Medicated Mental Impairments Under the ADA: Diagnosing the Problem, Prescribing the Solution

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INTRODUCTION

In any given year, more than one in five American adults has a diagnosable mental disorder.[1] Not surprisingly with such a high rate of mental disorders, employers are having difficulties determining how to treat employees who claim to have a mental disability under Title I of the Americans with Disabilities Act ("ADA").[2] Employers may be apprehensive of employees with mental impairments. Sometimes employers are afraid of explosive conduct, but more often employers are concerned that normal communication will be ineffective.[3] Employers may also perceive that accommodating mental disabilities will cause stress to other employees or be incompatible with the demands of a busy workplace.[4]

The ADA provides protection to employees with physical or mental disabilities,[5] but, the definition of a disability is far from clear. In 1996 alone, the Equal Employment Opportunities Commission ("EEOC") received around 18,000 disability discrimination charges—around 23% of its total intake of 78,000 charges.[6] In the last four years, claims involving emotional or mental impairments constituted about 12.7% of all employment discrimination charges filed with the EEOC which, under the authority of the ADA, has issued regulations and is responsible for the enforcement of Title I of the ADA.[7] The large number of mental disability claims indicates that the appropriate treatment of employees with mental impairments is important, but unsettled.

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1. *See* U.S. CONGRESS, OFFICE OF TECH. ASSESSMENT, PSYCHIATRIC DISABILITIES, EMPLOYMENT, AND THE AMERICANS WITH DISABILITIES ACT 57 (1994) (reporting findings from the National Institute of Mental Health's Epidemiologic Catchment Area Program) [hereinafter OFFICE OF TECH. ASSESSMENT].

2. 42 U.S.C. §§ 12111-12117 (1994).

3. *See* Paul F. Mickey, Jr. & Maryelena Pardo, *Dealing with Mental Disabilities Under the ADA*, 9 LAB. L. 531, 532 (1993).

4. *See id.*

5. *See* 42 U.S.C. § 12102(2) (1994).

6. *See Disabilities Discrimination: EEOC Sets Out Employer Guidance on Psychiatric Disabilities Under ADA*, 35 Gov't Empl. Rel. Rep (Warren, Gorhan & Lamont) 406 (Mar. 31, 1997) [hereinafter *Disabilities Discrimination*].

7. *See id.*; *see also* 42 U.S.C. §§ 12116-12117 (providing the EEOC with powers to issue regulations and enforce Title I of the ADA); 29 C.F.R. §§ 1630-1630.16 (1997) (regulations issued by the EEOC).

In response to the large volume of charges based on psychiatric impairments, the EEOC issued additional guidance on the enforcement of the ADA as it relates to psychiatric or mental impairments on March 25, 1997 ("March 1997 guidance").[8] The EEOC also issued interpretive guidance in conjunction with its regulations implementing Title I.[9]

Both guidances pertain to the employment of individuals with mental disabilities under the ADA. The first EEOC guidance was issued to help qualified individuals understand their rights and to facilitate compliance by covered entities.[10] The EEOC outlined its interpretation of Title I and provided examples to assist both qualified individuals and employers. The March 1997 guidance is designed to facilitate full enforcement of the ADA as it relates to employment of individuals with psychiatric disabilities and to respond to questions by both individuals and employers regarding the relevance of the ADA to persons with psychiatric disabilities.[11] The EEOC answers thirty-six hypothetical questions relating to the application of the ADA to employees with psychiatric disabilities and the employers' responsibilities under the ADA, including the definition of a disability.[12]

One of the main questions raised by the definition of a disability under the ADA is whether the ADA considers an individual with a mental illness as substantially impaired if the employee controls the condition with medication.[13] In response to this question, both EEOC guidances include interpretations of the definition of a disability that are not found in the language of the ADA or the regulations. Specifically, the guidances state that the existence of an impairment and whether an individual is substantially limited by that impairment is to be determined without consideration of the effect of mitigating measures such as medication or assistive devices.[14] Courts are split in their adherence to these portions of the interpretive guidance.[15] Most courts do not dispute that the existence of an impairment is determined without mitigating measures.[16] Rather,

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8. *See EEOC Enforcement Guidance: Psychiatric Disabilities and the Americans with Disabilities Act*, 3 EEOC Compl. Man. (BNA) No. 224, at N:2331 (Mar. 25, 1997) [hereinafter *EEOC Enforcement Guidance*].

9. *See* Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630, app. (1997); 56 Fed. Reg. 35726 (1991).

10. *See* 29 C.F.R. pt. 1630, app. (Introduction). This guidance interprets the regulations as they apply to both physical and mental disabilities.

11. *See EEOC Enforcement Guidance*, *supra* note 8, at N:2331.

12. *See generally id.* This Note will only discuss the first section of this guidance because it focuses on the definition of a disability under the ADA.

13. *See* Stephanie Proctor Miller, *Keeping the Promise: The ADA and Employment Discrimination on the Basis of Psychiatric Disability*, 85 CAL. L. REV. 701, 713 (1997). The definition of disability under the ADA and the significance of substantial impairment is discussed *infra* Part I.B.1.

14. *See EEOC Enforcement Guidance*, *supra* note 8, at N:2333; 29 C.F.R. pt. 1630, app. §§ 1630.2(h), 1630.2(j).

15. *See infra* Part II.

16. *But see* Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 859 (1st Cir. 1998) ("The ambiguous issue is whether the ADA's reference to an 'impairment' . . . means an impairment without treatment or an impairment after treatment.").

the disagreement revolves around the consideration of mitigating measures when determining if the impairment substantially limits a major life activity.[17]

This Note will explore the reasoning behind the split in authority and demonstrate specific problems which may be encountered when determining whether a mental disability exists. Part I will provide background information on the ADA. Part II will review the arguments used by the courts when deciding whether or not to adhere to the interpretive guidance.[18] Arguments for and against adherence to the guidance will be discussed and countered. Finally, Part III will discuss the practical effect of ignoring the corrective effects of medication for mental impairments.

Mental disabilities create problems of proof which are not encountered with physical disabilities. Courts may find themselves guessing how a certain impairment will affect an individual employee without individualized medical evidence. This speculation could result in a misapplication of the ADA. The Note will conclude that the possibilities of misapplication require that medication be taken into account when determining whether someone with a mental impairment is disabled under the ADA.[19]

I. BACKGROUND INFORMATION ON THE AMERICANS WITH DISABILITIES ACT

The discussion below details the reasoning behind the enactment of the ADA and some of the definitions contained in Title I of the ADA. Both the definitions and the general background provide an important framework for the discussions in Parts II and III regarding the consideration of mitigating measures as they relate to mental impairments.

A. General Background

Prior to the enactment of the ADA, the Rehabilitation Act of 1973 protected only federal employees and employees of contractors or grant recipients doing government work from disability discrimination.[20] Congress enacted the ADA to foster the goal of eliminating discrimination against individuals with disabilities

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17. *See infra* Part II. The Supreme Court recently declined to address this issue. *See* Bragdon v. Abbott, 118 S. Ct. 2196, 2206 (1998).

18. Although the focus of this Note is psychiatric or mental disabilities, the bulk of the cases relating to the EEOC guidance involve physical disabilities. The arguments can, however, be applied to psychiatric disabilities. The differences between physical and psychiatric disabilities will be addressed *infra* Part III.

19. This Note is not intended to address the "classical" mental disabilities such as mental retardation, organic brain syndrome, or learning disabilities. People with these severe (or classical) mental disorders will clearly be covered by the definition of a disability under the ADA. *See* OFFICE OF TECH. ASSESSMENT, *supra* note 1, at 5. Individuals with classical mental disorders may even require additional services to fit the definition of "qualified individual with a disability" under the ADA. *See id.* This Note is concerned only with those disorders which are "non-classical" such as depression.

20. *See* 29 U.S.C. §§ 701-797(b) (1994); Terry Carter, *Unhappy to Oblige*, A.B.A. J., July 1997, at 36, 36.

in the private sector.[21] Congress intended the analysis under the ADA to be similar to that of the Rehabilitation Act.[22] Therefore, most of the terminology contained in the ADA tracks the language of the Rehabilitation Act.[23]

By enacting the ADA in 1990, Congress intended to ensure that the federal government played a major role in enforcing clear, strong, and consistent standards regarding the treatment of individuals with disabilities.[24] Congress found that many individuals with disabilities encountered discrimination in major areas of life such as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.[25] Congress determined that, as a group, people with disabilities have an inferior status in society.[26] To equalize the status of people with disabilities, Congress enacted the ADA to insure equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.[27]

Title I of the ADA prohibits employers from discriminating against an individual with a disability because of that individual's disability.[28] The ADA protects an individual if he or she is a qualified individual with a disability.[29] A qualified individual with a disability means "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[30] Plaintiffs must show that (1) they are disabled within the meaning of the ADA, (2) they are able to perform the essential activities of the job and, (3) they were discriminated against in an employment decision due to their disability.[31] Therefore, determining if an individual has a disability is the first step under the ADA.[32]

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21. *See* OFFICE OF TECH. ASSESSMENT, *supra* note 1, at 26; *see also* Miller, *supra* note 13, at 704.

22. *See* 42 U.S.C. § 12201(a) (1994); Wilson v. Pennsylvania State Police Dep't, 964 F. Supp. 898, 901 n.2 (E.D. Pa. 1997); H.R. REP. NO. 101-485, pt. II, at 50 (1990); H.R. REP. NO. 101-485, pt. III, at 27 (1990); S. REP. NO. 101-116, at 21 (1989).

23. *See* H.R. REP. NO. 101-485, pt. III, at 31 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 492; Miller, *supra* note 13, at 708.

24. *See* 42 U.S.C. § 12101(b) (1994).

25. *See id.* § 12101(a)(3).

26. *See id.* § 12101(a)(6).

27. *See id.* § 12101(a)(8).

28. *See id.* § 12112(a).

29. *See id.*

30. *Id.* § 12111(8) (1994).

31. *See* Sutton v. United Air Lines, Inc., 130 F.3d 893, 897 (10th Cir. 1997).

32. After it is determined that the individual has a disability, the employer must also decide if the employee can perform the essential functions of the position. When a claim is filed under the ADA, consideration is given to the employer's determination of what functions are essential. *See* 42 U.S.C. § 12111(8). Further analysis of what constitutes an essential function is beyond the scope of this Note.

B. Definition of a Disability

A disability, with respect to an individual, is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual ["current impairment"]; (B) a record of such impairment ["record of"]; or (C) being regarded as having such an impairment ["regarded as"]."[33] Although this Note focuses on the first prong of the definition of disability, individuals may still qualify as disabled under the second or third prong of the definition.

The EEOC has defined the "record of" prong of the definition of a disability as having a history of, or being misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.[34] The "regarded as" prong has three separate definitions by the EEOC: first, having a "physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;"[35] second, having a "physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment;"[36] and third, having no impairment which substantially limits a major life activity, "but is treated by a covered entity as having a substantially limiting impairment."[37]

To determine if an individual has a disability under the first prong of the definition, two separate inquiries are necessary: (1) Does the individual have an impairment? and (2) does the impairment substantially limit a major life activity?

1. Impairment

The main text of the ADA does not include a definition of impairment. The EEOC, however, provides a definition in its Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act.[38] The definition of a physical impairment includes a list of body systems[39] which the condition must affect to be classified as an impairment. A mental impairment includes "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."[40]

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33. 42 U.S.C. § 12102(2) (1994); 29 C.F.R. § 1630.2(g) (1997).
34. *See* 29 C.F.R. § 1630.2(k).
35. *Id.* § 1630.2(*l*)(1).
36. *Id.* § 1630.2(*l*)(2).
37. *Id.* § 1630.2(*l*)(3).
38. *Id.* § 1630.2(h).
39. The body systems include neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine. *See id.* § 1630.2(h)(a).
40. *Id.* § 1630.2(h)(2). Some conditions are specifically excluded in the text of the ADA. These include homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoaetive substance use disorder resulting from current illegal drug use. *See* 42 U.S.C. §

Emotional or mental illnesses can include, but are not limited to, major depression, bipolar disorder, anxiety disorders, schizophrenia, and personality disorders.[41] According to the March 1997 guidance, the current edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders is relevant in identifying mental disorders.[42]

The use of mitigating measures, such as medication or a prosthesis, does not affect the underlying nature of a disorder.[43] A disorder is an impairment if it affects one of the enumerated body systems, regardless of whether the disorder diminishes with corrective measures.[44] In addition, the definition of an impairment does not include traits or behaviors unless they are shown to be related to a mental or physical impairment.[45] Impairments, however, are not automatically disabilities.[46] As discussed in the next Part, the impairment must also substantially limit a major life activity.

2. Substantially Limits a Major Life Activity

As with impairments, the text of the ADA does not include a definition of either "substantially limits" or "major life activities," but the EEOC has provided definitions for these terms in its regulations. A major life activity is a function such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[47] The March 1997 guidance also includes thinking, concentrating, interacting with others, and sleeping as major life activities which may be restricted by a mental impairment.[48]

The impairment is substantially limiting if the individual is unable to perform or is significantly restricted in the performance of a major life activity as compared to the average person in the general population.[49] A mild limitation is not enough.[50] An impairment does not substantially limit the individual simply

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12211 (1994).

41. *See EEOC Enforcement Guidance*, *supra* note 8, at N:2331.

42. *See id.* The fourth edition is the current edition of the manual. *See generally* AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) [hereinafter DSM-IV]. Some of the disorders contained in DSM-IV are specifically excluded from the definition of a disability under the ADA. *See supra* note 40.

43. *See* Sutton v. United Air Lines, Inc., 130 F.3d 893, 899 (10th Cir. 1997).

44. *See id.*

45. *See EEOC Enforcement Guidance*, *supra* note 8, at N:2332. The EEOC lists stress, irritability, chronic lateness, and poor judgment as traits which are not in themselves mental impairments. *Id.* The EEOC provided the following example in its Technical Assistance Manual: "A person suffering from general 'stress' because of a job or personal life pressures would not be considered to have an impairment. However, if this person is diagnosed by a psychiatrist as having an identifiable stress disorder, s/he would have an impairment that may be a disability." EQUAL EMPLOYMENT OPPORTUNITY COMM'N, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT, at II-3 (1992).

46. *See EEOC Enforcement Guidance*, *supra* note 8, at N:2332.

47. 29 C.F.R. § 1630.2(i) (1997).

48. *See EEOC Enforcement Guidance*, *supra* note 8, at N:2332.

49. *See* 29 C.F.R. § 1630.2(j).

50. *See EEOC Enforcement Guidance*, *supra* note 8, at N:2333.

because it affects a major life activity.[51] The effect must be more than trivial. Factors to consider when determining if an impairment substantially limits a major life activity are (1) "[t]he nature and severity of the impairment," (2) "[t]he duration or expected duration of the impairment," and (3) "[t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment."[52]

Whether an individual has an impairment that substantially limits a major life activity depends on the effects on the life of the particular individual, not on generalizations about or the name of the impairment.[53] The determination of a disability must be made on a case-by-case basis.[54] The March 1997 guidance states that when an individual is taking medication for the impairment, a disability still exists if there is evidence that the impairment would substantially limit a major life activity if left untreated.[55] An individual's use of a mitigating measure does not automatically indicate that the individual has a disability.[56]

II. ARGUMENTS FOR AND AGAINST ADHERENCE TO THE EEOC GUIDANCE

Before discussing the arguments for and against adherence to the EEOC guidance, it is important to look at how much deference courts give to interpretations of administrative agencies. The amount of deference a court gives to the guidance will determine whether or not the court will adhere to the guidance.

The amount of deference which must be given to a regulatory definition is well established.[57] In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court looked at the weight which must be given to administrative regulations.[58] The Court stated that two questions arise when a court reviews an agency's construction of a statute: first, whether Congress addressed the specific issue in question, and second, if Congress did not address the specific issue or if the statute is ambiguous, whether the agency's answer is a permissible construction of the statute.[59] The court must reject an agency's construction if it is contrary to the congressional intent.[60] The court must also, however, give considerable weight to an agency's interpretation of a statute that the agency was

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51. *See* Roth v. Lutheran Gen. Hosp., 57 F.3d 1446, 1454 (7th Cir. 1995).

52. 29 C.F.R. § 1630.2(j)(2).

53. *See EEOC Enforcement Guidance, supra* note 8, at N:2332; EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 45, at II-3.

54. *See* Sutton v. United Air Lines, Inc., 130 F.3d 893, 897 (10th Cir. 1997); Katz v. City Metal Co., 87 F.3d 26, 32 (1st Cir. 1996); *Roth*, 57 F.3d at 1454.

55. *See EEOC Enforcement Guidance, supra* note 8, at N:2333. The contradiction between this statement and other statements in the guidance will be discussed *infra* Part II.

56. *See Definition of Term "Disability,"* 2 EEOC Compl. Man. (BNA) § 902.5, at 902:0037 (Mar. 1995).

57. *See Sutton*, 130 F.3d at 899 n.3.

58. 467 U.S. 837, 842-45 (1984).

59. *See id.* at 842-43.

60. *See id.* at 843 n.9.

entrusted to administer.[61] Legislative regulations are controlling unless they are "arbitrary, capricious, or manifestly contrary to the statute."[62]

Several courts have stated that EEOC guidance is not binding on the court, but is simply a statement of what the agency thinks the statute means.[63] The court should give EEOC guidance some consideration, but the guidance does not carry the force of law and does not require any special deference.[64] Interpretive guidance is not given as much deference as regulations.[65] If the EEOC's interpretation is contrary to the plain language of the ADA, a court does not have to give any deference to the interpretation.[66]

Other courts have given great deference to the EEOC guidance that was issued in conjunction with the regulations, because the guidance was subject to public notice and comment procedures which normally apply to regulations.[67] Due to this conflict in the courts regarding the amount of deference afforded the EEOC guidance, this Note will assume the higher *Chevron* test should apply.[68]

A. Arguments Against Adherence to the EEOC Guidance

Several courts have refused to adhere to the EEOC guidance regarding the consideration of mitigating measures when determining whether an impairment substantially limits the major life activities of an employee. These courts have found that the guidance conflicts with the language of the ADA and that the guidance is not internally consistent.[69] Both these arguments are discussed below. Although most of the arguments relate to the guidance issued in conjunction with the regulations, the same arguments will apply to the March 1997 guidance because it also contains instructions not to consider mitigating measures, such as medication.

1. Actual Conflict with ADA Language

Under the current impairment prong of the definition of a disability, the ADA requires that an impairment substantially limits a major life activity of the employee.[70] The language indicates that the employee must be limited and not just

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61. *See id.* at 844.

62. *Id.*

63. *See, e.g.*, Schluter v. Industrial Coils, Inc., 928 F. Supp. 1437, 1444 (W.D. Wis. 1996); Coghlan v. H.J. Heinz Co., 851 F. Supp. 808, 812 (N.D. Tex. 1994).

64. *See* Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986); Sutton v. United Air Lines, Inc., 130 F.3d 893, 899 n.3 (10th Cir. 1997).

65. *See* Washington v. HCA Health Servs. of Tex., Inc., 152 F.3d 464, 469-70 (5th Cir. 1998); *Sutton*, 130 F.3d at 899 n.3.

66. *See* Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 171 (1989).

67. *See* Wilson v. Pennsylvania Police Dep't, 964 F. Supp. 878, 903 n.4 (E.D. Pa. 1997).

68. One publication supports this assumption, concluding that *Chevron* deference is required "[b]ecause the EEOC has been granted implicit authority to interpret the statute." Recent Cases, 111 HARV. L. REV. 2456, 2459 (1998). A further analysis of the applicable deference is beyond the scope of this Note.

69. *See infra* text accompanying notes 70-91.

70. *See* 42 U.S.C. § 12102(2) (1994).

have the possibility of limitation. The question under the ADA is whether the impairment actually affects the individual, not whether it could hypothetically affect the individual without the use of a corrective measure.[71]

The EEOC's interpretation of the question of substantial limitation directly conflicts with the language of the ADA.[72] According to the EEOC guidance, an employee who does not have a limitation will be considered disabled even though the ADA requires that the employee is substantially limited in a major life activity.[73] In other words, an employee using medication or corrective measures to treat an impairment will be considered disabled in fact; rendering the requirement of a substantial limitation meaningless.[74] Although the term "limitation" may have different interpretations, it should carry some meaning within the statute and not be written out completely by an agency interpretation.[75]

Courts have argued that the EEOC guidance does not write out the substantial limitation requirement.[76] One court argued that the trier of fact still must decide whether the untreated impairment substantially limits any major life activity.[77] Another court argued that "[t]he key question is whether the statutory word 'impairment' refers to treated or untreated impairments."[78] Therefore, "[t]he substantially limits requirement pertains to the impairment . . . regardless of whether that impairment is read to mean the condition in its treated or untreated state."[79] These arguments, although logical on their face, do not account for the ADA's individualized treatment. The ADA begins its definition of a disability with the phrase "with respect to an individual."[80] Therefore, the court should

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71. *See* Sutton v. United Airlines, Inc., 130 F.3d 893, 902 (10th Cir. 1997). One publication has argued that the reasoning in *Sutton* is circular because it acknowledges that without mitigating measures, the impairment would produce an actual effect on the individual's life. *See* Recent Cases, *supra* note 68, at 2460. This criticism is irrelevant, however, because the issue is not whether there would be an effect on the individual's life, but whether there would be a substantial impairment to a major life activity. Even if the individual *may* experience an actual effect without the mitigating measure, it is not always true that there would be an actual effect that impairs a major life activity.

72. *See Sutton*, 130 F.3d at 902; Wilking v. County of Ramsey, 983 F. Supp. 848, 854 (D. Minn. 1997), *aff'd*, No. 97-4313, 1998 WL 476739 (8th Cir. Aug. 17, 1998); Schluter v. Industrial Coils, Inc., 928 F. Supp. 1437, 1445 (W.D. Wis. 1996).

73. *See* Coghlan v. H.J. Heinz Co., 851 F. Supp. 808, 813 (N.D. Tex. 1994).

74. *See* Gilday v. Mecosta County, 124 F.3d 760, 767 (6th Cir. 1997) (Kennedy, J., concurring in part and dissenting in part); Testerman v. Chrysler Corp., No. CIV.A. 95-240 MMS, 1997 WL 820934, at *9 (D. Del. Dec. 30, 1997); *Schluter*, 928 F. Supp. at 1445.

75. *See Coghlan*, 851 F. Supp. at 813.

76. *See* Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 864 (1st Cir. 1998); Harris v. H & W Contracting Co., 102 F.3d 516, 521 (11th Cir. 1996), *reh'g denied*, 109 F.3d 773 (11th Cir. 1997); Sicard v. City of Sioux City, 950 F. Supp. 1420, 1436 (N.D. Iowa 1996).

77. *See Sicard*, 950 F. Supp. at 1436.

78. *Arnold*, 136 F.3d at 864.

79. *Id.*

80. 42 U.S.C. §12102(2) (1994).

analyze each individual separately to determine if the impairment substantially limits that employee's major life activities.[81]

Some courts have argued that there is nothing in the statute addressing whether a substantial limitation is to be considered with or without regard to mitigating measures.[82] Those courts using this argument have deferred to the congressional intent indicated in the legislative history.[83] While it is literally accurate that there is nothing in the language of the ADA addressing mitigating measures, the courts do not explain the direct conflict with the language requiring a substantial limitation. If Congress had intended to provide protection under the ADA for those who are not limited due to mitigating measures, the language of the statute should read "*could* substantially limit."[84]

2. Conflict Within the Guidelines

The EEOC's guidance not only conflicts with the statute, but it is also internally inconsistent.[85] First, the guidance issued in conjunction with the regulations states:

> The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment [that] the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.[86]

If, as the EEOC states, the name or the diagnosis of the impairment does not necessarily determine whether an individual has a disability, courts may be unable to determine whether the effects of that impairment in general substantially limits a major life activity. In addition, if the courts cannot take into account the effects

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81. *See* Gilday v. Mecosta County, 124 F.3d 760, 768 (6th Cir. 1997) (Guy, J., concurring in part and dissenting in part); *cf.* Washington v. HCA Health Servs. of Tex., Inc., 152 F.3d 464, 471 (5th Cir. 1998) (holding that "whether mitigating measures should be taken into account must be determined on a case by case basis").

82. *See Arnold*, 136 F.3d at 858; Harris v. H & W Contracting Co., 102 F.3d 516, 521 (11th Cir. 1996), *reh'g denied*, 109 F.3d 773 (11th Cir. 1997); Wilson v. Pennsylvania State Police Dep't, 964 F. Supp. 898, 904 (E.D. Pa. 1997).

83. *See Arnold*, 136 F.3d at 859-60; *Harris*, 102 F.3d at 521. The legislative history is discussed *infra* Part II.B.1.

84. *See* Ellison v. Software Spectrum, Inc., 85 F.3d 187, 191-92 n.3 (5th Cir. 1996) (noting in dicta that "had Congress intended that substantial limitation be determined without regard to mitigating measures, it would have provided for coverage under § 12102(2)(A) for impairments that have the potential to substantially limit a major life activity").

85. *See* Sutton v. United Air Lines, Inc., 130 F.3d 893, 902 (10th Cir. 1997).

86. 29 C.F.R. pt. 1630, app. § 1630(2)(j) (1997). The same type of language can be found in the March 1997 guidance. "The determination that a particular individual has a substantially limiting impairment should be based on information about how the impairment affects that individual and not on generalizations about the condition." *EEOC Enforcement Guidance*, *supra* note 8, at N:2332.

of mitigating measures, the courts are unable to determine the effects on the particular individual.

A court will not be able to determine, for example, how an employee with a mental impairment would be affected if the employee were not taking medication. Unless the employee was limited by the condition before starting medication, no individualized evidence will be available and the court would have no choice but to make its determination based on the name or the diagnosis of the impairment.[87] The court would then either be guessing as to how the impairment might affect the individual or considering "how a hypothetical person who did not take medication would compare."[88] This would conflict with the guidance that the name or diagnosis does not matter.

Second, the March 1997 guidance also indicates that "an impairment is substantially limiting if it lasts for more than several months and significantly restricts the performance of one or more major life activities during that time."[89] If the limitations caused by the impairment are analyzed without regard to medication, it will be difficult to determine whether some impairments would have lasted for more than several months or if they would have restricted a major life activity during that time. Of course, this is not true for impairments which have lasted for a period of time before medication began. However, if an employee has been diagnosed with depression, for example, and medication began within a month of any serious symptoms, it will be difficult for courts to determine how long the actual impairment lasted and what, if any, major life activities would have been affected during that time. Again, the courts will have to resort to the guessing game to determine how long this type of impairment would normally last and what types of restrictions it usually causes. The effect on the particular individual will once again be ignored.

Finally, the guidance issued in conjunction with the regulations contains an example which conflicts with the guidance to disregard the effects of mitigating measures. In a section involving the "regarded as" prong, the following example is used.

> For example, suppose an employee has controlled high blood pressure that is not substantially limiting. If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled.[90]

It is not clear that the EEOC was referring to medicated high blood pressure in its example or high blood pressure controlled by other means. If the example does refer to medicated high blood pressure, under the EEOC guidance that mitigating measures should not be considered, the employee should not have to resort to the

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87. In this case, it may be appropriate to use the "record of" prong of the definition of a disability.

88. Gilday v. Mecosta County, 124 F.3d 760, 767 (6th Cir. 1997) (Kennedy, J., concurring in part and dissenting in part).

89. *EEOC Enforcement Guidance*, *supra* note 8, at N:2333.

90. 29 C.F.R. pt. 1630, app. § 1630.2(*l*) (1998).

"regarded as" definition in order to find protection under the ADA.[91] Under the EEOC guidance, the court should look at this employee in an unmitigated state to determine if the employee is disabled. Even if the employee is controlling his high blood pressure by other means, the employee still has high blood pressure which may substantially limit a major life activity without mitigation.

The existence of the above example in the "regarded as" section of the guidance calls into question the EEOC's interpretation under the first prong of the definition of a disability. The employee in the example would not need to resort to the "regarded as" prong. Using the EEOC's interpretation, the employee would be actually disabled.

The EEOC guidance both conflicts with the language of the ADA and is internally inconsistent. Assuming the *Chevron* test applies, the guidance should not receive deference from the courts because it conflicts with the language of the ADA and is not a permissible construction of the statute. Notwithstanding this argument, however, several courts have given deference to the EEOC guidance as discussed in Part B which follows.

B. Arguments for Adherence to the EEOC Guidance

Courts which have adhered to the guidance regarding the consideration of mitigating measures have done so based on the legislative history of the ADA or the purpose underlying the ADA.

1. Legislative History of ADA

Various courts have argued that the EEOC's interpretation is consistent with the legislative history of the ADA.[92] The relevant House and Senate reports state that "whether a person has a disability should be assessed without regard to the availability of mitigating measures such as reasonable accommodations or auxiliary aids."[93] The language in the EEOC guidance was patterned on this language.[94] Congress did not intend to eliminate the finding of a disability because an individual uses mitigating measures.[95]

Although the Senate and House reports indicate that a disability should be assessed without regard to mitigating measures, there is an inconsistency within the legislative history, particularly the Senate report. While discussing the

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91. As one court stated, "if this were not so, why would a person suffering from high blood [pressure even] have to look to the 'regarded as' section of the ADA to prove the existence of a disability?" Murphy v. United Parcel Serv., Inc., 946 F. Supp. 872, 880 (D. Kan. 1996), *aff'd*, 141 F.3d 1185 (10th Cir. 1998).

92. *See, e.g.*, Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 859-60 (1st Cir. 1998); Harris v. H & W Contracting Co., 102 F.3d 516, 521 (11th Cir. 1996), *reh'g denied*, 109 F.3d 773 (11th Cir. 1997); Wilson v. Pennsylvania State Police Dep't, 964 F. Supp. 898, 905 (E.D. Pa. 1997).

93. S. REP. NO. 101-116, at 23 (1989); H.R. REP. NO. 101-485, pt. 2, at 52 (1990); *see also* H.R. REP. NO. 101-485, pt. 3, at 28.

94. *See Wilson*, 964 F. Supp. at 905.

95. *See id.*

"regarded as" prong of the definition of a disability, the Senate report indicates that a "goal of the third prong is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical condition."[96] As with the language contained in the EEOC guidance, it should be questioned why a person with a controlled medical condition should need to resort to the "regarded as" prong of the definition of a disability if the employee would fit under the first prong of the definition. It is possible that the Senate intended for an impairment to be determined without regard to mitigating measures, but required that the impairment actually substantially limited a major life activity.

Even if both houses of Congress intended the substantial limitation requirement to be evaluated without regard to mitigating measures, not all courts will consider the legislative history. For example, the Fifth Circuit has held that legislative history and congressional intent are inapplicable if the statutory language at issue is not ambiguous.[97] In contrast, the Third Circuit requires consideration of legislative history and intent where it justifies that the plain meaning of the statute be altered.[98]

2. Purpose of the ADA

The second argument used by courts when adhering to the EEOC guidance is the purpose of the ADA. Title I of the ADA protects persons with disabilities from being excluded from job opportunities unless they are actually unable to do the job.[99] The ADA is meant to rectify the inferior status of the disabled and provide them with opportunities to attain the same level of performance as non-disabled workers.[100] Title I combats both employment discrimination itself and the myths, fears, and stereotypes upon which it is based.[101]

Courts have stated that the EEOC guidance is consistent with the purpose of the ADA in recognizing that a person who is taking medication for an impairment may still be subject to discrimination and physical barriers to employment.[102] Courts frequently use the example of an individual who has lost a limb and uses a prosthetic device. The individual is no less disabled and no less subject to employment barriers because he or she has used the prosthesis.[103] While it may be the case that use of mitigating measures by employees with lost limbs does not eliminate the employment barriers, employees with medicated mental impairments are in a different situation.

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96. S. REP. NO. 101-116, at 24.

97. *See* Guilzon v. Commissioner, 985 F.2d 819, 823-24 & n.11 (5th Cir. 1993); Coghlan v. H.J. Heinz Co., 851 F. Supp. 808, 812 (N.D. Tex. 1994) (finding the word "limit" unambiguous). *But see* Washington v. HCA Health Servs. of Tex., Inc., 152 F.3d 464, 467 (5th Cir. 1998) (stating that "the text of the ADA is not unambiguously clear").

98. *See Wilson*, 964 F. Supp. at 905.

99. *See* H.R. REP. NO. 101-485, pt. 3, at 31 (1990).

100. *See id.* pt. 2, at 66.

101. *See EEOC Enforcement Guidance*, *supra* note 8, at N:2331.

102. *See* Hendler v. Intelecom USA, Inc., 963 F. Supp. 200, 206 (E.D.N.Y. 1997).

103. *See id.*

Mental impairments are not usually as obvious as physical impairments. If a mental impairment can be treated with medication and be controlled to such an extent that there is no substantial limitation on a major life activity, there is no reason to believe that the employment barriers still exist. An employer would have no reason to know or care that the employee has a mental impairment unless the impairment manifests itself at work. If the employer can tell that the employee has an impairment, the employee most likely is substantially limited even with the use of medication. The employer also may regard the employee as disabled. In either case the employee would still be protected by the ADA.

As stated in Part I, there are three prongs to the definition of a disability under the ADA. If an employee is able to control a mental impairment with medication and is still subject to employment discrimination, the employee should be able to show a disability under the "record of" or "regarded as" prongs. This interpretation is consistent with the purpose of the ADA because the employee would still be protected from the myths, fears, and stereotypes upon which the discrimination is based. If an employer discriminated against an employee due to a controlled mental condition, the discrimination is not based on an actual disability, but a perceived disability.

III. PRACTICAL EFFECTS OF THE MENTAL DISABILITY GUESSING GAME

Health professionals do not analyze mental impairments in the same manner as physical impairments. The diagnosis or symptoms are insufficient to determine the severity of a disability.[104] Mental health professionals themselves are unable to agree on whether certain mental conditions are properly characterized as mental illnesses or personality flaws.[105]

The tool suggested by the EEOC and most widely used by mental health professionals to diagnose mental impairments is the Diagnostic and Statistical Manual of Mental Disorders, now in its fourth edition ("DSM-IV").[106] The American Psychiatric Association produced the DSM-IV to make diagnosis within the profession more uniform.[107] A review of DSM-IV, however, validates the reality that diagnosing mental impairments contains many uncertain aspects.[108] For example, the DSM-IV contains a "cautionary statement" acknowledging that the classifications contained in the manual may not meet legal criteria for what

104. *See* OFFICE OF TECH. ASSESSMENT, *supra* note 1, at 6.

105. *See* Karin Mika & Denise Wimbiscus, *Responsibilities of Employers Toward Mentally Disabled Persons Under the Americans with Disabilities Act*, 11 J.L. & HEALTH 173, 175 (1997). For example, in *Kotlowski v. Eastman Kodak Co.*, 922 F. Supp. 790 (W.D.N.Y. 1996), although the plaintiff was diagnosed by two doctors as suffering from depression, another doctor found that her "depression" was just a "personality style" and that the plaintiff was simply wanting to be taken care of by others. *Id.* at 797.

106. *See* Mika & Wimbiscus, *supra* note 105, at 175; *see also EEOC Enforcement Guidance*, *supra* note 8, at N:2331.

107. *See* Mika & Wimbiscus, *supra* note 105, at 175.

108. *See id.*

constitutes a mental impairment.[109] In addition, the DSM-IV states that "there is no assumption that each category of mental disorder is a completely discrete entity with absolute boundaries dividing it from other mental disorders or from no mental disorder."[110]

The practical effects of adhering to the EEOC guidance when determining whether a person has a mental disability can be demonstrated by reviewing an approach used in a case which adhered to the guidance as it relates to a physical disability. The approach will then be used to determine the outcome of a hypothetical case involving mental disabilities.

A. Recent Case Adhering to the EEOC Guidance as It Relates to Physical Disabilities

In 1996, the Eleventh Circuit decided the case of *Harris v. H & W Contracting Co.*[111] A doctor diagnosed the plaintiff with Graves' disease, an endocrine disorder affecting the thyroid gland, approximately sixteen years before joining the defendant's company. Since diagnosis, Harris' thyroid problems have not seriously interfered with her work or other life activities because she has taken medication which controlled the condition.[112] The only exception was a panic attack caused by an overdose in her medication. While Harris was in the hospital after her panic attack, the defendant hired another individual to take Harris' place as controller.[113]

The first question addressed by the court was whether Harris had a disability under the "current impairment" definition.[114] The court quickly determined that Graves' disease is an impairment and turned to the question of whether Harris was substantially impaired. The company contended that Harris was not substantially limited in any of her major life activities because Harris had not experienced any effects from her thyroid problems since diagnosis. The court rejected the company's argument, citing the EEOC guidance stating that mitigating measures should not be considered.[115] The court gave the EEOC guidance considerable weight, using both the arguments that there is no direct conflict with the language of the ADA and that the EEOC guidance is consistent with the legislative history.[116]

In reviewing the substantial limitations, the court took judicial notice that Graves' disease is capable of substantially limiting major life activities when left untreated. The court looked to the description of the potential effects of Graves'

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109. DSM-IV, *supra* note 42, at xxvii.
110. *Id.* at xxii.
111. 102 F.3d 516 (11th Cir. 1996).
112. *See id.* at 517.
113. *See id.* at 518.
114. *See id.* at 519.
115. *See id.* at 520.
116. *See id.* at 521.

disease in a medical manual.[117] In addition, the court considered the plaintiff's deposition testimony in which she stated that if she did not take her medication, she would go into a coma and die. With this evidence, the court was satisfied that in the absence of medication the plaintiff's disease would substantially limit her major life activities.[118]

Notice that the court did not have individualized evidence that this particular individual would be substantially limited without medication. The court relied solely upon a medical manual and the plaintiff's speculative testimony to determine that she could be substantially limited by her disease. A reasonable argument can be made for the use of this evidence by the court because Graves' disease can be medically verified and presumably causes relatively consistent effects. The use of this type of judicial notice, however, can become more difficult when evaluating a mental impairment. The next section will review the potential results of the *Harris* approach in a mental impairment case.

B. Potential Results of Case Involving Mental Impairment If Plaintiff Was Taking Medication

If the courts adopt the approach taken by the court in *Harris*, plaintiffs will potentially receive protection from the ADA when they would not be disabled if they were not taking medication. Even though the EEOC claims that taking medication does not automatically mean that the plaintiff is disabled,[119] if the courts only look to the potential effects of the diagnosed condition without regard to the positive effects of the medication, a plaintiff taking medication will be found to be disabled in fact.

As an illustration, assume a plaintiff has been diagnosed with depression. The DSM-IV includes several different depressive disorders, but we will assume that the diagnosis is dysthymic disorder[120] and that it can be medicated to the extent that there are no obvious symptoms.[121] The DSM-IV characterizes dysthymic disorder by a chronic depressed mood that occurs on more days than not for at

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117. *See id.* at 522. The court indicated that judicial notice is appropriate because there is no reasonable dispute about the fact that Graves' disease is capable of being substantially limiting. Graves' disease is "'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" *Id.* (quoting FED. R. EVID. 201(b)(2)). Common signs of Graves' disease include goiter; tachycardia; widened pulse pressure; warm, fine moist skin; tremor; eye signs; and atrial fibrillation. Common symptoms are nervousness and increased activity, increased sweating, hypersensitivity to heat, palpitations, fatigue, increased appetite, weight loss, tachyeardia, insomnia, weakness, and frequent bowel movements. *See id.* (citing THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 1038-39 (Robert Berkow et al. eds., 15th ed. 1987)).

118. *See id.* at 523.

119. *See Definition of Term "Disability," supra* note 56, at 902:0037.

120. *See* DSM-IV, *supra* note 42, at 345.

121. Note that if there are still obvious symptoms, those symptoms may still substantially limit a major life activity, even with medication. For example, in *Coghlan v. H.J. Heinz Co.*, 851 F. Supp. 808 (N.D. Tex. 1994), the court held that there was still an issue of material fact regarding whether the plaintiff was substantially limited even after considering the corrective effects of the medication. *Id.* at 814.

least two years. "Individuals with dysthymic disorder describe their mood as sad or 'down in the dumps.'. . . [A]t least two of the following additional symptoms are present: poor appetite or overeating, insomnia or hypersomnia, low energy or fatigue, low self-esteem, poor concentration or difficulty making decisions, and feelings of hopelessness."[122] Note that according to this description, an individual could be, but does not necessarily have to be, substantially limited in a major life activity. In addition, note that the symptoms are relatively subjective.

The subjectivity of mental impairment symptoms is one reason that mental impairments are difficult to analyze. Plaintiffs have numerous "opportunities for gamesmanship" which do not exist in objectively verifiable physical disabilities.[123] Mental health professionals can only take their patients' word for the symptoms they are experiencing when making a diagnosis of a mental impairment. Employers are in an even more difficult position because not only do they have to take the word of the employee, but they do not have the training required to spot someone who is playing games.

Back to the hypothetical plaintiff, assume that the individual began medication after having symptoms for two years but that the individual was never substantially limited. The plaintiff has been taking medication for five years and is able to perform all major life activities without limitations. Now the individual is in court alleging that the employer discriminated against him or her because of the current disability.[124]

When analyzing the existence of a disability, the court, according to the EEOC guidance, will have to disregard the positive effects of the medication. Therefore, the question before the court is whether the plaintiff would have a substantial impairment without the medication. Using the *Harris* approach, a court would look at the symptoms associated with dysthymic disorder and determine that the plaintiff could experience any one of those symptoms to the extent that the individual would be substantially limited in a major life activity. The plaintiff would then be disabled under the ADA.

In contrast, the same hypothetical plaintiff without medication would not be disabled under the ADA unless the symptoms were enough to actually substantially limit a major life activity or the employer regarded the employee as being disabled. In one case, the *potential* effects of the mental impairment are used to determine that the plaintiff is disabled and in the other case the *actual* effects are used to determine that the plaintiff does not have a disability. Therefore, the use of medication has improved the plaintiff's chance of being protected by the ADA.

Although this example is only hypothetical, the results are likely if a court follows the EEOC guidance and ignores the positive effects of medication. This result contradicts the case-by-case, individualized approach of the ADA and the purpose of protecting individuals from barriers caused by their impairment. The

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122. DSM-IV, *supra* note 42, at 345.

123. Mickey & Pardo, *supra* note 3, at 532.

124. Note that the hypothetical plaintiff could also allege a "record of" disability or that he or she is "regarded as" disabled. This hypothetical assumes, however, that the plaintiff is only claiming disability under the "current impairment" prong.

ADA would cover individuals taking medication who are not experiencing employment barriers. An employer would need to learn the potential effects of its employees' impairments in order to determine if it needs to comply with the ADA.

If the effects of the medication are taken into account, employers would not need to become versed in psychiatric disorders. Instead, the ADA would only cover individuals with psychiatric disorders which are fully controlled by medication if the individual meets the "record of" or "regarded as" prong of the definition of a disability. An employer, therefore, still cannot discriminate against an employee based on a psychiatric disorder.

CONCLUSION

In order to equalize the results between a plaintiff who takes medication and a plaintiff who does not take medication, courts should not adhere to the EEOC guidance when determining if a mental impairment substantially limits a major life activity. Courts should consider the positive effects of medication when determining if a mental disability exists under the "current impairment" prong of the definition.[125] This approach will not necessarily exclude those plaintiffs who are taking medication from protection under the ADA. Any plaintiff who has a record of a mental impairment which substantially limits a major life activity or who can prove that the employer regarded the employee as disabled may still have a valid ADA claim.

This approach is consistent with the ADA's approach for determining if a disability exists. If the plaintiff takes medication but still experiences effects which substantially limit a major life activity, that plaintiff will meet the disability requirement of the ADA. If the plaintiff is taking medication but is not experiencing substantially limiting effects, that plaintiff may still meet either the "record of" or "regarded as" prong of the definition of a disability. The purpose of the ADA does not require a special analysis if the individual is taking medication. Equal opportunity should not equate to a "special opportunity" enabling those individuals who are taking medication to play a guessing game with the courts.

125. A recent Fifth Circuit decision, although adhering to the EEOC guidance with regard to Adult Stills Disease—a physical impairment—suggested that only "serious impairments" should be "considered in their unmitigated state." Washington v. HCA Health Servs. of Tex., Inc., 152 F.3d 464, 470 (5th Cir. 1998). One requirement for a "serious impairment" is that it is "serious in common parlance." *Id.* Although the "classical" mental disorders would clearly fall under this definition, *see supra* note 19, many mental impairments would not fall into this category and should, therefore, be considered in their mitigated state.