
TOO DISABLED OR NOT DISABLED ENOUGH:
BETWEEN A ROCK AND A HARD PLACE AFTER
MURPHY V. UNITED PARCEL SERVICE, INC.

[*MURPHY V. UNITED PARCEL SERVICE, INC.*, 119 S. CT.
2133 (1999)]

I. INTRODUCTION

The battle between the circuits is over and the Tenth Circuit has won. Siding with the Tenth Circuit, the only circuit to rule squarely against the Equal Employment Opportunity Commission (EEOC) regulations, the Supreme Court held that a disability should be evaluated in its mitigated state.¹ The real question is whether this decision is a victory for millions of Americans with disabilities that can be partially or fully alleviated with medication or other assistive measures. The answer is no.

The Americans with Disabilities Act (ADA) was meant to protect all Americans who have a disability from various forms of discrimination.² The recent Supreme Court decisions, *Murphy v. United Parcel Service, Inc.*³ and *Sutton v. United Airlines, Inc.*⁴ will drastically reduce the scope of the ADA's protection. As a result of these decisions, persons who have disabilities that are partially or fully correctable may no longer be protected from discrimination under the ADA.⁵ These decisions resolved a split among the circuits about whether mitigating measures should be taken into consideration when determining the threshold issue of whether a person has a disability under the ADA.⁶ The Su-

1. See *Murphy v. United Parcel Service, Inc.*, 119 S. Ct. 2133, 2136 (1999); *Sutton v. United Airlines, Inc.*, 119 S. Ct. 2139, 2143 (1999). For further discussion of these cases see Kirk Lowry, *A Discrete and Insular Minority: Behind the Headlines of Murphy v. United Parcel Service, Inc.*, 39 WASHBURN L.J. 196 (2000).

2. 42 U.S.C. § 12101(b) (1994).

3. 119 S. Ct. 2133.

4. 119 S. Ct. 2139.

5. See *Todd v. Academy Corp.*, 57 F. Supp. 2d 448 (S.D. Tex. 1999) for an example of the harsh effect the *Murphy* and *Sutton* decisions have on people who are victims of employment discrimination because of a disability that is partially correctable. See also *EEOC v. Gallagher*, 181 F.3d 645 (5th Cir. 1999).

6. The First, Second, Third and Seventh circuits all had decided that mitigating measures should not be taken into consideration when determining whether an individual has a disability. See *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854 (1st Cir. 1998); *Bartlett v. New York State Bd. of Law Exam'rs*, 156 F.3d 321 (2d Cir. 1998), *vacated sub nom.* *New York State Bd. of Law Exam'rs v. Bartlett*, 119 S. Ct. 2388 (1999); *Matczak v. Frankford Candy and Chocolate Co.*, 136

preme Court's decisions contradicted the clear legislative history, the majority of the circuits that had decided the issue, the opinion of the Department of Justice, and most importantly, the EEOC—the agency charged with interpreting the ADA.⁷ These decisions ignore the intent of Congress, and have harsh ramifications for individuals with treatable disabilities because they will still be subject to discrimination but will not have the protection of the ADA.

II. CASE DESCRIPTION

Vaughn Murphy, the plaintiff in *Murphy v. United Parcel Service, Inc.*, was the first victim of the Supreme Court's decision. Murphy developed severe hypertension as a child.⁸ Without medication, Murphy's blood pressure was approximately 250/160.⁹ Murphy was able to work as a mechanic for most of his adult life; however, he was never required to obtain a Department of Transportation Health Certificate until he went to work for United Parcel Service (UPS).¹⁰

Murphy was hired by UPS in Topeka, Kansas as a mechanic in August, 1994.¹¹ This position required Murphy to test drive commercial motor vehicles.¹² Consequently, he was required to obtain a Department of Transportation (DOT) health certificate.¹³ To obtain a DOT health certificate, one must have "no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial vehicle safely."¹⁴ The DOT regulations require that if a person's blood pressure is consistently above 160/90 then the person may be subject to further testing to determine whether he or she is "qualified to operate a commercial motor vehicle."¹⁵ Although Murphy's blood pressure was above 160/90, he was granted a DOT health certificate and began working for UPS.¹⁶

F.3d 933 (3d Cir. 1997); *Baert v. Euclid Beverage Ltd.*, 149 F.3d 626 (7th Cir. 1998). The Fifth Circuit decided that only the most serious of disabilities should be considered without regard to mitigating measures. See *Washington v. HCA Health Servs. of Texas*, 152 F.3d 464 (5th Cir. 1998), *vacated sub nom. HCA Health Servs. of Texas, Inc. v. Washington*, 119 S. Ct. 2388 (1999). The Tenth Circuit decided that mitigating measures should be taken into consideration when determining whether a person is disabled. See *Sutton v. United Airlines, Inc.*, 130 F.3d 893 (10th Cir. 1997), *aff'd*, 119 S. Ct. 2139 (1999); *Murphy v. United Parcel Service, Inc.*, No. 96-3380, 1998 WL 105933, (10th Cir. March 11, 1998), *aff'd*, 119 S. Ct. 2133 (1999).

7. See *supra* note 6 for cases holding that a disability should be evaluated without regard to mitigating measures. See 29 C.F.R. pt. 1630, app. § 1630.2(j) (1999) (EEOC interpretation); 28 C.F.R. pt. 35, app. A § 35.104 (1999) (Department of Justice interpretation).

8. See *Murphy*, 119 S. Ct. at 2136.

9. See *id.*

10. See *Murphy v. United Parcel Service, Inc.*, 946 F. Supp. 872, 875 (D. Kan. 1996), *aff'd*, No. 96-3380, 1998 WL 105933 (10th Cir. 1997), *aff'd*, 119 S. Ct. 2133 (1999).

11. See *Murphy*, 119 S. Ct. at 2136.

12. See *id.*

13. See *id.* (citing 49 C.F.R. § 391.41(a) (1998)).

14. *Id.* (quoting 49 C.F.R. § 391.41(b)(6)).

15. 49 C.F.R. § 391.43 (1998).

16. See *Murphy*, 119 S. Ct. at 2136.

In September of 1994, the UPS Medical Supervisor discovered that Murphy had been given a DOT health certificate despite his high blood pressure.¹⁷ Murphy was required to have his blood pressure re-tested, but it was still above 160/90.¹⁸ Consequently, UPS terminated Murphy in October of 1994 because his blood pressure was above 160/90.¹⁹ Murphy, however, found another job as a mechanic only two to three weeks after he was fired.²⁰

Vaughn Murphy brought an employment discrimination suit against UPS in the United States District Court of the District of Kansas,²¹ alleging that UPS had violated Title I of the ADA²² by terminating him because of his high blood pressure.²³

The federal district court granted UPS's motion for summary judgment,²⁴ holding that Murphy was not a disabled person within the meaning of the ADA.²⁵ In reaching its decision, the court rejected the EEOC guidelines which require that "[t]he determination of whether an individual is substantially limited in a major life activity [, and therefore disabled], must be made . . . without regard to mitigating measures such as medicines, or assistive or prosthetic devices."²⁶ The court found that Murphy's medicated hypertension was not a disability within the meaning of the ADA.²⁷ The district court also held that "UPS did not

17. *See id.*

18. *See* *Murphy v. United Parcel Service, Inc.*, 946 F. Supp. 872, 876 (D. Kan. 1996), *aff'd*, No. 96-3380, 1998 WL 105933 (10th Cir. 1997), *aff'd*, 119 S. Ct. 2133 (1999). The DOT Medical Regulatory Criteria for Evaluation requires that to qualify for a DOT health certificate, an applicant (among other things), must maintain blood pressure less than or equal to 160/90. *See* Medical Advisory Criteria for Evaluation Under 49 C.F.R. part 391.41, available at <<http://mchs.fhwa.dot.gov/rulesregs/fmcsr/medical.htm>> (visited Jan. 19, 2000) *cited in* *Murphy*, 946 F. Supp. at 876. This document also says that if a person's blood pressure is between 161/91-180/104, he or she is still qualified to drive a commercial motor vehicle, but he or she must bring his or her blood pressure down to 160/90. *Id.* Murphy's blood pressure was above the 160/90 criteria each time it was taken. *See* *Murphy*, 946 F. Supp. at 876. Murphy, however, argued that this document was erroneously relied on and that the DOT regulation stating that a person must not have a "current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial motor vehicle safely" should have been the basis for the court's decision. Brief for Petitioner at 37, *Murphy v. United Parcel Service, Inc.*, 119 S. Ct. 2133 (1999) (97-1992), available in 1999 WL 86488 (citing 49 C.F.R. § 391.41(b)(6) (1998)). Had this been the standard, Murphy may have been able to receive a DOT health certificate because there would not have been a 160/90 ceiling.

19. *See* *Murphy*, 119 S. Ct. at 2136.

20. *See* *Murphy*, 946 F. Supp. at 876.

21. *See id.* at 872-73.

22. 42 U.S.C. § 12112 (1994). Title I of the ADA requires that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.*

23. *See* *Murphy*, 946 F. Supp. at 873.

24. *See id.* at 874.

25. *See id.* at 881-82.

26. *Id.* at 879-81 (quoting 29 C.F.R. pt. 1630, app. § 1630.2(j) (1999) and rejecting EEOC Interpretive Guidelines).

27. *See id.* at 881. The court based its decision on the cases *Deghand v. Wal-Mart Stores*, 926 F. Supp. 1002, 1013 (D. Kan. 1996) and *Oswalt v. Sara Lee Corp.*, 889 F. Supp. 253, 257 (N.D. Miss. 1995), *aff'd* 74 F.3d 91 (5th Cir. 1996) which held that high blood pressure, by itself, was not a dis-

regard Murphy as disabled, only that he was not certifiable under DOT regulations."²⁸

Murphy appealed his case to the Tenth Circuit Court of Appeals.²⁹ In an unpublished disposition, the Tenth Circuit affirmed the district court's opinion,³⁰ relying on its recent decision in *Sutton v. United Airlines, Inc.*³¹ In *Sutton*, the Tenth Circuit held that the "determination of whether an individual's impairment substantially limits a major life activity should take into consideration mitigating or corrective measures utilized by the individual."³² Bound by precedent, the court held that Murphy's high blood pressure, in its medicated state, did not substantially limit a major life activity.³³

Murphy appealed the decision to the United States Supreme Court, which granted certiorari.³⁴ The Supreme Court affirmed the decisions of the lower courts.³⁵

III. BACKGROUND

The need for laws protecting those with disabilities is, and always has been, immense. Statistics show that between one in five and one in seven people in the United States are disabled.³⁶ A poll conducted in 1986 indicates that those with disabilities have encountered discrimination in many areas including employment, education, and transportation.³⁷ For example, one-fourth of those polled reported that they had

ability that substantially limits a major life activity. The court also reasoned that a rational fact finder would not be able to find that Murphy's high blood pressure in its medicated state would constitute a disability under the ADA. See *Murphy*, 946 F. Supp. at 881-82. Murphy, in fact, had only minimal restrictions on his activities (i.e. he was only restricted from lifting items over two hundred pounds). See *id.* at 882.

28. *Murphy*, 946 F. Supp. at 882. Had the court found that UPS "regarded" Murphy as disabled, then Murphy would have been protected under the ADA. See 42 U.S.C. § 12102(2)(C) (1994).

29. *Murphy v. United Parcel Service, Inc.*, No. 96-3380, 1998 WL 105933, (10th Cir. March 11, 1998), *aff'd* 119 S. Ct. 2133 (1999). On appeal, Murphy argued that the "district court should have considered his high blood pressure in its unmedicated state" when determining whether or not he had a disability. *Id.* at *2. Murphy also argued that the district court erred in not finding that he was entitled to protection under the ADA because "UPS regarded him as having an impairment that substantially limits a major life activity." *Id.* at *2. He argued that UPS terminated him on the belief that it was too risky to employ people with high blood pressure because they are more likely to have heart attacks or strokes. See *id.* at *2. The court held that UPS did not terminate Murphy because of an "unsubstantiated fear that he would suffer a heart attack," but only because Murphy's blood pressure exceeded the DOT's requirements. *Id.* at *2.

30. See *Murphy*, 1998 WL 105933, at *1.

31. 130 F.3d 893 (10th Cir. 1997), *aff'd* 119 S. Ct. 2139 (1999).

32. *Id.* at 902.

33. See *Murphy*, 1998 WL 150933, at *2.

34. See *Murphy v. United Parcel Service, Inc.*, 119 S. Ct. 2133 (1999).

35. See *id.* at 2136.

36. See ROBERT L. BURGDORF JR., DISABILITY DISCRIMINATION IN EMPLOYMENT LAW 1 (1995) (citing JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 6-7 (1993)).

37. See *id.* at 12 (citing LOUIS HARRIS & ASSOCS., THE ICD SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM (1986)).

encountered job discrimination because of their disabilities, and forty-seven percent of those who were unemployed reported that a major reason for their unemployment was that employers thought they were incapable of working a full-time job.³⁸ A legal scholar who himself had a disability said, “[t]he history of society’s formal methods for dealing with handicapped people can be summed up in two words: segregation and inequality.”³⁹ This illustrates the need for legislation protecting the rights of those with disabilities.

One of the first reported lawsuits challenging discrimination because of a disability was brought in 1934 when a man unsuccessfully sued a local school board because his mentally retarded child was excluded from the educational system.⁴⁰ Such actions, challenging discrimination based on disabilities, were largely unsuccessful until the 1970’s⁴¹ when courts began to protect those with disabilities through the United States Constitution.⁴² The bulk of successful plaintiffs in these challenges relied on the Equal Protection and the Due Process clauses.⁴³ This strategy, however, limited plaintiffs to challenging only government action and excluded challenges to discrimination by private entities.⁴⁴

Responding to the situation, bills were introduced in 1971 in the United States House of Representatives and in 1972 in the United States Senate, amending Title VI of the Civil Rights Act of 1964 to include protection from discrimination for persons with disabilities in federally assisted programs.⁴⁵ Unfortunately, both of these bills died in judiciary committees.⁴⁶ Similar bills were introduced in the 1970’s and 1980’s but were never enacted.⁴⁷

Although attempts to amend Title VI were unsuccessful, Congress enacted several other statutes prohibiting discrimination against people with disabilities. The Architectural Barriers Act of 1968⁴⁸ mandated that all buildings that were built or altered with government funds or for

38. *See id.* (citing LOUIS HARRIS & ASSOCS., *THE ICD SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM* 75,70 (1986)).

39. *Hutchinson v. United Parcel Service, Inc.*, 883 F. Supp. 379, 389 (N.D. Iowa 1995) (quoting ROBERT L. BURGENDORF, JR., *THE LEGAL RIGHTS OF HANDICAPPED PERSONS: CASES, MATERIALS, AND TEXT* 51 (1980)).

40. *See Board of Educ. v. State ex rel. Goldman*, 191 N.E. 914 (Ohio Ct. App. 1934).

41. *See THE BUREAU OF NATIONAL AFFAIRS, THE AMERICANS WITH DISABILITIES ACT: A PRACTICAL AND LEGAL GUIDE TO IMPACT, ENFORCEMENT, AND COMPLIANCE* 10 (1990).

42. *See Gurmankin v. Contanzo*, 556 F.2d 184 (3d Cir. 1977) (holding that refusal of the Philadelphia school board to allow a blind teacher to take a qualifying test to teach sighted students was a violation of the due process clause of the 14th Amendment).

43. *See BURGENDORF, supra* note 36, at 25.

44. *See id.*

45. *See id.* at 26.

46. *See id.* at 27.

47. *See id.*

48. 42 U.S.C. §§ 4151-57 (1994).

government use must be accessible by persons with disabilities. In 1975, Congress passed the Education for All Handicapped Children Act (EACHA),⁴⁹ renamed the Individuals with Disabilities Education Act (IDEA) in 1990.⁵⁰ IDEA gives general federal grants to states provided they maintain certain policies that guarantee various educational rights to children with disabilities.⁵¹ Other federal legislation aimed at reducing discrimination against those with disabilities included the Developmental Disabilities Assistance and Bill of Rights Act of 1975,⁵² the Air Carrier Access Act of 1986,⁵³ the Voting Accessibility for the Elderly and Handicapped Act of 1984,⁵⁴ and the Fair Housing Amendments Act of 1988.⁵⁵

The first federal law specifically designed to protect against discrimination in the workplace was the Act of June 10, 1948, which prohibited discrimination against persons with disabilities in the United States Civil Service.⁵⁶ This statute was enacted to protect the veterans of World War II from employment discrimination.⁵⁷

Also aimed at employment discrimination was the Rehabilitation Act of 1973, the predecessor of the ADA and probably the most important piece of federal legislation regarding employment discrimination up to the date of its enactment.⁵⁸ The Rehabilitation Act declared that the federal government should pursue an objective to be an equal opportunity employer for persons with disabilities.⁵⁹ The Act mandated an affirmative action program to accomplish this objective.⁶⁰ The Rehabilitation Act also mandated a similar affirmative action program for federal government contractors.⁶¹ Most importantly, however, the Rehabilita-

49. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400-16 (1990)); BURGDORF, *supra* note 36, at 28.

50. Pub. L. No. 101-476, 104 Stat. 1103, § 901(a)(2)-(3) (codified as amended at 20 U.S.C. §§ 1400-91 (1994)); BURGDORF, *supra* note 36, at 28.

51. See BURGDORF, *supra* note 36, at 28-30 for a detailed explanation of the provisions included in the IDEA.

52. 42 U.S.C. §§ 6000-83 (1994) (providing funding for the care and treatment of individuals who have severe and long-term disabilities that require extended care or treatment).

53. 49 U.S.C. § 41705 (1994) (prohibiting discrimination against people with disabilities by all air carriers).

54. 42 U.S.C. § 1973ee to ee-6 (1994) (improving accessibility at polling places for federal elections).

55. 42 U.S.C. §§ 3601-19 (1994) (expanding the Fair Housing Act to prohibit discrimination against those with disabilities when selling or renting private housing).

56. See BURGDORF, *supra* note 36, at 35 (citing Act of June 10, 1948, Pub. L. No. 80-617, 62 Stat. 351) (1948).

57. See Lowell P. Weicker, Jr., *Historical Background of the Americans With Disabilities Act*, 64 TEMP. L. REV. 387, 387 (1991).

58. See BURGDORF, *supra* note 36, at 36 (stating that sections 501, 503, and 504 of the Rehabilitation Act as well as the ADA are "far and away" the most significant federal statutes addressing employment discrimination).

59. See 29 U.S.C. § 791 (1994).

60. See 29 U.S.C. § 791(b).

61. See 29 U.S.C. § 793(a) (1994).

tion Act laid the “conceptual foundation” for the ADA.⁶² Section 504 of the Act prohibited discrimination against any “otherwise qualified individual” in any program receiving federal assistance.⁶³ The scope of Section 504 extended to “employment, education, housing, transportation, health services, recreation programs, and others.”⁶⁴ There was difficulty, however, with implementing the Rehabilitation Act.⁶⁵ The weakness of the Rehabilitation Act and its predecessors “arose from their statutory language, limited coverage, inadequate enforcement mechanisms, and erratic judicial interpretations.”⁶⁶

The ADA was created to address the deficiencies of the Rehabilitation Act.⁶⁷ Congress found that even though the Rehabilitation Act had been in effect for seventeen years, it was not providing the necessary means for eliminating segregation of and discrimination against persons with disabilities.⁶⁸ According to the Congressional findings, discrimination against people with disabilities was still occurring in many areas including: “employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.”⁶⁹ The ADA addresses some of these issues with specific provisions; the provisions at issue in *Murphy*, however, are those that address discrimination against persons with disabilities in the context of employment.

Title I of the ADA mandates that employers shall not discriminate against “qualified individual[s]” who have a disability.⁷⁰ The scope of this mandate extends to “job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”⁷¹ To be protected under the ADA, one must first show that he or she has a disability.⁷² According to the ADA, the term “disability” includes:

62. BURGENDORF, *supra* note 36, at 39.

63. *Id.* (quoting 29 U.S.C. § 794(a) (1994)).

64. *Id.* See also 29 U.S.C. § 794(b).

65. See BURGENDORF, *supra* note 36, at 39.

66. *Id.*

67. See *Murphy v. United Parcel Service, Inc.*, 946 F. Supp. 872, 876 (D. Kan. 1996), *aff'd*, No. 96-3380, 1998 WL 105933 (10th Cir. 1998), *aff'd*, 119 S. Ct. 2133 (1999) (quoting *Hutchinson v. United Parcel Service, Inc.*, 883 F. Supp. 379, 387 (N.D. Iowa 1995)). Also, note that a vote of 377 to 28 in the House of Representatives and a vote of 91 to 6 in the Senate passed the ADA in July, 1990. See 136 CONG. REC. H4629 (daily ed. July 12, 1990); 136 CONG. REC. S9695 (daily ed. July 13, 1990).

68. See *Hutchinson*, 883 F. Supp. at 387.

69. 42 U.S.C. § 12101(a)(3) (1994).

70. 42 U.S.C. § 12112(a) (1994).

71. *Id.*

72. See *Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170, 1173 (10th Cir. 1996). A person must not only show that he or she has a disability, the person must also show that he or she is able to “perform the essential functions of the job with or without reasonable accommodations,” and that “the employer terminated [him or her] because of [his or] her disability.” *Id.* (citing *White v. York Int'l Corp.*, 45 F.3d 357, 360-61 (10th Cir. 1995)).

“(A) a physical or mental impairment that substantially limits one or more of the major life activities . . . ; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”⁷³

The federal circuit courts conflict as to whether mitigating measures should be taken into account when deciding if a person is substantially limited in a major life activity and therefore disabled within the meaning of the ADA. In the context of *Murphy*, for example, Vaughn Murphy would have clearly been considered disabled if he were unable to take medicine to control his hypertension.⁷⁴ With medication, however, Mr. Murphy was able to partake in most of life’s major activities.⁷⁵ As mentioned previously, even prior to *Murphy*, the Tenth Circuit had decided in *Sutton* that the court should consider corrective measures when determining whether an individual’s disability substantially limits a major life activity.⁷⁶ Many of the other circuits that had addressed the issue, however, decided that mitigating measures should not be considered in the determination of whether a person is disabled.⁷⁷

For example, in *Arnold v. United Parcel Service, Inc.*,⁷⁸ the First Circuit found that an insulin dependent diabetic was disabled within the meaning of the ADA.⁷⁹ The court held that a disability should be assessed without regard to mitigating measures.⁸⁰ In making its determination, the court decided that since the ADA is not clear on the issue, it should turn to the legislative history and the EEOC interpretation which both indicate that mitigating measures should not be taken into

73. 42 U.S.C. § 12102(2) (1994). The words “major life activities” have been interpreted by the EEOC to mean, “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 29 C.F.R. § 1630.2(i) (1999). To show that a person’s major life activity of working is “substantially limited,” a person must show that he or she is prevented from performing a “class” of jobs or a broad range of jobs as a result of his or her disability. *Murphy v. United Parcel Service, Inc.*, 946 F. Supp. 872, 877 (D. Kan. 1996); 29 C.F.R. § 1630.2(j)(3)(i). The inability to perform one particular job does not constitute a substantial limitation in the major life activity of working. *See Murphy*, 946 F. Supp. at 877; 29 C.F.R. 1630.2(j)(3)(i).

74. This conclusion is based on the presumption that without medication, Vaughn Murphy would be limited in the “major life activities of walking, seeing, lifting, climbing, performing manual tasks, eating, exercising, hearing and working.” *Murphy*, 946 F. Supp. at 873.

75. *See id.* at 875. Murphy, however, argued that there was evidence in the record that the long-term effect of his hypertension could cause damage to his heart, kidneys, and eyes and could even kill him. *See* Brief for Petitioner at 31, *Murphy v. United Parcel Service, Inc.*, 119 S. Ct. 2133 (1999) (No. 97-1992), available in 1999 WL 86488. Murphy also argued that his hypertension, even in its medicated state, limits his major life activities of “running, lifting, eating, hearing, seeing, and working.” Brief for Petitioner at 31, *Murphy* (97-1992).

76. *Sutton v. United Airlines, Inc.*, 130 F.3d 893, 902 (10th Cir. 1997).

77. *See* cases cited *supra* note 6.

78. 136 F.3d 854 (1st Cir. 1998).

79. *See id.* at 866. The facts of this case are substantially similar to *Murphy* in that Mr. Arnold would have been hired by UPS but for his diabetic condition. The court said that “Arnold’s diabetes makes him just the type of person the ADA was designed to protect. He would have been hired by UPS but for his inability to get a commercial vehicle license, which was prevented only because he had diabetes . . .” *Id.* at 862.

80. *Id.* at 863. The court came to its conclusion based on the plain language of the ADA, the legislative history that indicates that Congress intended disabilities to be evaluated in light of mitigating measures, and based on the remedial purpose of the ADA. *See id.*

account.⁸¹ Similarly, the Third Circuit held that an individual who controls his or her disability with medication could still be disabled within the meaning of the ADA.⁸² Likewise, the Second Circuit held in *Bartlett v. New York State Board of Law Examiners*,⁸³ that self-accommodations could not be considered when determining a disability.⁸⁴ In *Baert v. Euclid Beverage Ltd.*,⁸⁵ the plaintiff had insulin-dependent diabetes that prohibited him from getting a commercial driver's license. The defendant fired the plaintiff, but subsequently rehired him in a limited capacity that caused him to lose his seniority.⁸⁶ The Seventh Circuit joined the majority of circuits in ruling that the extent to which an impairment limits a major life activity should be determined without regard to mitigating measures such as insulin.⁸⁷ Finally, the Fifth Circuit held that only serious conditions should be assessed without regard to mitigating measures.⁸⁸

It is also important to note that the EEOC and the Department of Justice, the executive agencies that have issued regulations or interpretive guidelines construing the ADA, have determined that whether a person is disabled should be considered without regard to mitigating measures.⁸⁹ The EEOC's Interpretive Guidelines require that the determination of whether an individual is "substantially limited in a major life activity," and therefore disabled, must be made without regard to mitigating measures.⁹⁰ Similarly, the Department of Justice mandated that, "[t]he question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids and services."⁹¹

IV. ANALYSIS

A. *The Sutton Decision*

The Supreme Court solved the conflict between the Tenth Circuit and the other circuits in the companion cases, *Sutton v. United Airlines, Inc.*⁹² and *Murphy v. United Parcel Service, Inc.*⁹³ In *Sutton*, the peti-

81. *See id.* at 858-65.

82. *See Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933, 937-38 (3d Cir. 1997).

83. 156 F.3d 321 (2d Cir. 1998), *vacated sub nom.* New York Bd. of Law Exam'rs v. Bartlett, 119 S. Ct. 2388 (1999).

84. *See id.* at 329.

85. 149 F.3d 626 (7th Cir. 1998).

86. *See id.* at 628.

87. *See id.* at 629.

88. *See Washington v. HCA Health Servs. of Texas, Inc.*, 152 F.3d 464, 470-71 (5th Cir. 1998), *vacated sub nom.* HCA Health Servs. of Texas, Inc. v. Washington, 119 S. Ct. 2388 (1999).

89. *See Sutton v. United Airlines, Inc.*, 119 S. Ct. 2139, 2153 (1999) (Stevens, J., dissenting).

90. *See id.* at 2156 (quoting 29 C.F.R. pt. 1630, app. § 1630.2(j) (1998)).

91. *Id.* at 2156 (quoting 28 C.F.R. pt. 35, app. A § 35.104 (1998)).

92. 119 S. Ct. 2139 (1999).

tioners were twin sisters who had severe myopia causing them to see 20/200 in their right eye and 20/400 in their left eye when their vision remained uncorrected.⁹⁴ The petitioners applied to United Airlines (United) for positions as commercial airline pilots.⁹⁵ Both women were invited for an interview, but were subsequently informed that there had been a mistake because they did not meet United's minimum vision requirement of 20/100 uncorrected.⁹⁶ Petitioners sued United in the United States District Court for the District of Colorado, claiming that the company discriminated against them on the basis of their disabilities in violation of the ADA.⁹⁷ The petitioners' complaint was dismissed for failure to state a claim upon which relief could be granted.⁹⁸ The district court reasoned that the petitioners were not "disabled" under the meaning of the ADA because their vision impairment was fully correctable and therefore they were not substantially limited in a major life activity.⁹⁹ The Tenth Circuit affirmed and the Supreme Court granted certiorari.

The Supreme Court first addressed the issue of whether mitigating measures should be considered when deciding if an individual's impairment substantially limits a major life activity.¹⁰⁰ The Court held that corrective or mitigating measures should be considered in determining whether an individual is substantially limited in a major life activity.¹⁰¹ The Court rejected the EEOC guidelines because it believed that the EEOC's approach would result in disabilities being evaluated in their "hypothetical uncorrected state," and that this is an impermissible interpretation of the ADA.¹⁰²

The Court reached its decision based on what it believed to be the plain language of "[t]hree separate provisions of the ADA."¹⁰³ First, the Court relied on the ADA's definition of disability.¹⁰⁴ Once again, under the ADA, a person's impairment must "substantially limit" a major life activity for him or her to be considered disabled.¹⁰⁵ The Court reasoned that because the words "substantially limits" are in their present indicative verb form, the words must be read to require "that a person be presently—not potentially or hypothetically—substantially limited in

93. 119 S. Ct. 2133 (1999).

94. *See Sutton*, 119 S. Ct. at 2143.

95. *See id.*

96. *See id.*

97. *See id.*

98. *See id.* at 2144.

99. *See id.*

100. *See id.* at 2146.

101. *See id.* at 2143.

102. *Id.* at 2146.

103. *Id.*

104. *See id.* *See also* 42 U.S.C. § 12102(2)(A) (1994).

105. *See* 42 U.S.C. § 12102(2)(A).

order to demonstrate a disability.”¹⁰⁶ Continuing, the Court declared that “[a] ‘disability’ exists only where an impairment ‘substantially limits’ a major life activity, not where it ‘might,’ ‘could,’ or ‘would’ be substantially limiting if mitigating measures were not taken.”¹⁰⁷ Consequently, people who have a fully correctable impairment, such as the petitioners in *Sutton*, are not disabled within the meaning of the ADA.¹⁰⁸

Next, the Court construed another portion of the ADA’s definition of “disability.”¹⁰⁹ The ADA requires that disabilities “be evaluated ‘with respect to an individual’ and be determined based on whether an impairment substantially limits the ‘major life activities’ of such individual.”¹¹⁰ This means that a person is not disabled per se because he or she has been diagnosed with a certain disease.¹¹¹ Instead, the proper inquiry is whether the person’s disability has an adverse effect on his or her major life activities.¹¹² The Court feared that the agency’s guidelines are contrary to the language in the ADA.¹¹³ The Court believed that the agency approach would cause courts and employers to speculate about what a person’s condition would be in its unmedicated state instead of determining the person’s actual condition in its present form.¹¹⁴

Finally, the Court looked to the congressional finding that “some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older.”¹¹⁵ The Court said that the forty-three million figure indicates that persons who have impairments that are “largely corrected by medication or other devices are not ‘disabled’ within the meaning of the ADA.”¹¹⁶ The Court reasoned that if those who had correctable disabilities were protected under the ADA, the figure that reflects those persons with disabilities would be much higher.¹¹⁷ The Court based this conclusion on the facts that, “the number of people with vision impairments alone is 100 million, . . . more than 28 million Americans have

106. *Sutton*, 119 S. Ct. at 2146.

107. *Id.*

108. *See id.* at 2146-47.

109. *See id.* at 2147.

110. *Id.* (quoting 42 U.S.C. § 12102 (2) (1994)). *See also* *Bragdon v. Abbot*, 524 U.S. 624 (1998) (holding that whether a person has a disability under the ADA is an individualized inquiry).

111. *See Sutton*, 119 S. Ct. at 2147 (quoting 29 C.F.R. pt. 1630, app. § 1630.2 (j) (1999)).

112. *See id.* To determine whether a person is substantially limited in a major life activity, the courts can turn to the EEOC regulations that list factors to be considered. These factors include, “(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.” 29 C.F.R. § 1630.2(j)(2)(i)-(iii).

113. *See Sutton*, 119 S. Ct. at 2147.

114. *See id.*

115. 42 U.S.C. § 12101(a)(1) (1994).

116. *Sutton*, 119 S. Ct. at 2148.

117. *See id.* at 2149.

impaired hearing, . . . [a]nd there [are] approximately 50 million people with high blood pressure (hypertension)."¹¹⁸ The Court believed that if Congress had meant to include all persons with correctable disabilities in the ADA, then "it undoubtedly would have cited a much higher number of disabled persons in the findings."¹¹⁹

In *Sutton*, the petitioners also argued that by virtue of United's vision requirement, the airline "regarded" them as having a disability that substantially limited a major life activity, thus bringing them under the protection of the ADA.¹²⁰ The petitioners further argued that because of the vision requirement, they were substantially limited in the major life activity of working.¹²¹ In response, the respondent argued that in order to be substantially limited in the major life activity of working, the petitioners must show that they are precluded from a class of jobs, not just precluded from being pilots.¹²² The Court's response to the petitioners' argument was that the "ADA allows employers to prefer some physical attributes over others and to establish physical criteria."¹²³ It followed, according to the Court, that "[b]ecause the position of global airline pilot is a single job, this allegation does not support the claim that respondent regards petitioners as having a substantially limiting impairment."¹²⁴ The Court recognized that the petitioners could still be regional pilots or pilot instructors.¹²⁵

B. *The Murphy Decision*

In *Murphy*, the companion case to *Sutton*, the Court first addressed whether the Tenth Circuit had been correct in evaluating Murphy's hypertension in its medicated state.¹²⁶ The Supreme Court affirmed the Tenth Circuit's decision based on its decision in *Sutton*.¹²⁷ Consequently, the Supreme Court held that Murphy's high blood pressure, in

118. *Id.*

119. *Id.*

120. *See id.* at 2150. Even if a person is found not to be disabled under the ADA, an employer can still be liable if it "regarded" the employee as having a disability that substantially limits one or more major life activities. *See* 42 U.S.C. § 12102(2)(A), (C) (1994). To prevail on the "regarded as" theory, a plaintiff must show that: (1) an employer "mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities," or (2) an employer "mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities." *Sutton*, 119 S. Ct. at 2149-50. The Court put it more plainly when it said, "[I]t is necessary that a covered entity entertain misperceptions about the individual-it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting." *Id.* at 2150.

121. *See Sutton*, 119 S. Ct. at 2150.

122. *See id.*

123. *Id.*

124. *Id.* at 2151.

125. *See id.*

126. *See Murphy v. United Parcel Service, Inc.*, 119 S. Ct. 2133, 2137 (1999).

127. *See id.*

its medicated state, did not substantially limit a major life activity.¹²⁸

Next, the *Murphy* court analyzed whether the Tenth Circuit was correct in holding that Murphy was not “regarded as” disabled by UPS.¹²⁹ The Court applied its holding in *Sutton*, (that a “person is ‘regarded as’ disabled within the meaning of the ADA if a covered entity mistakenly believes that the person’s actual, nonlimiting impairment substantially limits one or more major life activit[y]”) to the *Murphy* case.¹³⁰ Murphy argued that UPS regarded his hypertension as “substantially limiting him in the major life activity of working.”¹³¹ The Court held that UPS did not fire Murphy because it thought his impairment substantially limited a major life activity.¹³² Instead, it reasoned, UPS fired him only because he could not meet the DOT health standards, and at best he was “regarded as” incapable of performing only a specific job.¹³³

Last, the Court addressed whether the allegation by UPS that Murphy could not obtain a DOT health certificate was “sufficient to create a genuine issue of material fact as to whether [he should be] regarded as substantially limited in one or more major life activities.”¹³⁴ The Court reiterated the rule that for a person to be substantially limited in the major life activity of working, he or she must be “significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes”¹³⁵ The Court held that Murphy was not regarded as unable to perform “a class of jobs;” instead, he was only unable to perform jobs that required a DOT health certificate.¹³⁶ In making this determination, the Court noted that Murphy had been a mechanic for twenty-two years before working for UPS, he was able to obtain a new job as a mechanic two to three weeks after being fired from UPS, and he had an array of other skills that made many jobs available to him.¹³⁷

C. *The Murphy and Sutton Dissents*

Justices Stevens and Breyer dissented in both *Sutton* and *Murphy*.¹³⁸ The dissenters believed that Murphy suffered from a disability

128. *See id.*

129. *See id.*

130. *Id.* (citing *Sutton v. United Airlines, Inc.*, 119 S. Ct. 2139, 2149 (1999)).

131. *Id.*

132. *See id.* at 2139.

133. *See id.*

134. *Id.* at 2138.

135. *Id.* (quoting 29 C.F.R. § 1630.2(j)(3)(i) (1998)).

136. *See id.*

137. *See id.* at 2139.

138. *See id.* *See also* *Sutton v. United Airlines, Inc.*, 119 S. Ct. 2139, 2152 (1999). The justices wrote an extensive dissent in *Sutton*, and referred the readers of *Murphy* to the dissent in *Sutton*. *See Murphy*, 119 S. Ct. at 2139 (Stevens, J. dissenting).

within the meaning of the ADA and that his severe hypertension, without medication, would substantially limit his performance in numerous major life activities.¹³⁹ The dissenting justices believed, based on legislative history, the EEOC regulations and the Department of Justice guidelines, that a person should be evaluated in his or her unmedicated state when determining if he or she is disabled within the meaning of the ADA.¹⁴⁰

According to the dissenters in *Sutton*, “[t]he ADA originated in the Senate. The Senate Report states that ‘whether a person has a disability should be assessed without regard to the availability of mitigating measures such as reasonable accommodations or auxiliary aids.’”¹⁴¹ When referring to the “regarded as” prong of the definition of disability, the Senate Report also says, “[an] important goal of the third prong of the [disability] definition is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions.”¹⁴² The Senate Report said that this prong of the ADA is to protect individuals who have a controlled disability, such as diabetes or epilepsy, who are sometimes denied jobs because of their condition even though they are qualified.¹⁴³ The report says that “[s]uch denials are the result of negative attitudes and misinformation.”¹⁴⁴ This language clearly indicates that the ADA was meant to protect individuals who have a correctable disability from discrimination in the workplace. The Court’s decision, however, effectively eliminates such persons from the umbrella of the ADA’s protection.

The *Sutton* dissenters also argued that since the EEOC and the Department of Justice have dictated that a disability should be evaluated without regard to mitigating measures, the Court should defer to the agencies.¹⁴⁵ According to Justice Stevens, the Court has, “traditionally accorded respect to such views when, as here, the agencies ‘played a pivotal role in setting [the statutory] machinery in motion.’”¹⁴⁶ He went on to say, “[a]t the very least, these interpretations ‘constitute a body of experience and informed judgment to which [we] may properly resort’ for additional guidance.”¹⁴⁷ The dissenters observed that the EEOC has maintained that “to remain allegiant to the Act’s structure and purpose, courts should always answer ‘the question

139. See *Murphy*, 119 S. Ct. at 2139 (Stevens, J., dissenting).

140. See *Sutton*, 119 S. Ct. at 2152 (Stevens, J., dissenting).

141. *Id.* at 2154 (quoting S. REP. NO. 101-116, at 23 (1989)).

142. *Id.* at 2154-55 (quoting S. REP. NO. 101-116, at 24 (1989)).

143. See *id.* at 2155 (quoting S. REP. NO. 101-116, at 24 (1989)).

144. *Id.* (quoting S. REP. NO. 101-116, at 24 (1989)).

145. See *id.*

146. *Id.* (quoting *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980)).

147. *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

whether an individual has a disability . . . without regard to mitigating measures that the individual takes to ameliorate the effects of the impairment.”¹⁴⁸

D. Agency Deference and Legislative History

The Supreme Court's decision in *Murphy* discredited the EEOC's interpretation of the ADA and ignored the legislative history pertaining to mitigating measures. *Murphy* argued that the reports from the congressional committees responsible for the ADA demonstrate that Congress intended the courts to evaluate a person's disability without regard to mitigating measures,¹⁴⁹ and that the EEOC, charged with interpreting the ADA, had done so in a manner consistent with the language of the ADA, and the legislative history.¹⁵⁰ Thus, the EEOC's interpretation should be given “*Chevron* deference.”¹⁵¹

“*Chevron* deference” requires that if an agency is given the authority to administer a statute then the agency's interpretation is entitled to substantial deference provided that the interpretation is not “arbitrary,” “capricious,” or “manifestly contrary to the statute.”¹⁵² In *Murphy*, the Court refused to apply “*Chevron* deference”¹⁵³ because it found the EEOC regulations were an unacceptable interpretation of the ADA.¹⁵⁴ But, how can the EEOC's interpretation of the ADA be “arbitrary” or “capricious” when its interpretation is consistent with the legislative history?¹⁵⁵

As previously noted, the Court believed that the plain meaning of the statute indicates that mitigating measures must be taken into account when determining if an individual has a disability.¹⁵⁶ Based on this holding the Court refused to even consider the legislative history. The Court determined that, “[b]ecause we decide that, by its terms, the

148. *Id.* at 2156 (citing Brief for United States and the Equal Employment Opportunity Commission as Amicus Curiae Supporting Petitioners, *Sutton v. United Airlines, Inc.*, 119 S. Ct. 2139 (1999) (No. 97-1943), available in 1999 WL 95496).

149. See Brief for Petitioner at 11, *Murphy v. United Parcel Service, Inc.*, 119 S. Ct. 2133 (1999) (No. 97-1992), available in 1999 WL 86488.

150. See *id.* at 12.

151. See *id.*

152. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). In *Chevron*, the Supreme Court said that if an agency is given the authority to administer a statute then the agency's interpretation is “controlling weight.” *Id.*

153. *Murphy v. United Parcel Service, Inc.*, 119 S. Ct. 2133, 2137 (1999) (citing its opinion in *Sutton* which rejected the EEOC interpretation that mitigating measures should not be taken into account when determining whether a person is disabled).

154. See *Sutton v. United Airlines, Inc.*, 119 S. Ct. 2139, 2146 (1999). This holding applies to *Murphy* by the *Murphy* Court's reference to *Sutton*. See *Murphy*, 119 S. Ct. at 2137.

155. It is clear from the legislative history that the legislative intent was to evaluate disabilities without regard to mitigating measures. See *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 859-60 (1st Cir. 1998) (quoting H.R. REP. No. 101-485, pt. III, at 28 (1989), reprinted in 1990 U.S.C.A.N. 445, 451 (House Judiciary Report)); see also S. REP. No. 101-116, at 23 (1989).

156. *Sutton*, 119 S. Ct. at 2146. This holding also applies to *Murphy* by the Court's reference. See *Murphy*, 119 S. Ct. at 2137.

ADA cannot be read in this manner, we have no reason to consider the ADA's legislative history."¹⁵⁷ The Court simply ignores the legislative history and suggests that it does not have to address the legislative intent even though it is in direct conflict with its decision. Had the Court considered the legislative history it would have been clear that the legislative intent was to evaluate disabilities without regard to mitigating measures. The House and Senate Committee Reports clearly state that an impairment "should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in less-than-substantial limitation."¹⁵⁸

E. Ramifications of the Murphy and Sutton Decisions

Plaintiff's counsel described the result reached in *Murphy* as creating a "catch-22" situation for employees who have a partially correctable disability.¹⁵⁹ In other words, employers will be able to successfully argue that a plaintiff who has a life threatening disease does not have a disability because the disease is controlled with medication.¹⁶⁰ At the same time, the employer will be able to fire the individual because he or she has the disability.¹⁶¹ For example, in the context of *Murphy*, UPS was able to successfully argue that Murphy was not disabled because he was able to take medication that relieved some of the effects of his illness.¹⁶² At the same time, UPS admitted that it fired Murphy because he had high blood pressure that allegedly made him unable to obtain a DOT health certificate.¹⁶³ The unfortunate result is that persons such as Murphy will not be afforded the protection of the ADA because they will not be considered disabled enough to meet the "disability" threshold of the ADA.¹⁶⁴ At the same time, those who are disabled enough to meet the "disability" threshold will be eliminated from protection under the ADA because they will be too disabled to be considered a "qualified individual" as required by the second prong of Title I of the

157. *Sutton*, 119 S. Ct. at 2146. This holding also applies to *Murphy* by the Court's reference. See *Murphy*, 119 S. Ct. at 2137.

158. See *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 859 (1st Cir. 1998) (quoting H.R. REP. NO. 101-485, pt. III, at 28 (1989), reprinted in 1990 U.S.C.C.A.N. 445, 451 (House Judiciary Report)); see also S. REP. NO. 101-116, at 23 (1989).

159. See Brief for Petitioner at 12, *Murphy* (97-1992).

160. See *id.*

161. See *id.*

162. See *Murphy v. United Parcel Service, Inc.*, 946 F. Supp. 872, 881-82 (D. Kan. 1996), *aff'd*, No. 96-3380, 1998 WL 105933 (10th Cir. 1997), *aff'd*, 119 S. Ct. 2133 (1999).

163. See *Murphy v. United Parcel Service, Inc.*, 119 S. Ct. 2133, 2136 (1999).

164. The first threshold showing a person must make for protection under the ADA is that he or she is disabled. See 42 U.S.C. § 12112(a) (1994); see also Michelle T. Friedland, *Not Disabled Enough: The ADA's "Major Life Activity" Definition of Disability*, 52 STAN. L. REV. 171, 178 (1999). The general rule of the ADA is that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual . . ." 42 U.S.C. § 12112(a).

ADA. This leaves individuals either too disabled or not disabled enough to qualify for protection under the ADA.¹⁶⁵

The case, *Todd v. Academy Corp.*,¹⁶⁶ is a perfect illustration of the implications of the *Murphy* and *Sutton* decisions. In this case the plaintiff had epilepsy, but it was controlled with medication.¹⁶⁷ The plaintiff's medication limited his seizures to about one per week, which lasted between five and fifteen seconds.¹⁶⁸ The plaintiff alleged that the defendant fired him because of his epilepsy.¹⁶⁹ The court recognized that the plaintiff unquestionably suffered from a physical impairment, but the court found that the plaintiff's medicated epilepsy did not result in a substantial limitation in a major life activity.¹⁷⁰ In light of the Supreme Court's decision in *Sutton*, the court considered mitigating measures when making the disability determination.¹⁷¹ The court believed that prior to the *Sutton* decision, the plaintiff's disability would have been evaluated without regard to mitigating measures, and if that were the case, "epilepsy would, without question be considered a substantial limitation on several major life activities"¹⁷² The unfortunate result of the new rule created by *Sutton* and *Murphy* is that the plaintiff's case was dismissed on a motion for summary judgment.¹⁷³ Is the ADA left lifeless after these decisions?

V. CONCLUSION

The Supreme Court's decisions in *Sutton v. United Airlines, Inc.* and in *Murphy v. United Parcel Service, Inc.* will be devastating for persons who have a disability that can be controlled with medication and that are discriminated against in the workplace for such a disability. *Todd v. Academy Corp.* clearly illustrates the effect these decisions are already having on those in such a predicament. Employers can now fire an individual because he or she has epilepsy, diabetes, high blood pressure or even a prosthetic limb, and never be held accountable for the discrimination. The Court should have taken into account the legislative history that clearly states that the ADA was meant to protect all persons with disabilities from discrimination, including those who have partially correctable disabilities like Vaughn Murphy. The Court also should have given the EEOC's interpretation of the ADA the defer-

165. Brief for Petitioner at 12-13, *Murphy* (97-1992).

166. 57 F. Supp. 2d 448 (S.D. Tex. 1999).

167. See *id.* at 449.

168. See *id.* at 449-50.

169. See *id.* at 451.

170. See *id.* at 452.

171. See *id.* at 452-53.

172. *Id.* at 452.

173. See *id.* at 454.

ence that it deserves. The EEOC's guidelines are not an "impermissible interpretation of the ADA," especially in light of the fact that the guidelines are consistent with the legislative history.

It remains to be seen if there will be legislation to correct the detrimental effect of the *Murphy* and *Sutton* decisions. It hardly seems fair that a person is not protected by the ADA simply because he or she has taken the initiative to limit the effect of his or her disability.

Barbara M. Smith-Duer