

4-1-1999

# An Application of the *Chevron* Doctrine to the EEOC's Interpretation of the ADA: Why Mitigating Measures Must be Considered When Evaluating A Disability

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## Recommended Citation

Thais Hernandez, *An Application of the Chevron Doctrine to the EEOC's Interpretation of the ADA: Why Mitigating Measures Must be Considered When Evaluating A Disability*, 7 U. Miami Bus. L. Rev. 309 (1999)

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# AN APPLICATION OF THE *CHEVRON* DOCTRINE TO THE EEOC'S INTERPRETATION OF THE ADA: WHY MITIGATING MEASURES MUST BE CONSIDERED WHEN EVALUATING A DISABILITY

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## I. INTRODUCTION

The Americans with Disabilities Act<sup>1</sup> ("ADA" or "Act") is a federal civil rights statute that was enacted in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."<sup>2</sup> In the employment arena, the ADA prohibits a "covered entity"<sup>3</sup> from "discriminat[ing] 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."<sup>4</sup> Thus, one of the primary purposes of the ADA is to remove barriers that prevent qualified individuals from enjoying the same employment opportunities that are available to persons without disabilities.<sup>5</sup>

To establish a *prima facie* case under the ADA, a plaintiff must prove: 1) that he has a disability; (2) that he is a qualified individual; and, (3) that he

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<sup>1</sup> 42 U.S.C. §§ 12101-12213 (1990).

<sup>2</sup> 42 U.S.C. § 12101(b)(1)(1990). *See also* Grenier v. Cyanamid Plastics, Inc., 70 F.3d 667, 671 (1st Cir. 1995) (quoting Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986)).

<sup>3</sup> A "covered entity" is defined as a person engaged in an industry affecting commerce who has fifteen (15) or more employees. *See* 42 U.S.C. § 12112(a)(1990).

<sup>4</sup> *Id.*

<sup>5</sup> *See* Burch v. Coca-Cola, Co., 119 F.3d 305, 313 (5th Cir. 1997) (quoting Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 161 (5th Cir. 1996)).

was discriminated against because of his disability.<sup>6</sup> The ADA defines "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 impairment; or, (c) being regarded as having such an impairment.<sup>7</sup> In evaluating an "impairment," the courts may consider: 1) the individual's condition without regard to mitigating measures;<sup>8</sup> or, 2) the same individual's condition after the mitigating measures are in place.<sup>9</sup>

When Congress passed the ADA, it authorized the Equal Employment Opportunity Commission ("EEOC") to issue regulations that define workplace discrimination under Title I of the ADA.<sup>10</sup> The EEOC guidelines<sup>11</sup> support the position that mitigating measures should not be considered when evaluating

<sup>6</sup> See 42 U.S.C. § 12132 (1990). See also *Harris v. H & W Contracting Co.*, 102 F.3d 516, 519 (11th Cir. 1997). But cf. *Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 58 (4th Cir. 1995) (holding that "[i]n a typical discharge case brought under the ADA, a plaintiff must prove by a preponderance of the evidence that (1) she was in the protected class; (2) she was discharged; (3) at the time of the discharge, she was performing her job at a level that met her employer's legitimate expectations; and, (4) her discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination."). The *Ennis* court applied this formulation of the final prong for two reasons: "[f]irst, [w]here disability . . . is at issue, the plaintiff in many, if not most, cases will be unable to determine whether a replacement employee is . . . disabled . . . . Second, even if the plaintiff could obtain such information, requiring a showing that the replacement was outside the protected class would lead to the dismissal of many legitimate disability discrimination claims, since most replacements would fall within the broad scope of the ADA's protected class." *Id.* "Therefore, it is necessary to reformulate the fourth prong . . . to require that the plaintiff present some other affirmative evidence that disability was a determining factor in the employer's decision. *Id.* at 59. See also *Homes v. Bevilacqua*, 794 F.2d 142 (4th Cir. 1996) (en banc).

Nonetheless, the Fourth Circuit Court of Appeals seems to be the only circuit court relying on this fourth prong, as the majority of the federal appellate courts that have addressed the issue of a prima facie case under the ADA rely on the three-prong test.

<sup>7</sup> 42 U.S.C. § 12102(2)(1990).

<sup>8</sup> For example, an individual with 20/200 vision without his corrective lenses.

<sup>9</sup> For example, the same individual wearing corrective lenses.

<sup>10</sup> See 42 U.S.C. § 12116 (1990). Nevertheless, this authority has come under attack by the federal courts as they battle to interpret the ADA. See generally *Ennis*, 53 F.3d at 55:

The EEOC, under its charge to issue regulations to carry out Title I of the ADA, see 42 U.S.C. § 12116, has defined "physical or mental impairment" to include "[a]ny physiological disorder, or condition, . . . affecting one or more of the following systems: reproductive . . . hemic and lymphatic." 29 C.F.R. § 1630.2(h)(1). Although uncertain of the EEOC's authority to promulgate this regulation, since it interprets a term which does not appear in Title I (the specified extent of the EEOC's regulatory authority), we do not understand this regulation to be in conflict with the above conclusion. This regulation does not eliminate (nor could it) the statutory requirement that the physical or mental impairment substantially limit a major life activity of the particular individual.

*Id.* at 59-60, n.4.

<sup>11</sup> 29 C.F.R. app. § 1630.2(h) (1996).

an impairment. The majority of the circuits rely on the EEOC guidelines, reasoning that if an impairment is considered with regard to mitigating measures, then the "substantially limit[ing]" requirement would be eliminated from the statute.<sup>12</sup> Nevertheless, one circuit maintains the minority view, which takes mitigating measures into consideration. The split between the circuits highlights the fundamental question of how much deference is due to interpretations proffered by administrative agencies.

This Article focuses on the proper interpretation of "disability,"<sup>13</sup> as defined by the ADA, with a particular focus on the first prong of the definition.<sup>14</sup> Accordingly, the crux of the issue is whether courts should consider mitigating measures when determining if an impairment substantially limits a major life activity of an individual. Underlying that issue is whether the courts should defer to the EEOC's mandate, given that the doctrine of judicial deference to administrative agencies is deceptively simple and inconsistently applied. Part II of this Article reviews the circuit court decisions that implement the EEOC guidelines<sup>15</sup> evaluating the impairment without regard to the availability of mitigating measures, such as medication or treatment. Part III focuses on the minority viewpoint, adhered to only by the Tenth Circuit, which considers the individual's situation once the impairment is controlled by medication or treatment. Part IV briefly analyzes the *Chevron* doctrine,<sup>16</sup> which sets forth the standard of review afforded to agency decisions and interpretations. Part V demonstrates the inconsistency with which the Supreme Court has applied the *Chevron*. In Part VI, the *Chevron* doctrine is applied to the EEOC's Interpretive Guidance and discusses the various reasons why judicial deference to the EEOC guidelines is inappropriate are discussed. Part VII concludes that the Supreme Court is likely to apply the EEOC guidelines, despite persuasive textual arguments favoring rejection of that interpretation.

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<sup>12</sup> See *Schluter v. Industrial Coils, Inc.*, 928 F. Supp. 1437, 1445 (W.D. Wis. 1996).

<sup>13</sup> In *Bragdon v. Abbott*, 118 S. Ct. 2196, 2202 (1998), a heavily-fragmented Supreme Court recently applied a three-step test to determine whether the plaintiff was disabled under the ADA. First, it considered whether the HIV infection in that case was an impairment. *Id.* Second, the Court identified the life activity which the plaintiff claimed was limited, in that case reproduction and child bearing, to determine whether it constituted a major life activity under the ADA. *Id.* Third, it "tied the two statutory phrases together" and determined whether the impairment substantially limited the major life activity. *Id.* See also *infra* notes 202-04.

<sup>14</sup> That prong defines "disability" as a physical or mental impairment that substantially limits one or more of the major life activities of such individual. 42 U.S.C. § 12102(2)(1990).

<sup>15</sup> See 29 C.F.R. app. § 1630.2(h) (1996).

<sup>16</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

## II. PERSPECTIVES SUPPORTING THE EEOC GUIDELINES

When Congress enacted the ADA, its purpose was to provide "clear, strong, consistent, enforceable standards."<sup>17</sup> Yet because many of the ADA's terms are ambiguous, the courts are left to interpret, with little and conflicting legislative history to assist them, the meaning and proper application of the ADA.<sup>18</sup> This has resulted in inconsistent rulings by the courts, as they strive to determine the reach of the ADA's protection.

The majority of the circuits support the EEOC's interpretation of the ADA,<sup>19</sup> which suggests that the courts evaluate an impairment without regard to the availability of mitigating measures.<sup>20</sup> Several persuasive arguments are set forth by the circuits which defer to the EEOC guidelines. First, they argue, the EEOC guidelines are consistent with the text of the ADA.<sup>21</sup> In particular, the Act defines disability to include "with respect to an individual, . . . a physical . . . impairment that substantially limits<sup>22</sup> one or more of the major

<sup>17</sup> 42 U.S.C. § 12101 (b)(2)(1990).

<sup>18</sup> See Harvard Law Review Association, *The Americans with Disabilities Act: Great Progress, Greater Potential*, 109 HARV. L. REV. 1602, 1615 (1996).

<sup>19</sup> See *Washington v. HCA Health Serv. of Texas, Inc.*, 152 F.3d 464 (5th Cir. 1998) (adopting the EEOC's interpretation, but narrowing it to apply to only specific disabilities); *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854 (1st Cir. 1998) (adopting the EEOC guidelines as the proper interpretation); *Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933 (3d Cir. 1997) (same); *Gilday v. Mecosta County*, 124 F.3d 769 (6th Cir. 1997) (same); *Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997) (same); *Harris v. H & W Contracting Co.*, 102 F.3d 516, 520-21 (11th Cir. 1996) (same); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996) (same), *cert. denied*, 117 S. Ct. 1349 (1997); *Roth v. Lutheran General Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995) (same). See also *Fallacaro v. Richardson*, 965 F. Supp. 87 (D.D.C. 1997); *Wilson v. Pennsylvania State Police Dept.*, 964 F.Supp. 898, 907 (E.D. Pa. 1997); *Hendler v. Intelcom USA, Inc.*, 963 F. Supp. 200, 206 (E.D.N.Y. 1997); *Shiflett v. GE Fanuc Automation Corp.*, 960 F. Supp. 1022, 1029 (W.D. Va. 1997); *Sicard v. Sioux City*, 950 F. Supp. 1420, 1438-39 (N.D. Iowa 1996); *Sarsycki v. United Parcel Serv., Inc.*, 862 F. Supp. 336, 340 (W.D. Okla. 1994).

<sup>20</sup> See 29 C.F.R. app. § 1630.2(h) (1996). Similarly, the United States Department of Justice, which is charged with enforcing the ADA's prohibition of discrimination based on disability on the part of state and local entities, also assesses disabilities without regard to the availability of mitigating measures. See 28 C.F.R. app. § 35.104 (1996).

<sup>21</sup> See *Harris*, 102 F.3d at 521.

<sup>22</sup> See 29 C.F.R. § 1630.2(j)(1)(ii) (1996): "[T]he term *substantially limits* means: . . . significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity." However, that the EEOC did not address in this regulation whether an impairment that, "substantially limits one or more of [an individual's] major life achievement" should be considered with or without mitigating measures. This is significant because if they had, that clarification would be in a regulation which is afforded substantial deference. See discussion *infra* at p. 26 and accompanying notes 196-201. However, because the EEOC chose only to include it in the appendix to those regulations, it is not entitled to a great degree of deference. See *id.*

life activities of such individual.”<sup>23</sup> Thus, if a person is unable to perform a major life activity without depending on medication or a medical device to ameliorate the effects of that impairment, that person suffers from a disability.<sup>24</sup> For example, a person who requires a hearing aid may be considered limited in the major life activity of hearing.<sup>25</sup>

Second, these courts reason that because many disabilities can be overcome through technology or other assistance, employers are expected to make reasonable accommodations, an underlying purpose of the ADA.<sup>26</sup> In other words, an employer can easily accommodate a person whose condition is completely controlled.<sup>27</sup> Thus, although a person may be able to overcome the effects of their impairment through mitigating measures, and as a result require very little, if any, accommodation, this “achievement should not leave him subject to discrimination based on his underlying disability.”<sup>28</sup> The final argument presented by these courts is that the ADA’s legislative history strongly supports the position of the EEOC.<sup>29</sup>

In *Baert v. Euclid Beverage Limited*,<sup>30</sup> a recent decision by the Seventh Circuit, the court cited its earlier decision in *Roth v. Lutheran General*

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<sup>23</sup> 42 U.S.C. § 12102(2)(a) (1990).

<sup>24</sup> See, e.g., *Gilday v. Mecosta County*, 124 F.3d 760, 763 (6th Cir. 1997).

<sup>25</sup> *Id.* at n.3.

[S]imilarly, a person with only one foot is disabled under the ADA even if a prosthesis allows him to function just as well as most two-footed people. This is a core case of disability. . . . To say that such a person does not suffer a limitation and is therefore not disabled would strain the meaning of both terms. . . . The EEOC’s ‘no mitigating measures’ interpretation embodies the sensible position that the use of a prosthetic aid or medication does not eliminate the underlying disability although it may, as a practical matter, reduce or even eliminate its effects.

*Id.* (quoting *Fallacaro v. Richardson*, 965 F. Supp. 87, 93 (D.D.C. 1997)).

<sup>26</sup> See *Gilday*, 124 F.3d at 763.

<sup>27</sup> *Id.* Yet this scenario begs the question of whether or not this individual truly requires an accommodation by the employer. If the disability is overcome, for example, a person with 20/40 vision wears eyeglasses to correct her vision to 20/20, is there really anything left for an employer to accommodate? See *Fallacaro*, 965 F. Supp. at 93 (“That a person with a disability is able to use medical knowledge or technology to overcome the effects of his condition . . . may mean that he will, in practice, rarely require any sort of accommodation . . .”).

<sup>28</sup> See *Gilday*, 124 F.3d at 763.

<sup>29</sup> See *Gilday v. Mecosta County*, 124 F.3d 760, 764 (6th Cir. 1997) (citing the House Education and Labor Committee Report, H.R. REP. No. 101-485(II), at 53 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 334). But see *Runnebaum v. Nationsbank of Maryland, N.A.*, 123 F.3d 156, 168 (4th Cir. 1997) (refusing to consider *Amici* arguments citing to Committee Reports because the court found the statutory meaning of “impairment” was plain and unambiguous, and therefore had no need to resort to legislative history to determine the intent of Congress. See also discussion *infra* at pp. 21, 22 and accompanying notes 179-88.

<sup>30</sup> 149 F.3d 626 (7th Cir. 1998).

*Hospital*<sup>31</sup> for the proposition that the evaluation of an individual's impairment should be made without regard to mitigating measures or assistive devices.<sup>32</sup> In *Roth*, the court found that a doctor with strabismus<sup>33</sup> was not entitled to a preliminary injunction against his potential employer because he failed to show he was "disabled" within the meaning of the ADA. The doctor claimed he discriminatorily was declined residency at Lutheran General Hospital because of his sight disability.<sup>34</sup> The *Roth* court considered the fact that, before applying for his residency in pediatrics at Lutheran, the doctor had been a registered pharmacist and had successfully attended law school while working as a pharmacist.<sup>35</sup> In addition to functioning, in his own words, "very well" as a registered pharmacist and as an attorney, he was also a faculty lecturer at the University of Illinois.<sup>36</sup> The court concluded that "not every impairment that affects an individual's major life activities is a substantially limiting impairment."<sup>37</sup> Nevertheless, although the court in *Roth* quoted the EEOC interpretation, the court did not apply it. Therefore, because the court in *Baert* relied on *Roth* in applying the EEOC's interpretation without any substantial analysis, the Seventh Circuit's current rationale for relying on the EEOC guidelines remains unclear.<sup>38</sup>

In *Holihan v. Lucky Stores, Inc.*,<sup>39</sup> the Ninth Circuit also relied on the EEOC's interpretation, finding insufficient evidence to support the plaintiff's claims that outside work following his discharge from the hospital constituted a mitigating measure.<sup>40</sup> In that case, the plaintiff was diagnosed with "Organic

<sup>31</sup> 57 F.3d 1446 (7th Cir. 1995). But see *Erjavac v. Holy Family Health Plus*, 13 F. Supp.2d 737, 745 n.3 (N.D. Ill. 1998) (stating it is "impossible to tell from *Roth* whether the Seventh Circuit would endorse the guidelines as a permissible interpretation of the ADA," and instead applying the First Circuit's analysis and conclusions in *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 866 (1st Cir. 1998)).

<sup>32</sup> See *Baert*, 149 F.3d at 629. See also *Granzow v. Eagle Food Centers, Inc.*, 27 F. Supp.2d 1105 (N.D. Ill. 1998) (relying on *Baert*); *Denson v. Village of Bridgeview*, 19 F. Supp. 2d 829 (N.D. Ill. 1998) (same).

<sup>33</sup> See *Roth*, 57 F.3d at 1448, 1446 n.1 (7th Cir. 1995) ("Strabismus is a condition in which the eyes are not correctly aligned. For example, one may be looking straight ahead while the other eye is not looking in the same direction.").

<sup>34</sup> *Id.* at 1452.

<sup>35</sup> *Id.* at 1455.

<sup>36</sup> *Id.* at 1448.

<sup>37</sup> *Id.* at 1454 (quoting *Hamm v. Runyon*, 51 F.3d 721, 724 (7th Cir. 1995)).

<sup>38</sup> The *Roth* court noted that the mere use of mitigating measures does not automatically prove the presence of a disability. *Roth*, 57 F.3d at 1454 (quoting *Hamm v. Runyon*, 51 F.3d 721, 726 (7th Cir. 1995) ("... not every impairment that affect[s] an individual's major life activities is a substantially limiting impairment."). See also *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986) (noting the key is the extent to which the impairment restricts a major life activity and concluding the impairment must be a significant one.).

<sup>39</sup> 87 F.3d 362 (9th Cir. 1996), cert. denied, 117 S. Ct. 1349 (1997).

<sup>40</sup> *Id.* at 366.

Mental Disorder, Not Otherwise Specified"<sup>41</sup> and was granted continuing leaves of absence totaling six months, as allowed under his employer's leave of absence policy.<sup>42</sup> Nevertheless, during the last two months of his approved leave, the plaintiff worked up to eighty hours per week preparing to open a sign-making business, obtaining his real estate license, and selling real estate.<sup>43</sup> The employer refused to extend his leave of absence beyond the six months and terminated him when he did not return to work.<sup>44</sup>

When the plaintiff reapplied four months later, his former employer offered him a clerical position instead of his previous management position, because there were no management positions open at the time.<sup>45</sup> The employee refused the offer and filed suit, alleging discrimination on the basis of his disability.<sup>46</sup> He argued that his pursuits in the sign-making and real estate businesses should be considered "mitigating measures, akin to treatment, which enabled him to overcome his impairment."<sup>47</sup> The Ninth Circuit concluded that, as a matter of law, the plaintiff was not actually disabled within the meaning of the ADA because his impairment, when considered without regard to mitigating measures, did not substantially limit him in any major life activity.<sup>48</sup>

The Eleventh Circuit Court of Appeals in *Harris v. H & W Contracting Co.*<sup>49</sup> has also deferred to the EEOC interpretation. In *Harris*, the court reasoned that although the guidelines<sup>50</sup> provided by the EEOC in the appendix to the federal regulations are not law,<sup>51</sup> the Supreme Court has held that an agency's interpretation should be given "considerable weight."<sup>52</sup>

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<sup>41</sup> *Id.* at 364.

<sup>42</sup> *Id.* at 364-65.

<sup>43</sup> *Id.* at 364.

<sup>44</sup> *Id.* at 365.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* However, the court went on to state that "[e]ven if Holihan were not actually disabled, the ADA prohibits discrimination against individuals 'regarded as' disabled. If Lucky regarded Holihan as disabled, Holihan would have a 'disability' within the meaning of section 12102(2)(c)." *Id.* at 366. The court found a genuine issue of material fact remained as to whether Lucky regarded Holihan as disabled within the meaning of section 12102(2) of the ADA, and summary judgment was, therefore, improperly granted to Lucky. *Id.* at 366-67. *See also* *Coleman v. Southern Pacific Trans. Co.*, 997 F. Supp. 1197, 1201 (D. Az. 1998) (relying on *Holihan* to conclude that courts are not to consider mitigating measures in determining whether an individual is disabled).

<sup>49</sup> 102 F.3d 516 (11th Cir. 1996).

<sup>50</sup> *See* 29 C.F.R. app. § 1630 (1996).

<sup>51</sup> *See Harris*, 102 F.3d at 521.

<sup>52</sup> *Id.* (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)).

In *Harris*, the plaintiff suffered from active Graves' disease, an endocrine disorder affecting the thyroid gland, and brought an action under the ADA against her former employer after her employer replaced her while she was out on sick leave.<sup>53</sup> On appeal, the Eleventh Circuit reversed the lower court's finding of summary judgment for the employer. The court remanded the case for consideration of whether the employee's impairment, in the absence of mitigating measures, would substantially limit her major life activities.<sup>54</sup> The Eleventh Circuit found the EEOC's view was supported by legislative history and was a reasonable interpretation of the statute.<sup>55</sup>

In *Doane v. City of Omaha*,<sup>56</sup> the Eighth Circuit also relied on the EEOC's interpretation when a police officer brought a claim under the ADA.<sup>57</sup> The police officer claimed that the city's refusal to rehire him after a short medical leave because of his blindness in one eye was discriminatory.<sup>58</sup> Relying on the Eleventh Circuit's decision in *Harris*,<sup>59</sup> the court refused to consider mitigating measures, which included the way in which the police officer compensated for his limitation by subconsciously using his stronger eye to redevelop his depth perception.<sup>60</sup>

In *Gilday v. Mecosta County*,<sup>61</sup> the Sixth Circuit also concluded that the EEOC interpretation was correct. The court set aside the trial court's determination that the employee's diabetes, when properly treated and controlled, fell outside the protection of the ADA.<sup>62</sup> The employee, a paramedic, was a diabetic who took oral medication, monitored his blood levels, and kept a strict regimen of diet and exercise.<sup>63</sup> The employer claimed that the employee was fired because of the employee's history of rudeness and

<sup>53</sup> See *Harris*, 102 F.3d at 518.

<sup>54</sup> *Id.* at 524.

<sup>55</sup> See also *Bancalé v. Cox Lumber Co., Inc.*, No. 97-113-CIV-FTM-25D, 1998 WL 469863, at \*1 (M.D. Fla. May 18, 1998) (same, relying on *Harris*). However, the *Harris* court recognized that some individuals may use mitigating "measures to alleviate impairments that are not substantially limiting" and that as a result, the mere use of a mitigating measure does not automatically prove the presence of a disability. *Id.* at 521. See also *Roth v. Lutheran General Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995) (finding not every impairment that affects an individual's major life activities is a substantially limiting impairment).

<sup>56</sup> 115 F.3d 624 (8th Cir. 1997).

<sup>57</sup> *Id.* at 627.

<sup>58</sup> *Id.* at 626.

<sup>59</sup> See discussion *infra* pp. 315-16 and accompanying notes 49-55.

<sup>60</sup> See *Doane*, 115 F.3d at 627. Another mitigating measure was the fact that the police officer had learned to compensate for his loss of peripheral vision by adjusting his head position. *Id.*

<sup>61</sup> *Gilday v. Mecosta County*, 124 F.3d 760 (6th Cir. 1997).

<sup>62</sup> *Id.* at 765.

<sup>63</sup> *Id.*

conduct unbecoming a paramedic.<sup>64</sup> The employee, on the other hand, argued that stress caused his blood sugar to fluctuate, thereby resulting in his frustration and irritability.<sup>65</sup> Furthermore, he claimed the employer should have honored his request for a transfer "to a less chaotic station, which would have allowed him to maintain the regimen that control[led] his diabetes."<sup>66</sup> The Sixth Circuit relied on the EEOC guidelines<sup>67</sup> in finding that the trial court should have examined the impairment without regard to the availability of mitigating measures.

The Third Circuit in *Matczak v. Frankford Candy and Chocolate Co.*,<sup>68</sup> has also addressed the mitigating measures issue. In that case, the court found that an employee who had been diagnosed with epilepsy thirty years prior to suffering a seizure at work had to be evaluated in his unmedicated state.<sup>69</sup> After suffering an epileptic seizure while working, the employee was hospitalized for almost three weeks, put on a new medication for approximately six months, and had his physical activities curtailed.<sup>70</sup> When he returned to work, his employer placed him on restricted duty and assigned him work that was not prohibited by his doctor.<sup>71</sup> Approximately four months later, the employer terminated him, citing the employee's inadequate job performance and the company's unavailability of work.<sup>72</sup> The employee claimed these reasons were pretextual and that the real reason he was terminated was because of his epilepsy.<sup>73</sup> In reversing the decision, the Third Circuit relied on the EEOC's guidelines<sup>74</sup> and the legislative history of the ADA, and concluded that the congressional intent of the ADA was to consider the individual in his untreated condition.<sup>75</sup>

Finally, the First Circuit in *Arnold v. United Parcel Service, Inc.*,<sup>76</sup> deferred to the EEOC guidelines and to the circuit court decisions that have expressly adopted the guidelines. In *Arnold*, the defendant, United Parcel Service, refused to hire a driver to operate a commercial motor vehicle

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> 29 C.F.R. app. § 1630.2(j) (1996).

<sup>68</sup> 136 F.3d 933 (3rd Cir. 1997).

<sup>69</sup> *Id.* at 937.

<sup>70</sup> *Id.* at 935.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> See also *Deane v. Pocono Med. Center*, No. 96-7174, 1997 WL 500144, at \*1 (3rd Cir. Aug. 25, 1997) (relying on the EEOC's definition of when an individual is "regarded as" being disabled).

<sup>75</sup> See *Matczak*, 136 F.3d at 937-38.

<sup>76</sup> 136 F.3d 854 (1st Cir. 1998).

because of his insulin-dependent diabetes.<sup>77</sup> At a pre-employment physical, the driver was told that the "Department of Transportation regulations preclude[d] insulin-dependent diabetics from obtaining the DOT certification" he needed for the job.<sup>78</sup> The First Circuit reversed, concluding that the district court erred in evaluating the plaintiff's condition in light of the ameliorating effects of his medication.<sup>79</sup> The First Circuit declined to fully defer to the EEOC interpretative guidelines,<sup>80</sup> but noted they were consistent with the ADA's legislative history.<sup>81</sup>

### III. PERSPECTIVES REJECTING THE EEOC GUIDELINES

Clearly, the majority of the circuit courts support the EEOC's interpretation of the ADA, which suggests that the courts should evaluate the impairment without regard to the availability of mitigating measures. The opposing viewpoint, specifically adhered to by only one circuit court, is that the impairment should be evaluated by the court once the impairment is controlled by medication or treatment.<sup>82</sup>

In *Sutton v. United Air Lines*,<sup>83</sup> the Tenth Circuit reasoned that courts should be "concerned with whether the impairment affects the individual in fact, not whether it would hypothetically affect the individual without the use

<sup>77</sup> *Id.* at 857.

<sup>78</sup> *Id.*

<sup>79</sup> However, the court failed to address the defendant's argument that the decision to deny the plaintiff employment was because of DOT regulations, which incidentally, are consistent with the EEOC guidelines with reference to mitigating measures.

<sup>80</sup> See discussion *infra* at pp. 334-35 accompanying notes 196-201, discussing the differing levels of deference due to agency dictates, depending on whether they are legislative or interpretive.

<sup>81</sup> See *Arnold*, 136 F.3d at 866. See also *Katz v. City Metal Co., Inc.*, 87 F.3d 26, 30-31 (1st Cir. 1996) (relying on the EEOC's interpretation of the terms "disability," "physical impairment," "major life activities," "substantially limited," and "factors to be considered in assessing whether an individual is substantially limited in a major life activity"). In *Katz*, the First Circuit had previously relied on the EEOC's interpretation of the ADA for other terms. It can be inferred that this court would likewise rely on the EEOC's interpretation for "impairment."

<sup>82</sup> See *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 902 (10th Cir. 1997) (holding that the EEOC's Interpretive Guidance with regard to mitigating measures is in direct conflict with the plain language of the ADA); *Schluter v. Industrial Coils, Inc.*, 928 F. Supp. 1437, 1445 (W.D. Wis. 1996) ("If an insulin-dependent diabetic can control her condition with the use of insulin . . . she cannot argue that her life is substantially limited by her condition."); *Murphy v. United Parcel Serv., Inc.*, 946 F. Supp. 872, 881 (D. Kan. 1996) (rejecting EEOC view as contrary to statute); *Coghlan v. H.J. Heinz Co.*, 851 F. Supp. 808, 813-14 (N.D. Tex. 1994) (same).

<sup>83</sup> 130 F.3d 893 (10th Cir. 1997), *affirmed*, *Sutton v. United Air Lines*, 119 S.Ct. 790 (1999). Since this article was written, the United States Supreme Court has adopted this position. See also discussion *infra* at pp. 328-36 (setting forth why such a conclusion is inevitable).

of corrective measures.”<sup>84</sup> In *Sutton*, twin sisters sought employment as commercial airline pilots with United Air Lines (“United”) but were disqualified because their uncorrected vision failed to meet United’s requirements.<sup>85</sup> United required pilot applicants to have uncorrected vision of 20/100 or better in each eye.<sup>86</sup> The plaintiffs’ vision was 20/200 in the right eye and 20/400 in the left.<sup>87</sup> However, plaintiffs’ corrected vision was 20/20 in both eyes.<sup>88</sup> The Tenth Circuit found for United, rejecting the EEOC Interpretive Guidance suggestion that disability inquiries be made without regard to mitigating measures.<sup>89</sup> The court noted the plaintiffs’ admissions that with their corrective measures they “function[ed] identically to individuals without a similar impairment” and that their normal daily activities were not limited to those that could be performed with their uncorrected vision.<sup>90</sup> The court concluded that:

Plaintiffs cannot have it both ways. They are either disabled because their uncorrected vision substantially restricts their major live [sic] activity of seeing and, thus, they are not qualified individuals for a pilot position with United, or they are qualified for the position because their vision is correctable and does not substantially limit their major life activity of seeing.<sup>91</sup>

Several persuasive arguments support this position.<sup>92</sup> First, “the EEOC’s position on mitigating measures appears not in the regulations themselves,” but rather in an appendix thereof.<sup>93</sup> “The appendix constitutes a set of

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<sup>84</sup> *Sutton*, 130 F.3d at 902. *But see* *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 942 (10th Cir. 1994) (relying on the EEOC interpretive guidelines for the correct definition of “major life activities”: “The ADA regulations adopt the definition of ‘major life activities’ found in the Rehabilitation Act regulations, 34 C.F.R. § 104. See 29 C.F.R. Pt. 1630, Appendix to Part 1630 - Interpretive Guidance on Title I of the Americans with Disabilities Act, § 1630.2(I) Major Life Activities.”); *MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437, 1444 (10th Cir. 1996) (relying on the EEOC for interpretation of “regarded as,” “major life activities” and “substantially limits”: “The ADA does not define these terms. For this reason, we have previously referred to the Act’s implementing regulations, see 29 C.F.R. Pt. 1630, for clarification.”).

<sup>85</sup> *Sutton*, 130 F.3d at 895.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 901-02.

<sup>90</sup> *Id.* at 903.

<sup>91</sup> *Id.* (citation omitted).

<sup>92</sup> These arguments are set forth most eloquently by Justice Kennedy in her dissent in *Gilday v. Mecosta County*, 124 F.3d 760, 766 (6th Cir. 1997).

<sup>93</sup> *Id.* See also *Coghlan v. H.J. Heinz Co.*, 851 F. Supp. 808, 811-12 (N.D. Tex. 1994) (rejecting EEOC view as contrary to statute).

interpretive, rather than legislative, rules and is therefore not binding law."<sup>94</sup> Second, although such "administrative interpretation" may be properly resorted to for guidance,<sup>95</sup> and interpretive rules are "entitled to some deference where the rule is a permissible construction of the statute,"<sup>96</sup> supporters of this viewpoint reject the EEOC's interpretation as being in "conflict with the text of the statute,"<sup>97</sup> and therefore not a permissible construction of the statute."<sup>98</sup> The reasoning behind this proposition is that the EEOC's rule conflicts with the first requirement to prove a disability under the ADA—a physical or mental impairment that substantially limits a major life activity.<sup>99</sup> If one accepts the EEOC guidelines, then the individual is seen as disabled even if, with the benefit of medication, the individual is not in fact substantially limited in any major life activity.<sup>100</sup> Further, even though the legislative history lends some support to the EEOC position,<sup>101</sup> "where the statutory text is unambiguous, there is no need to resort to legislative history to cloud the text."<sup>102</sup>

The third argument rests on the notion that Congress did not intend "the ADA to protect as disabled [all] individuals whose life activities would hypothetically be substantially limited [if they were] to stop taking medication."<sup>103</sup> Specifically, "where an impairment is fully controlled by mitigating measures and such measures do not themselves substantially limit an individual's major life activities," the individual should not be afforded protection under the ADA.<sup>104</sup> In essence, the reasoning follows, the EEOC is creating a different standard for those persons who take medication for their condition.<sup>105</sup> This reasoning conflicts with the intent of the ADA, which is to

<sup>94</sup> *Gilday*, 124 F.3d at 766 (Kennedy, J., dissenting).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* (quoting *Reno v. Koray*, 515 U.S. 50, 55 (1995)).

<sup>97</sup> *Id.* (Kennedy, J., dissenting). *See also* *Public Employees Retirement System v. Betts*, 492 U.S. 158, 171 (1989) ("[O]f course, no deference is due to agency interpretations at odds with the plain language of the statute itself").

<sup>98</sup> *Gilday*, 124 F.3d at 760 (Kennedy, J., dissenting).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* (quoting *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994)).

<sup>103</sup> *Id.* at 767 (Guy, J., dissenting) (finding the impact of mitigating measures must be made on a case by case basis depending on how functional the individuals are after taking their medication). *See also* Erica Worth Harris, *Controlled Impairments Under the Americans with Disabilities Act: A Search for the Meaning of "Disability,"* 73 WASH. L. REV. 575, 580 (1998) (noting that according to the EEOC, individuals with controlled impairments "have disabilities even if they do not experience, and have never experienced, any limitation from their condition.").

<sup>104</sup> *Gilday*, 124 F.3d at 767 (Kennedy, J., dissenting)

<sup>105</sup> *Id.*

provide protection only for those whose impairments substantially limit their lives.<sup>106</sup>

The Fifth Circuit has also, until recently, flatly rejected the EEOC guidelines defining disability. In *Ellison v. Software Spectrum, Inc.*,<sup>107</sup> the plaintiff argued that the court should adhere to the EEOC guidelines addressing mitigating measures.<sup>108</sup> Noting that it would not consider this argument on appeal because the plaintiff had failed to present it in the district court,<sup>109</sup> the Fifth Circuit nonetheless went on to state, in dicta, its position on the EEOC guidelines.<sup>110</sup> The court noted that "the appendix is not part of the regulations but is, instead, the EEOC's interpretation of those regulations."<sup>111</sup> Additionally, the court found that the section addressing mitigating measures addresses impairment, not disability,<sup>112</sup> and that "[a] physical impairment, standing alone, is not necessarily a disability as contemplated by the ADA [because t]he statute requires an impairment that substantially limits one or more of the major life activities."<sup>113</sup> The court went on to add that if Congress had intended that "substantial limitation be determined without regard to mitigating measures, it would have provided for coverage under § 12102(2)(A) for

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<sup>106</sup> *Id.* In response to this argument, the *Gilday* majority rejoined: "It is hard to imagine that Congress wished to provide protection to workers who leave it to their employers to accommodate their impairments but to deny protection to those workers who act independently to overcome their disabilities and thus create a disincentive to self-help." *Id.* at 763, n.5. *Cf. Harris V.H. & W. Contracting Co.*, 102 F.3d 516 (11th Cir. 1996):

[R]ational people will not cease to mitigate their impairments because the cost of living with an impairment that substantially limits a major life activity, even combined with the added benefit of more generous ADA protection, is far greater than the cost of undertaking such measures. Rational individuals would pay a hundred dollars per month for medication that would enable them to live free of severe pain rather than sit at home in pain to save a thousand dollars per month and receive the benefit of ADA protection.

*Id.* at 600-02. Further, several circuit courts have held that employees who refuse to take reasonable mitigating measures to manage controllable impairments may not be able to demand that their employers provide accommodations. *See Van Styn v. Fancy Colours & Co.*, 125 F.3d 563, 570 (7th Cir. 1997) (noting that "[a] plaintiff cannot recover under the ADA if through his own fault he fails to control an otherwise controllable illness."); *Keoughan v. Delta Airlines, Inc.*, 113 F.3d 1246, 1247 (10th Cir. 1997) (noting, without comment, the lower court's reasoning that "[a] disabled individual is not 'qualified' if she needs accommodation precisely because she failed to manage an otherwise controllable disorder"); *Siefken v. Village of Arlington Heights*, 65 F.3d 664, 667 (7th Cir. 1995) (holding employees do not have a cause of action under the ADA if they are discharged due to their own failure to manage controllable disabilities).

<sup>107</sup> 85 F.3d 187 (5th Cir. 1996). *See also Burch v. Coca-Cola*, 119 F.3d 305, 316 (5th Cir. 1997); *Daugherty v. City of El Paso*, 56 F.3d 695, 697 (5th Cir. 1995).

<sup>108</sup> *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 191 (5th Cir. 1996).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 191 n.3.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* (citing *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995)).

impairments that have the *potential* to substantially limit a major life activity."<sup>114</sup>

Nevertheless, the Fifth Circuit in *Washington v. HCA Health Services of Texas, Inc.*<sup>115</sup> has recently modified its position. In *Washington*, the court noted that although it was "more reasonable to say that mitigating measures must be taken into account," that position was not "so much more reasonable to warrant overruling the EEOC."<sup>116</sup> The court concluded that it would follow the EEOC guidelines and legislative history, but would read them narrowly: "[o]nly 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."<sup>117</sup>

The Fourth Circuit Court of Appeals is apparently undecided as to whether to support or reject the EEOC's Interpretative Guidelines. For example, in *Ennis v. National Association of Business and Educational Radio, Inc.*,<sup>118</sup> the court stated its uncertainty of the EEOC's authority to interpret the term 'impairment' "[s]ince it interprets a term that does not appear in Title I (the specified extent of the EEOC's regulatory authority). . . ."<sup>119</sup> Three years later, however, the court seemed to rely on the EEOC guidelines. Although it never reached the issue precisely, in *Williams v. Channel Master Satellite Systems, Inc.*,<sup>120</sup> the court cited *Meritor Savings Bank, FSB v. Vinson*<sup>121</sup> for the proposition that the EEOC guidelines "[w]hile not controlling upon the courts by reason of their authority, do constitute a body of experience and

<sup>114</sup> *Ellison*, 85 F.3d at 191-92 n.3 (5th Cir. 1996).

<sup>115</sup> 152 F.3d 464 (5th Cir. 1998).

<sup>116</sup> See *Washington*, 152 F.3d at 470 (5th Cir. 1998). See also *Hamilton v. Southwestern Bell Telephone Co.*, 136 F.3d 1047, 1051 n.13 (5th Cir. 1998) (relying on the EEOC's Interpretive Guidance in dicta, without analysis or discussion, six months before *Washington* was decided).

<sup>117</sup> *Washington*, 152 F.3d at 470. The Fifth Circuit went on to state:

The impairments must be serious in common parlance, and they must require that the individual use mitigating measures on a frequent basis, that is, he must put on his prosthesis every morning or take his medication with some continuing regularity. In order for us to ignore the mitigating measures, they must be continuous and recurring; if the mitigating measures amount to permanent corrections or ameliorations, then they may be taken into consideration. If an individual has a permanent correction or amelioration, such as an artificial joint or a pin or a transplanted organ, that individual must be evaluated in his mitigated state and cannot claim that he is disabled because he would be "substantially limited in a major life activity" if he had not had his hip joint replaced.

*Id.* at 470-71.

<sup>118</sup> 53 F.3d 55 (4th Cir. 1995).

<sup>119</sup> See *Ennis*, 53 F.3d at 59-60 n.4.

<sup>120</sup> 101 F.3d 346 (4th Cir. 1996).

<sup>121</sup> 477 U.S. 57 (1986) (citations and internal quotation marks omitted).

informed judgment to which courts and litigants may properly resort for guidance. . . ."<sup>122</sup>

Yet, just one year later, in *Runnebaum v. Nationsbank of Maryland, N.A.*,<sup>123</sup> the Fourth Circuit changed course once more. In *Runnebaum*, the court implicitly rejected the EEOC guidelines, finding that the statutory language of the ADA insofar as the meaning of the word "impairment" was clear and unambiguous. The Fourth Circuit concluded that the word "[c]annot be divorced from its dictionary and common sense connotation of a diminution in quality, value, excellence or strength."<sup>124</sup> Consequently, the Fourth Circuit interpreted the ADA without resorting to the EEOC guidelines, reasoning that because the language was plain and unambiguous, there was no need to resort to legislative history.<sup>125</sup> The court concluded that Congress did not intend the ADA to cover conditions where no diminishing effects are exhibited.<sup>126</sup> The Fourth Circuit's indecision is a clear example of the uncertainty the courts face in interpreting the ADA.

#### IV. THE CHEVRON DOCTRINE OF JUDICIAL DEFERENCE

The proper interpretation of the ADA depends on whether the judiciary should be required to give credence to an administrative agency's interpretation of statute, a question that remains effectively unanswered. On the one hand, "[t]o determine 'what the law is' in the context of an actual controversy that turns on a question of statutory meaning is the quintessential judicial function."<sup>127</sup> This view has its roots as far back as *Marbury v. Madison*,<sup>128</sup>

<sup>122</sup> *Williams v. Channel Master Satellite Systems, Inc.*, 101 F.3d 346, 349, n.2 (4th Cir. 1996).

<sup>123</sup> 123 F.3d 156 (4th Cir. 1997)(en banc).

<sup>124</sup> See *Runnebaum*, 123 F.3d at 168 (quoting *de la Torres v. Bolger*, 781 F.2d 1134, 1138 (5th Cir. 1986) (quotation omitted)).

<sup>125</sup> *Id.* at 169.

<sup>126</sup> *Id.* at 168. However, this case involved a plaintiff suffering from asymptomatic HIV. In *Bragdon v. Abbott*, 118 S. Ct. 2196, 2204 (1998), the Supreme Court of the United States specifically found that asymptomatic HIV is a disability under the ADA, overruling *Runnebaum* in that regard.

<sup>127</sup> Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 452 (1989) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). See also Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071, 2085 (1990) ("Before the discretionary, policy-making administrative agency became pervasive, the notion that courts would interpret the law, including federal statutes, seemed axiomatic."). See also John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretation of Agency Rules*, 96 COLUM. L. REV. 612, 617 (1996):

If an agency's rules mean whatever it says they mean . . . the agency effectively has the power of self-interpretation. This empowerment 'contradicts a major premise of our constitutional scheme and of contemporary separation of powers case law – that a fusion of lawmaking and law-exposition is especially dangerous to our liberties.'

which held that it was the courts' "proper and peculiar province"<sup>129</sup> to determine what the law is.

Conversely, administrative agencies might be better situated to interpret statutes for several reasons. First, administrative agencies have technical expertise and are familiar with the history, purpose and current congressional views,<sup>130</sup> areas in which the judicial branch is severely lacking. Most importantly, agencies, unlike courts, are accountable to their electorate.<sup>131</sup>

The controlling case today argues for great judicial deference to agency interpretations. In *Chevron v. Natural Resources Defense Council, Inc.*,<sup>132</sup> the Environmental Protection Agency ("EPA") revised its previous interpretation of a statutory term under the Clean Air Act. The Court held that so long as Congress had not directly addressed the issue before the agency and had not foreclosed the agency's interpretation, then the agency's construction of the statute should be upheld unless it was unreasonable or otherwise impermissible.<sup>133</sup>

A unanimous Court set forth a two-part test for deciding when to accept an agency's interpretation of a statute.<sup>134</sup> The first step requires the court to determine whether clear congressional intent governs the interpretation of the statute.<sup>135</sup> If so, the court must give effect to such intent.<sup>136</sup> If Congress has not "directly addressed the precise question at issue," the second step of the *Chevron* test requires that the court defer to the agency's interpretation, so long as that interpretation is permissible.<sup>137</sup>

*Id.* (footnote omitted).

<sup>128</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>129</sup> *Id.* at 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").

<sup>130</sup> See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514; Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 368 (1986).

<sup>131</sup> See Sunstein, 90 COLUM. L. REV. at 2087.

<sup>132</sup> 467 U.S. 837 (1984) (footnote omitted).

<sup>133</sup> *Id.* at 843-45.

<sup>134</sup> See also Russel L. Weaver & Thomas A. Schweitzer, *Deference to Agency Interpretations of Regulations: A Post-Chevron Assessment* 22 MEM. ST. U. L. REV. 411, 429-430 (1992) (arguing there is strong evidence for supporting the proposition that all standards, including *Chevron's*, are applied inconsistently); Quintin Johnstone, *An Evaluation of the Rules of Statutory Interpretation*, 3 KAN. L. REV. 1, 5 (1954) (arguing the Court uses a plethora of rules, a virtual "bag of tricks from which [it] pull[s] respectable-sounding rules to justify any possible result"); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (citing Judge Harold Leventhal's emphasis on the previous point in regard to the Court's use of legislative history, stating that it is "akin to 'looking over a crowd and picking out your friends.'").

<sup>135</sup> *Chevron*, 467 U.S. at 842-43.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

The first problem with this deceptively simplistic deferential test is the fundamental issue of stare decisis. To some extent, the values promoted by stare decisis and by *Chevron* conflict.<sup>138</sup> The doctrine of stare decisis requires that courts uphold earlier judicial constructions of statutes.<sup>139</sup> Stare decisis promotes certainty and predictability; once a meaning is fixed by the court, it remains fixed, absent a congressional overruling or compelling reasons for change.<sup>140</sup> By ensuring the law does not change in response to shifts in the political winds, stare decisis fosters respect for the courts and for the legal process.<sup>141</sup>

In contrast, *Chevron* calls for deference to interpretations made by administrative agencies, unless Congress clearly intended that a particular interpretation should govern.<sup>142</sup> *Chevron* is premised, in part, on a recognition of the need for flexibility and political responsiveness in the interpretation of statutes.<sup>143</sup> Congress created agencies to administer statutes, thereby allowing statutes to change over time in response to new circumstances, shifts in public sentiment, or shifts in political power.<sup>144</sup>

Some commentators argue that the rationales for deference to agencies exist regardless of whether the courts have addressed the statute in question.<sup>145</sup> They reason that the courts should apply the doctrine of judicial deference even when courts have previously interpreted the statute.<sup>146</sup> Others disagree, arguing that "*Chevron* represents a usurpation of judicial power and results in [an] excessive concentration of power in administrative agencies."<sup>147</sup>

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<sup>138</sup> See Rebecca Hanner-White, *The Stare Decisis "Exception" to the Chevron Deference Rule*, 44 FLA. L. REV. 723, 754-55 (1992).

<sup>139</sup> Stare decisis is defined as "the doctrine of precedent, under which it is necessary for courts to follow earlier judicial decisions when the same points arise again in litigation." BLACK'S LAW DICTIONARY 590 (Pocket ed. 1996).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> See Jahan Sharifi, *Precedents Construing Statutes Administered by Federal Agencies after the Chevron Decision: What Gives?* 60 U. CHI. L. REV. 223, 224 (1993).

<sup>143</sup> *Id.* at 224.

<sup>144</sup> *Id.*

<sup>145</sup> See Susan K. Goplen, *Judicial Deference to Administrative Agencies' Legal Interpretations After Lechmere, Inc. v. NLRB*, 68 WASH. L. REV. 207, 226 (1993).

<sup>146</sup> *Id.* (arguing that the Supreme Court reached the wrong conclusion in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) where it held that when interpreting administrative statutes, instead of applying the *Chevron* analysis, the Court will defer to its own previous interpretations rather than defer to administrative agencies' interpretations of statutes).

<sup>147</sup> Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-Chevron Era*, 32 B.C. L. REV. 757, 759 (1991). To avoid an improper balance of power, our founding fathers felt that an active judiciary was necessary to ensure legislative supremacy over the executive branch on matters of policy. See *id.* They reasoned that when the judiciary defers to the executive branch, the legislative branch is weakened. See *id.* This undermines our constitutional structure and defeats the

An in-depth analysis of the impact of *Chevron* on administrative law is beyond the scope of this Article. Nevertheless, a brief foray into the Court's reasoning may prove helpful. In an opinion authored by Justice Stevens, the Court noted that if an agency is acting pursuant to an explicit delegation of authority by Congress, courts should give agency interpretations "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."<sup>148</sup> In support of this broad rule of deference, Justice Stevens offered three rationales: (1) delegation by Congress to an agency implies discretion to interpret;<sup>149</sup> (2) comparative competence:<sup>150</sup> agencies are experts in their areas of delegated power where courts are not; and (3) agencies are politically accountable while courts are not.<sup>151</sup>

In its application, however, the simplicity of the two step *Chevron* test has been deceiving, as exemplified by its second weakness: the inconsistency with which the highest court of the land executes it. Since *Chevron*, the Supreme Court has achieved results that have been greatly deferential, allowing agencies to subvert congressional intent.<sup>152</sup> Conversely, the Court has also reached decisions that severely constrict agency discretion to make policy choices.<sup>153</sup> The Court will have to address this inconsistency when determining whether the courts should defer to the EEOC's interpretation of the ADA.

## V. THE INCONSISTENT APPLICATION OF THE *CHEVRON* DOCTRINE

The inconsistency with which the Supreme Court applies the *Chevron* test is exemplified in several later decisions. These decisions suggest that the justices may be more comfortable applying the doctrine of *stare decisis* than applying the *Chevron* doctrine. For example, in *Maislin Industries, U.S. Inc.*

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purpose underlying our system of checks and balances. *See id.* Consequently, there exists no constitutional justification for court deference. *See id.* at 787. Thus, the implementation of the *Chevron* test has far-reaching consequences, threatening the very foundation of our judicial system. *See id.*

<sup>148</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (footnote omitted).

<sup>149</sup> *Id.* at 865.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 865-66.

<sup>152</sup> *See Young v. Community Nutrition Institute*, 476 U.S. 974, 981 (1986) (finding the meaning of section 346 of the FDCA was ambiguous and the FDA's interpretation should be given deference).

<sup>153</sup> *See Maislin Industries, U.S., Inc. v. Primary Steel, Inc.* 497 U.S. 116, 113 (1990) (finding that deference to an agency's statutory construction was inappropriate where congressional intent was unambiguous and refusing to apply the *Chevron* analysis where the Court had a long history of insisting on a literal interpretation of a statute). Additionally, the courts have excepted from *Chevron* deference the interpretation of criminal law by the Justice Department. *See Crandon v. United States*, 494 U.S. 152 (1990).

*v. Primary Steel, Inc.*,<sup>154</sup> decided in 1990, the Court concluded that the Interstate Commerce Commission's new interpretation of shipping rates was "flatly inconsistent with the statutory scheme as a whole."<sup>155</sup> Furthermore, the Court held that "[o]nce we have determined a statute's clear meaning, we adhere to that determination under the doctrine of stare decisis, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning."<sup>156</sup>

In the two years following *Maislin*, four justices departed, significantly changing the composition of the Court.<sup>157</sup> Nonetheless, when *Lechmere, Inc. v. NLRB*<sup>158</sup> was decided in 1992, the Supreme Court again refused to apply the *Chevron* test because it had previously addressed the statute in question.<sup>159</sup> Once more, the doctrine of stare decisis took precedence over that of judicial deference, eclipsing the *Chevron* test. In light of these decisions, when an agency's present interpretation conflicts with either past agency or judicial interpretations of the statute, one must consider what weight, if any, the prior interpretation should be given.<sup>160</sup>

A significantly less complex situation occurs where no prior judicial interpretation exists and the court is confronted with only the agency's present interpretation of the statute. In those cases, as is the case in this instance with the EEOC guidelines, no conflict with stare decisis exists.<sup>161</sup> Congress enacted the ADA on July 26, 1990.<sup>162</sup> Exactly one year later, the EEOC issued its regulations interpreting the ADA, including the Interpretive Guidance in the Appendix.<sup>163</sup> Yet, the Act did not become effective until July of 1992. Accordingly, until the effective date, no litigation had ensued regarding the proper interpretation of the Act. Therefore, for purposes of this Article, the doctrine of stare decisis is inapplicable, in either the context of prior judicial interpretation or prior agency interpretation. Nonetheless, the Supreme Court would still be expected to apply the two-part test set forth in *Chevron* when deciding whether to accept the EEOC's interpretation of the

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<sup>154</sup> 497 U.S. 116 (1990).

<sup>155</sup> *Maislin*, 497 U.S. at 131.

<sup>156</sup> *Id.*

<sup>157</sup> See Goplen, *supra* note 145, at 223 (1993).

<sup>158</sup> 502 U.S. 527 (1992).

<sup>159</sup> *Id.* at 536 (1992) (refusing to adhere to the NLRB's interpretation of the NLRA because the Court had previously interpreted the Act).

<sup>160</sup> See Rebecca Hanner-White, *The Stare Decisis "Exception" to the Chevron Deference Rule*, 44 FLA. L. REV. 723, 741 (1992).

<sup>161</sup> *Id.*

<sup>162</sup> 42 U.S.C. §§ 12101-12213 (1990).

<sup>163</sup> 29 C.F.R. app. § 1630 (1996).

ADA. For purposes of this Article, it is assumed that the Court will apply the test as it was set forth in *Chevron*.

## VI. APPLICATION OF THE *CHEVRON* DOCTRINE TO THE EEOC'S INTERPRETATIVE GUIDANCE

In *Chevron*, a unanimous Court set forth a two-part test for deciding when to accept an agency's interpretation of a statute. The first step requires the court to determine whether clear congressional intent governs the interpretation of the statute.<sup>164</sup> If so, the court must give effect to such intent because the statute is unambiguous.<sup>165</sup> If Congress has not "directly addressed the precise question at issue," then the statute is ambiguous and the second step of the *Chevron* test requires that the court defer to the agency's interpretation, so long as that interpretation is permissible.<sup>166</sup> A permissible interpretation of the statute is one that is not "arbitrary, capricious or manifestly contrary to the statute."<sup>167</sup>

The "starting point for interpretation of a statute 'is the language of the statute itself.'"<sup>168</sup> *Chevron*'s first step requires courts to avoid attempting to extricate legislative intent themselves<sup>169</sup> and to "assume that the legislative purpose is expressed by the ordinary meaning of the words used."<sup>170</sup> Thus, if

<sup>164</sup> 467 U.S. 837, 842-43 (1984); but see Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) ("The chances that of several hundred [legislators], each will have exactly the same determinate situations in mind as possible reductions of a given determinable, are infinitesimally small.").

<sup>165</sup> *Chevron v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

<sup>166</sup> *Id.* "[When] Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* (footnotes omitted).

<sup>167</sup> *Id.* at 844. See also *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 171 (1989) (holding that agency interpretations of statutes are entitled to deference unless the agency interpretation contradicts the plain language of the statute).

<sup>168</sup> See *Kaiser Alum. & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

<sup>169</sup> See, e.g., *Sutton v. United Air Lines*, 130 F.3d 893, 897 (10th Cir. 1997) (quoting *Smith v. United States*, 508 U.S. 223, 228 (1993) ("[w]hen a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."). But see *Merz v. Secretary of Health & Human Servs.*, 969 F.2d 201, 205-07 (6th Cir. 1992) (holding that a court should reject the literal meaning of a statute in favor of one which favors congressional intent); *Sciarotta v. Bowen*, 837 F.2d 135, 138-39 (3rd Cir. 1988) (same); *Swain v. Schweiker*, 676 F.2d 543, 546-47 (11th Cir. 1982) (same).

<sup>170</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431-32 (1987) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)). See also Karin P. Sheldon, "It's Not My Job to Care": Understanding Justice Scalia's Method of Statutory Interpretation Through *Sweet Home* and *Chevron*, 24 B.C. ENVTL. AFF. L. REV. 487, 503 (1997) (where statutory language is unambiguous, any use of legislative history to determine its

the language of a statute "is plain and admits of no more than one meaning" and "if the law is within the constitutional authority of the law-making body which passed it," then "the duty of interpretation does not arise" and "the sole function of the courts is to enforce the statute according to its terms."<sup>171</sup>

The plain meaning of the words "substantially limits" is that the individual's impairment, currently and in actuality, not potentially or hypothetically, substantially limits a major life activity.<sup>172</sup> If Congress had intended to adopt a hypothetical approach, it could have adopted language to that effect.<sup>173</sup> But the courts' treatment of an impairment as a disability, where such an impairment is controlled by medication or ameliorative devices, has two congressionally unintended effects on the "substantially limits" language. First, such an interpretation eliminates the need for a "substantial limit[ation]." An interpretation that considers an impairment to be a disability because of its hypothetical or potential<sup>174</sup> limitations when mitigating

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meaning, "poison[s] the well of future legislation, depriving legislators of the assurance that ordinary terms, used in an ordinary context, will be given a predictable meaning.").

<sup>171</sup> *Caminetti v. United States*, 242 U.S. 470, 485 (1917). See also, e.g., *Runnebaum v. Nationsbank of Maryland, N.A.*, 123 F.3d 156, 168 (4th Cir. 1997) (en banc):

Here, the term "impairment" is not defined in the statute. Webster's defines "impair" as to "make worse by or as if by diminishing in some material respect." Webster's Ninth New Collegiate Dictionary 603 (1986); see also BLACKS LAW DICTIONARY 677 (5th ed. 1981) ("To weaken, or make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner."). "Impairment" is defined as a "decrease in strength, value, amount, or quality." Webster's II New Riverside University Dictionary 612 (1988).

*Id.* at 168. The *Runnebaum* court reasoned that the statutory meaning of "impairment" was plain and unambiguous, and as a result, had no reason to resort to the legislative history to ascertain Congress' intent. *Id.*

<sup>172</sup> See *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 902 (10th Cir. 1997) ("In making disability determinations, we are concerned with whether the impairment affects the individual in fact, not whether it would hypothetically affect the individual without the use of corrective measures.")

<sup>173</sup> In *Sicard v. City of Sioux City*, 950 F. Supp. 1420, 1436 (N.D. Iowa 1996), the court found that the plain meaning of impairment was only the untreated condition. ("[T]he statute certainly does not say 'impairment plus treatment' or 'impairment after treatment' or 'treated impairment.'"). *Id.* However, the opposite argument can be just as easily constructed: the statute does not say "impairment prior to treatment" or "impairment without medication." At the very least, this court would have to concede that the statute is ambiguous.

<sup>174</sup> The Supreme Court of the United States held in *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998) that reproduction is a major life activity. *Id.* at 2205. The Court further held that asymptomatic HIV infection is a disability under the ADA, because the minute risk of transmitting the disease during the act of reproduction could amount to a substantial limitation on that major life activity. *Id.* at 2206-07. With this ruling, however, the Court has broadened the scope of the ADA to include any individuals who have a genetic defect which predicts the later onset of a debilitating or fatal disease that can be passed on to their children. See *id.* at 2216 (Rehnquist, C.J., concurring) (finding that the plaintiff's argument "[t]aken to its logical extreme, would render every individual with a genetic marker for some debilitating disease 'disabled' here and now because of some possible future effects."). Congress could not possibly have

measures aren't considered, renders the "substantially limits" language unnecessary. Such a reading violates the basic rule of statutory construction that a statute should not be read in such a way that it "[r]enders one part a mere redundancy."<sup>175</sup>

Second,

[A]lthough the statute does not expressly state what time frame is to be used, the tense of the phrase 'substantially limits' clearly indicates the determination is to be made with regard to present reality. The definition is written in the present tense and contemplates that the impairment at the present time substantially limits a major life activity.<sup>176</sup>

Because it is presumed that Congress acts in accordance with the rules of statutory construction,<sup>177</sup> this interpretation of its intent is the more plausible. Therefore, because clear congressional intent is expressed through the "ordinary meaning of the words used", the text is unambiguous and the court's inquiry should end here.<sup>178</sup>

Assuming, for argument's sake, that the text was ambiguous, the court could then consider the ADA's legislative history to determine congressional intent. The courts who support the EEOC guidelines heavily rely upon the legislative history. Specifically, courts rely on the House and Education and Labor Committee Report, which explained that "[w]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids."<sup>179</sup> Similarly, the House Judiciary Committee Report stated: "The impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in less-than-substantial limitation."<sup>180</sup>

Nevertheless, the Senate Labor and Human Resources Committee Report is inconsistent with the two House Reports. In particular, the Senate Report

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intended such individuals to be beneficiaries of the ADA. (In *Bragdon*, the Court noted the dispute over whether mitigating measures should be considered, but did not further explore the issue.) *Id.* at 2206.

<sup>175</sup> See *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-08 (1961) ("The statute admits a reasonable construction which gives effect to all of its provisions. In these circumstances we will not adopt a strained reading which renders one part a mere redundancy.").

<sup>176</sup> See *Harris v. H&W Contracting, Co.*, 102 F.3d 516, 603 (11th Cir. 1996).

<sup>177</sup> See *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991).

<sup>178</sup> See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431-32 (1987) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)).

<sup>179</sup> H.R. REP. NO. 101-485(II), at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 334.

<sup>180</sup> H.R. REP. NO. 101-485(III), at 28 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 451.

indicates that one of the goals of the third prong "[i]s 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."<sup>181</sup> Although at least one circuit court has addressed the discrepancy between the reports, subsequently finding that the House Reports were due greater weight,<sup>182</sup> the Senate Committee's point remains persuasive.

Moreover, the wording of the ADA defines disability in the disjunctive, not the conjunctive: it lists three possible ways of defining a "disability", separated by an "or" not an "and." A "disability" is defined as (a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) a record of such impairment; *or* (c) being regarded as having such an impairment.<sup>183</sup> The use of "or" denotes an alternative,<sup>184</sup> that a choice or selection is to be made. Therefore, its use by Congress is clearly intended to mean that those who don't qualify for coverage under one definition can seek, as an alternative, coverage under another. Allowing an individual to proceed under two categories at once would render the other categories superfluous.

For example, assume an individual is "substantially limited in a major life activity" *without* the use of mitigating measures, i.e. an insulin-dependent diabetic. That individual would clearly be found "disabled" under the first definition of a disability: a physical or mental impairment that substantially limits one of his major life activities. The problem, however, is that the EEOC's interpretation allows that same individual to proceed under the third definition of disability as well: being regarded as having such an impairment. Under this reasoning, the individual would have two gateways to ADA coverage where he should only have had one.

If Congress had intended that the individual be able to proceed under more than one definition at a time, Congress would have worded the statute differently, separating the categories by an "and/or," or by using wording such as: "a disability is one or more of the following." But Congress specifically chose to create three distinct definitions of a disability. By allowing plaintiffs whose impairments are controlled to proceed under the first prong definition, the EEOC's interpretation creates a class of plaintiffs *who are not substantially limited in a major life activity and are not regarded as being such*.

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<sup>181</sup> S. REP. NO. 101-116, at 24 (1989) (emphasis added).

<sup>182</sup> See *Washington v. HCA Health Serv. of Texas, Inc.*, 152 F.3d 464, 467-69 (5th Cir. 1998).

<sup>183</sup> 42 U.S.C. § 12102(2)(1990) (emphasis added).

<sup>184</sup> "Or" is used to indicate "an alternative, usually only before the last in a series." See RIVERSIDE WEBSTER'S II DICTIONARY 482 (Rev. ed. 1996).

Nevertheless, if the individual's diabetic condition were evaluated with mitigating measures in place, then the ADA would cover only those individuals Congress intended to protect. This interpretation draws clear distinctions between the different types of "disability" from which a plaintiff can claim he suffers. Consideration of the same individual with mitigating measures in place would reveal that the same individual could proceed *only* under the third prong: being regarded as having an impairment that substantially limits a major life activity.<sup>185</sup> The individual has not been left without recourse, but rather has been categorized as being discriminated against, not because he is, in actuality, substantially limited, but rather because he is simply perceived as such. Review of the Senate Report indicates that the goal of the third prong was *to create a cause of action for those who were not substantially limited because their conditions were under control*, but instead, because the individual was still perceived as being in some way limited.<sup>186</sup>

The legislative history provides another reason for rejecting the EEOC Interpretive Guidance: there is authority that indicates that the definition of a disability was a functional one, not one based on hypothetical situations. In fact, it is clear that Congress did not support a definition of disability based on medical diagnoses of future conditions, but rather preferred one based in fact.<sup>187</sup> Thus, the Act specifically requires that an individual's impairment substantially limit a major life activity. By recasting the definition from a functional one to a hypothetical one, the EEOC requires contemplation of a hypothetical world, and disregards the reality of the individual's situation.<sup>188</sup>

Assuming, for argument's sake, that the plain language of the ADA is ambiguous *and* that the legislative history is inconclusive, then congressional intent can be deemed elusive. Thus, the second step of the *Chevron* test requires that the court defer to the agency's interpretation, so long as that

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<sup>185</sup> 42 U.S.C. § 12102 (2) (C) (1990). For purposes of this Article, the second prong is irrelevant. If the individual had a record of a disability, then he would simply proceed under the second prong. *See* 42 U.S.C. § 12102 (2) (B) (1990).

<sup>186</sup> *See* S. REP. NO. 101-116. *But see* *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 860 (1st Cir. 1998) (asserting that "these passages can be easily squared by recognizing that an individual could have a "disability" under both prong one (having an impairment that substantially limits a major life activity) and prong three ("regarded as" having such an impairment) at the same time; one does not preclude the other."). However, this argument fails to address the plain text of the passages, which as discussed, is worded in the disjunctive.

<sup>187</sup> *See, e.g.*, 136 CONG. REC. H9072 (daily ed. May 1, 1990) (statement of Rep. Bartlett) ("The ADA does not cover 900 classes of disability. The ADA includes a *functional rather than a medical definition* of disability. An individual with a disability is one who -has, has a record of, or is regarded as having—a physical or mental impairment that substantially limits a major life activity.") (emphasis added).

<sup>188</sup> *See also* *Harris v. H&W Contracting, Co.*, 102 F.3d 516, 581-82 (11th Cir. 1996).

interpretation is permissible.<sup>189</sup> However, the basic rules of statutory construction render the EEOC's interpretation impermissible for a variety of reasons.

First, as discussed earlier, the plain language of the statute contradicts the EEOC guidelines. Second, under the guidelines, the EEOC has significantly increased the class of plaintiffs who can seek redress under the ADA by allowing plaintiffs to proceed under the first prong definition of "disability" even though they are not, in actuality, substantially limited in a major life activity.<sup>190</sup> These plaintiffs would otherwise have brought their cause of action under the third prong definition of disability. In other words, the plaintiff would have to show that their employer regarded the impairment as substantially limiting.<sup>191</sup> By allowing the courts to contemplate situations that do not exist, the EEOC has rendered the third prong moot,<sup>192</sup> by reading the "substantially limits" wording right out of the statute.<sup>193</sup> Under the EEOC guidelines, these individuals no longer have to prove that their employers regarded their impairment as substantially limiting, even where the employer may not even have known such impairment existed,<sup>194</sup> because they can now proceed under the first prong, even without a substantial limitation.

A simple example would be someone who wears contact lenses to correct their vision to 20/20. An employer who intends to discharge such an employee for poor performance can be discouraged as a result of the EEOC guidelines.

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<sup>189</sup> See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

<sup>190</sup> See also *Harris*, 102 F.3d at 586 (noting that the ADA is the only anti-discrimination statute which has an ambiguous protected class; the other classes all have immutable characteristics). See also *id.* at 594-95 (arguing that "[t]he anti discrimination principle presupposes an animus-based form of disability discrimination" which is lacking in individuals with controlled impairments precisely because their impairments are controlled.).

<sup>191</sup> Plaintiffs who have a cause of action under the second prong definition are not affected by this analysis. The EEOC in its regulations defines the third prong definition, 'is regarded as having such an impairment' as: "(1) [h]aving a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such a limitation; (2) [h]aving a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (3) [h]aving none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment." See 29 C.F.R. § 1630.2(l) (1997) (emphasis added). Section (h) defines 'physical or mental impairment.' See 29 C.F.R. § 1630.2(l) (1997).

<sup>192</sup> It is highly unlikely that an employer will arbitrarily begin treating an employee as having a disability where none exists. Clearly, then, this prong was intended to protect those individuals who have taken mitigating measures to correct impairments that would otherwise be substantially limiting, e.g. a visually-impaired person who, wearing corrective lenses, has 20/20 vision, but who is dismissed because his employer perceives him as being visually-impaired.

<sup>193</sup> See *Schluter v. Industrial Coils, Inc.*, 928 F. Supp. 1437, 1445 (W.D. Wis. 1996).

<sup>194</sup> See Arthur F. Silbergeld & Stacie S. Polashuk, *Chronic Serious Health Impairments and Worker Absences Under Federal Employment Laws*, 14 LABOR LAWYER 1, 20-21 (Summer 1998).

When that individual hears of his impending discharge and claims discrimination under the ADA because of his disability, as interpreted by the EEOC, the employer must now keep the individual on, if only long enough to document why the person is being terminated. Clearly, this creates an unfair burden for an employer trying to exercise his at will employment privileges and whose reason for terminating the employee had nothing to do with a real or perceived disability.<sup>195</sup>

Third, even assuming the EEOC guidelines were permissible and not violative of either the ADA's plain text or the basic canons of statutory construction, the guidelines, as Interpretive Guidance, are not entitled to any special deference under *Chevron*.<sup>196</sup> It is merely an interpretative rule, not a substantive or legislative one.<sup>197</sup> Whereas legislative rules have the force of law,<sup>198</sup> interpretative guidelines are only persuasive.<sup>199</sup> Specifically, the EEOC guidelines in question are not included within the EEOC's regulations, which are binding, and are instead in an appendix to those regulations entitled "ADA Title I Interpretive Guidance."<sup>200</sup> Thus, as the title plainly states, it is

<sup>195</sup> See also *Harris v. H&W Contracting, Co.*, 102 F.3d 516, 582-85 (11th Cir. 1996) (arguing the plaintiff's evidentiary burden in ADA cases is significantly lightened under the EEOC interpretation and that this expansion of the term "disability" effectively entitles plaintiffs to "just cause" protection from termination); *Silbergeld & Polashuk*, *supra* note 194 (arguing that the EEOC's guidelines invite abuse by individuals with completely controlled conditions). Cf. *Bragdon v. Abbott*, 118 S. Ct. 2196, 2216 (1998) (Rehnquist, C.J., concurring) (asserting that voluntary choice can not constitute a "limit" on one's life activities).

<sup>196</sup> But see *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (finding that guidelines, "[w]hile not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. . .").

<sup>197</sup> See *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-04 (1979) (explaining the distinction between interpretive rules and substantive or legislative rules). See also *Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1282 (10th Cir. 1994) (granting no special deference to Department of Labor comment because it is a "purely interpretative rule").

<sup>198</sup> See *Joseph v. United States Civil Serv. Comm'n*, 554 F.2d 1140, 1154 n.26 (D.C. Cir. 1977). For a discussion of interpretive rules and legislative rules, see generally 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* chs. 6-17 (3d ed. 1994).

<sup>199</sup> See *Skidmore v. Swift*, 323 U.S. 124, 140 (1944). See also *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87 (1995) (holding that because interpretive rules are not subject to the notice and comment procedure, they are not accorded the weight that regulations are given); *Batterton v. Francis*, 432 U.S. 416, 425 (1977) ("[A] court is not required to give effect to an interpretive regulation. Varying degrees of deference are accorded to administrative interpretations . . ."); *Washington v. HCA Health Serv. of Texas, Inc.*, 152 F.3d 464, 469-70 (5th Cir. 1998) ("[B]ecause the EEOC's Interpretive Guidelines are not only *not* promulgated pursuant to any delegated authority to define statutory terms or the like but are also *not* subject to the notice and comment procedure like regulations are, they are *not* entitled to the high degree of deference that is accorded to regulations under the *Chevron* doctrine.") (citations omitted) (emphasis added).

<sup>200</sup> 29 C.F.R. app. § 1630 (1996).

clearly interpretive.<sup>201</sup> As a result, while the EEOC guidelines may be entitled to some consideration in the courts' analyses, these guidelines do not have the force of law and courts are not required to, and for the reasons stated herein, should not defer to them.

## VII. CONCLUSION

Although the Tenth Circuit's analysis for its opposition to the adoption of the EEOC guidelines presents powerful arguments, the Supreme Court will not likely be convinced. Assuming it applies the *Chevron* test, the Court will likely find that Congress' intent is clear: to protect those individuals with physical impairments that substantially limit a major life activity without regard to mitigating measures. Additionally, the Court will likely defer to the EEOC's interpretation for at least two reasons: (1) because the interpretation set forth by the ADA is a reasonable one, given the purpose and legislative history of the ADA under the second step of the *Chevron* test; and 2) it is likely to agree with the majority of the courts that Congress intended to protect *all* disabled individuals, regardless of mitigating measures.

Moreover, in *Bragdon v. Abbott*,<sup>202</sup> a heavily fragmented Court recently interpreted the ADA as extending to those individuals with asymptomatic HIV infections.<sup>203</sup> The conclusion that the ADA is intended to protect those who may *in the future* have a debilitating condition due to asymptomatic HIV infection may signal the Court's inclination to encompass within the scope of the ADA all those individuals who in the future may have an impairment that substantially limits a major life activity.<sup>204</sup> This is a far-reaching expansion of the class of plaintiffs who can seek redress under the ADA, and likely is a broader scope than Congress originally had intended.

Presently, the United States Courts of Appeal remain divided on the issue. The circuit courts in favor of adopting the EEOC guidelines are: the First, Third, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh; the Fourth Circuit is undecided; the Tenth Circuit is against adopting the EEOC guidelines; and,

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<sup>201</sup> See, e.g., *Gilday v. Mecosta County*, 124 F.3d 760, 763 (6th Cir. 1997) (finding that EEOC's no mitigating measure guideline constitutes an interpretive, not legislative, rule, so the reviewing court must conduct an independent evaluation of the guideline).

<sup>202</sup> 118 S. Ct. 2196 (1998).

<sup>203</sup> *Id.* at 2204-05.

<sup>204</sup> See *id.* at 2214, 2216 (Rehnquist, C.J. concurring).

the District of Columbia and Second<sup>205</sup> Circuits have not yet precisely addressed the issue.

To some degree, the federal courts of appeal seem to agree that the EEOC guidelines on mitigating measures in the appendix to the regulations do not constitute binding law, but are entitled to some deference to the extent they do not conflict with the statute itself.<sup>206</sup> Nevertheless, it is interesting to note that those in favor of adopting the EEOC guidelines failed to address what may very well be the strongest argument made by those opposing the adoption of the guidelines.

The opposition argues that the EEOC's interpretation of the ADA conflicts with the wording of the statute. Specifically, the conclusion the opposition finds problematic is that an individual with the benefit of medication who is not substantially limited in any major life activity is still considered disabled.<sup>207</sup> In effect, the opposition argues, considering an impairment in this fashion would negate the ADA's statutory requirement that an individual be substantially limited in a major life activity.<sup>208</sup> It is highly questionable as to whether this was Congress' intent when it included this requirement in the statute. Yet none of the decisions reviewed addressed this argument with any merit, and conveniently ignored the barrier raised by the Senate Labor and Human Resources Committee Report.<sup>209</sup> Therefore, until the Supreme Court addresses the issue, it seems each court will continue to interpret the troublesome act on its own. No doubt Congress will be ill at ease with a judicial interpretation that entirely eliminates the explicit language which requires a substantial limitation in a major life activity in order for an individual to be covered under the ADA. And rightly so.

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<sup>205</sup> In *Bartlett v. New York State Board of Law Examiners*, 156 F.3d 321, 329 (2d Cir. 1998), the court noted that a learning disabled plaintiff's "[h]istory of self-accommodations, while allowing her to achieve roughly average reading skills (on some measures) when compared to the general population, 'do not take [her] outside of the protective provisions of the ADA.'" (citation omitted). This circuit has not yet precisely addressed the issue of whether mitigating measures should be considered, although given this wording, it appears they are inclined to disregard them, implicitly adopting the majority position.

<sup>206</sup> See, e.g., *Gilday v. Mecosta County*, 124 F.3d 760, 766 (6th Cir. 1997) (6th Cir. Sept. 2, 1997) (Kennedy, J., dissenting).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> S. REP. NO. 101-116, at 24 (1989) (emphasis added). See also discussion *infra* pp. 22-24 and accompanying notes 183-88.