum of interpretation, do such achievements play a role in the ADA determinations?

Most likely, only future litigation will provide answers to these ques-

142. See Fishman, supra note 14, at 2039 (recognizing potential inconsistency problem in mitigating measures analysis).


144. See Fishman, supra note 14, at 2039 (“Inquiring into the medical risks of available medications throws the court deep into the medical arena and forces it to make choices regarding personal lifestyle.”).


146. See Fishman, supra note 14, at 2035 (rationalizing outcomes of possible future litigation surrounding mitigation and financial constraints).

147. Cf. id. (recognizing need for future litigation to avoid inconsistent outcomes).

148. Cf. Kimmel, supra note 27, at 762 (addressing pre-Sutton analysis regarding mitigating measures and financial concerns in Arnold v. United Parcel Serv., 136 F.3d 854, 863 (1st Cir. 1998)).

149. For a discussion of the Third Circuit’s focus in Emory, see supra notes 90-104 and accompanying text.

150. See Ranseen & Parks, supra note 12, at 99-100 (questioning effect of long-term successful self-accommodation on disability determinations). Recognizing that ADA determinations are made in comparison to the average person, the courts have left open the issue of protection where an individual reached a level of success greater than average with reliance on learned cognitive coping skills. See id. (noting need for education in order to reduce tension between students, clini-
tions. A self-achieving plaintiff seeking protection, however, must stress the true purpose of the ADA and refocus the court, as in Emory, to the obstacles that he or she must face on a day-to-day basis due to his or her impairment, rather than on the endeavors he or she has been persistent and diligent enough to accomplish.

V. Conclusion

While well-intentioned, the ADA, in its ambiguous and complicated state, has been unsympathetic to many plaintiffs seeking its protection. Since its enactment, the Supreme Court has increasingly narrowed its scope, continuously redefining the elusive class of "disability." In the midst of this narrowing trend, however, the Third Circuit reemphasized the ADA's essential goals of providing equal opportunity and ending stereotypical discrimination. In Emory, the court recognized that the ADA should not be used as a means of discouraging plaintiffs from reaching success in all aspects of life; rather, ADA determinations should focus on the substantial obstacles that individuals face in reaching that success.

In light of Emory, practitioners in the Third Circuit have the opportunity to emphasize the difficulties that their clients face in performing major life activities, notwithstanding opposing counsel's possible attempts to minimize such substantial limitations by focusing on the clients' life achievements and accomplishments. By emphasizing actual difficulties faced, individuals with learning disabilities who rely on Emory have a

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151. For a discussion of questions unanswered by the Third Circuit, see supra notes 119-50 and accompanying text.
152. For a discussion of Emory's ADA claim and the Third Circuit's analysis, see supra notes 73-104 and accompanying text.
153. For a discussion of the statute's background and inherent ambiguity, see supra notes 26-28 and accompanying text.
154. For a discussion of Supreme Court cases narrowing protection to individuals substantially limited in their mitigated states, see supra notes 49-72 and accompanying text.
155. See Emory v. AstraZeneca Pharm., 401 F.3d 174, 180 (3d Cir. 2005) (creating room for providing statutory protection to individuals in need).
156. See id. at 181 (refusing to allow fact that Emory became "productive member of society" to negate claim for ADA protection).
157. Cf. id. at 183 (focusing on obstacles and not plaintiff's courage).
stronger basis for making successful showings of their substantial limitations and thus, satisfying the protected class requirements.\textsuperscript{158} By distinguishing cognitive coping skills from artificial mitigating measures and self-compensation by one’s body systems, the Third Circuit allows plaintiffs within these factual settings to overcome the impediments to protection set forth in the Supreme Court trilogy.\textsuperscript{159}

"By rejecting the Supreme Court’s physical disabilities approach when addressing the question of learning disabilities, society affirms that persons with learning disabilities are capable of the same autonomous, self-actualization that persons without disabilities achieve."\textsuperscript{160} This is the message that the Third Circuit sent to those individuals seeking ADA protection.\textsuperscript{161} Although not open-ended in its scope, the Third Circuit’s ADA interpretation appropriately enables at least one of the two plaintiffs in the introductory hypothetical to seek remedial action as a result of disability discrimination, allowing the plaintiff to be proud of his past accomplishments and with the help of reasonable accommodations, reach new levels of success in the future.\textsuperscript{162}

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\textsuperscript{158} For a discussion of the Third Circuit analysis in Emory, see supra notes 90-104 and accompanying text.

\textsuperscript{159} For a comparison of cognitive coping skills and mitigating measures in the Third Circuit, see supra notes 105-18 and accompanying text. For an analysis of the impact of this distinction of potential claims, see supra notes 118-38 and accompanying text.

\textsuperscript{160} Nicastro, supra note 2, at 371 (addressing ethical considerations of Supreme Court’s trilogy decisions in light of ADA’s purpose).

\textsuperscript{161} For an analysis of the Third Circuit’s stance, see supra notes 90-118 and accompanying text.

\textsuperscript{162} For a discussion of the introductory hypothetical, see supra notes 1-11 and accompanying text.