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Notes

Insulin: Can’t Be Disabled with It—Can’t Live Without It

Creative Solutions for Employees with Diabetes Claiming Disability Discrimination in a Post-Sutton World

by

AMY M. KIMMEL*

Introduction

The Americans with Disabilities Act ("ADA") represents "a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life."1 Individuals with disabilities now have a civil rights statute that celebrates "the 'new' disabled man/woman— independent, free, loud and proud ... recognizing] that people with disabilities can excel in all kinds of functions and roles."2 But the recent Supreme Court cases known collectively as the Sutton trilogy3 may have dramatically

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altered this effect for the over fifteen million Americans with diabetes.  

People with diabetes have traditionally been covered under the ADA. Diabetes is an example of an impairment in Congressional reports on the ADA and it is also used as an example in the Equal Employment Opportunity Commission ("EEOC") regulations. While Sutton does not explicitly state that individuals with diabetes are not disabled, those individuals may have more difficulty proving a disability because of Sutton’s restrictive interpretation of disability. Courts must now examine individuals with diabetes, and all individuals, in their treated, or "mitigated" state, to decide if they are disabled. Many people can substantially control their diabetes with insulin. But this mitigating (and life-saving) measure may, under Sutton, cost them the protections of the ADA.

This Note focuses on Americans with diabetes and their status as individuals with disabilities under the ADA post Sutton. Part I details the Sutton Court’s interpretation of the ADA’s employment provisions and the EEOC guidelines. Part II explains diabetes: the disease itself, its side-effects, and complications with and without the mitigating measure of insulin. Part III highlights problems that Sutton raises or did not address. Part IV offers strategies and solutions for individuals with diabetes who are attempting to bring anti-discrimination cases under the ADA.

I. Current State of the Law—ADA, Sutton, and Beyond

A. Americans with Disabilities Act

The ADA promised a new future to Americans with disabilities, "a future of inclusion and integration, and the end of exclusion and

8. See Sutton, 527 U.S. at 488-89.
9. In the interests of time and space this note will focus on employment discrimination, even though the ADA covers much more ground than that.
segregation." It provided a new forum to deal with discrimination, stereotypes, and exclusion of individuals with disabilities. The ADA prohibits covered employers from discriminating against a "qualified individual with a disability because of the disability . . . 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." To bring a claim under the ADA, a petitioner must have any one or more of these three characteristics:

(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.

The inquiry does not end there, however; the petitioner must still be a "qualified individual." This means that the individual must be able to perform the essential functions of a job with or without reasonable accommodations. Accessibility of existing facilities, job restructuring, and modified work schedules are examples of reasonable accommodations.

B. EEOC Regulations Implementing the Equal Employment Provisions of the ADA

The EEOC regulations provide, define, and clarify the employment provisions of the ADA. These regulations are only persuasive; they are not binding on the courts. The EEOC regulations define a physical impairment as "[a]ny physiological disorder, or condition . . . affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory, . . . cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine." The regulations are explicit that an impairment should be viewed "without

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16. Id. § 12111(9).
19. 29 C.F.R. § 1630.2(h)(1).
regard to mitigating measures such as medicines or assistive or prosthetic devices. For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by medicine.\textsuperscript{20}

The House Reports on the ADA also find that the "impairment should be assessed without considering whether mitigating measures \ldots would result in a less-than-substantial limitation."\textsuperscript{21} One justification for assessing disability without considering mitigating measures is the idea that these measures do not "cure," or get rid of, the disability. A prosthetic limb does not cure the absence of a leg, nor does insulin rid one's body of diabetes. Rather, these measures make the person's daily life easier.

Under the EEOC, major life activities are defined as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."\textsuperscript{22} The language of the guidelines suggests that the list is not exclusive and courts, including the Supreme Court, have agreed.\textsuperscript{23}

For a life activity to be substantially limited, the individual must be:

Unable to perform a major life activity that the average person in the general population can perform; or

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 the same major life activity.\textsuperscript{24}

The EEOC details some factors that may be used in deciding a substantial limitation, such as the nature of the impairment and its severity, duration, and any permanent or long-term impacts.\textsuperscript{25} The EEOC specifically cites diabetes as an impairment that substantially limits individuals: "a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication."\textsuperscript{26}

\begin{itemize}
  \item \textsuperscript{20} 29 C.F.R. app. § 1630.2(h) (2000).
  \item \textsuperscript{22} 29 C.F.R. § 1630.2(i).
  \item \textsuperscript{23} See, e.g., Bragdon v. Abbot, 524 U.S. 624, 638 (1998) (finding that the EEOC list is not exhaustive and that reproduction is a major life activity because of its significance to life).
  \item \textsuperscript{24} 29 C.F.R. § 1630.2(j)(1).
  \item \textsuperscript{25} Id. § 1630.2(j)(2).
  \item \textsuperscript{26} 29 C.F.R. app. § 1630.2(j) (2000).
\end{itemize}
With respect to the major life activity of working, the EEOC further narrows the definition. An individual is not substantially limited in working if her disability only precludes her from performing a single, specific job. Instead, she must be restricted from performing “either a class of jobs or a broad range of jobs in various classes” compared to someone with comparable skills, training and ability.

The EEOC regulations also provide clarification for the “record of” and “regarded as” prongs of the disability definition. There is a record of a disability when an employer relies upon a record that indicates that the employee has or had a substantially limiting impairment. These types of records include educational, medical, or employment records. This disability definition was established to ensure that employers do not discriminate against qualified individuals who have recovered from their disability.

The third prong of the disability definition covers situations where an individual is “regarded as” being disabled. This definition is satisfied when the employer believes the individual has a substantially limiting impairment. It does not matter if the employee has an impairment or not, or if the impairment is actually limiting in any way; only the employer’s perception is relevant. This prong was added to combat the many stereotypes that are associated with disabilities: “[s]ociety’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from the actual impairment.”

C. Sutton and Beyond ...

The Sutton trilogy is composed of three cases clarifying the Supreme Court’s interpretation of the meaning of disability under the ADA. In finding that an individual’s disability status should be based on her condition with mitigating measures, the Court resolved a
major circuit split. While most circuits had been following the EEOC regulations, the Tenth Circuit, where Sutton originated, had not.

In Sutton v. United Air Lines Inc., twin sisters with severe myopia sued United Air Lines for failing to hire them as commercial airline pilots. United Air Lines had a vision requirement of 20/100 or better. The petitioners claimed that they were disabled under the ADA because their myopia was a substantially limiting impairment. The Supreme Court disagreed, holding that "because petitioners allege that with corrective measures their vision 'is 20/20 or better' ... they are not actually disabled ... if the 'disability' determination is made with reference to these measures." Part of the Court's justification in Sutton is based on a plain language interpretation of the ADA; the Court does not defer to the EEOC guidelines. The ADA requires that the disability determination must be an individualized inquiry "not necessarily based on the name or diagnosis of the impairment ... but rather the effect ... on the life of the individual." According to Sutton, this individualized inquiry demands that individuals be judged in their mitigated states. To look at an individual in an unmitigated state requires speculation about her condition and would lead to assumptions about how the impairment generally affects people. The Court was troubled that this "unmitigated" view requires that all people with diabetes would then be considered disabled, even though a given individual may not actually be impaired because insulin is helping control blood sugar levels.

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40. Id.
41. Id. at 476.
42. Id. at 481.
43. See id. at 482. For the Court's full discussion on the applicability of the EEOC regulations, see id. at 475-85.
44. 29 C.F.R. app. § 1630.2(j) (2000).
45. See Sutton, 527 U.S. at 488.
46. Id. at 483.
47. Id.
The Sutton sisters also alleged that United "regarded" them as substantially limited in the activity of working.\textsuperscript{48} They claimed that United's vision requirements for global pilots were based on stereotypes.\textsuperscript{49} The Court disagreed. These vision requirements were not enough to prove that United regarded the sisters as disabled, because the requirements only applied to a single job.\textsuperscript{50} To be substantially limited in the life activity of working, the law requires that an individual be limited in a broad range of jobs.\textsuperscript{51} This opinion also calls into question the viability of the working life activity generally by "assuming without deciding" its validity.\textsuperscript{52}

Justice Stevens' dissent in \textit{Sutton} disputed that the plain language of the ADA requires examining individuals in their mitigated state. Congress was concerned not only with individuals who were actually presently disabled, but also those who are no longer disabled.\textsuperscript{53} This concern prompted lawmakers to include section (B) of the disability definition: "a record of a disability."\textsuperscript{54} Therefore, disability under the ADA should not consider mitigating measures.

Justice Stevens characterized the majority's reasoning as concluding "that the ADA's safeguards vanish when individuals make themselves more employable by ascertaining ways to overcome their physical or mental limitations."\textsuperscript{55} This is also contrary to the Act, which was passed, in part, to encourage the employment of disabled individuals.\textsuperscript{56} The dissent also disagreed with the majority view that examining individuals in their untreated state leads to speculation.\textsuperscript{57} Justice Stevens argued that this examination instead "simply requires examining an individual's ability in a different state."\textsuperscript{58}

\textit{Murphy v. United Parcel Service} follows the \textit{Sutton} decision almost exactly.\textsuperscript{59} Murphy was an individual with hypertension that he controlled through medication.\textsuperscript{60} He was fired because UPS believed that his blood pressure was too high for him to qualify as a...
commercial driver under the Department of Transportation regulations. The Court, relying on Sutton, promptly dismissed his claim because in his medicated state he was not an individual with a disability. Murphy did not claim that he was substantially limited while taking his medications; therefore, the Court made no ruling on that situation.

The third case in the trilogy is Albertson's v. Kirkingburg. Kirkingburg had an eye condition that gave him monocular vision in one eye and 20/200 vision in the other. This led him to mentally develop a “different” way of seeing; his body created its own mitigating measure. Unlike Sutton and Murphy, Albertson's focused more fully on whether Kirkingburg was a qualified individual, but it, too, clings to the Sutton holding regarding mitigating measures. The Court found that there is no difference between artificial measures and measures the body undertakes on its own. The Court again followed Sutton and found that Kirkingburg had to be examined in his mitigated state.

The Sutton trilogy marks a major shift in disability discrimination analysis. By not following the regulations and by examining individuals in their mitigated states, Sutton and its progeny have made disability discrimination claims potentially more difficult to prove for some individuals. People with diabetes especially are greatly affected by this change because of their insulin use. They provide a good example of the difficulties that plaintiffs might encounter. Their situation also presents an opportunity for suggesting creative solutions that they can employ.

Few diabetes cases have come through the courts since Sutton and there is little indication of how courts will treat this issue or how petitioners and respondents will present their cases. In a few recent

61. Id. at 520.
62. Id. at 521-22.
63. Id.
64. 527 U.S. 555 (1999).
65. Id. at 559.
66. Id. at 561.
67. Id. at 565.
68. Id. at 565-66.
69. Id.
cases, the employer did not contest the issue of disability. 71 One court warned employees that Sutton could change their disabled status, while another court granted a plaintiff’s request to submit new evidence in light of the Sutton trilogy. 72 It is likely that employers will question disability status more frequently. For example, a New York District Court granted an employer’s renewed motion for summary judgement based on Sutton. 73 The court had previously found that the plaintiff was disabled, but after the Sutton decision the plaintiff was deemed not disabled based on his medicated state. 74 Other cases simply accepted Sutton as authority and quickly dismissed the individual’s claim. 75 Plaintiffs that have withstood summary judgements have focused on the “regarded as” prong of the disability definition 76 or have been creative in the major life activities they claim are substantially limited. 77 Ideally this Note will warn future litigants of what to avoid and will provide helpful strategies for success.

II. Diabetes

To understand exactly the impact of the Sutton decision on mitigating measures, it is important to understand diabetes and the role of insulin. Diabetes is an incurable disease affecting more than fifteen million Americans. 78 A person with diabetes has difficulty converting food into energy because there is a problem with her insulin production. 79 Insulin regulates blood sugar, which is the

74. Id. at 224-26.
79. See ARENT, BACKGROUND MATERIALS, supra note 78.
When insulin is not properly regulating blood sugar levels, too much glucose stays in the bloodstream instead of going to the cells. This leaves cells “starved for energy.”

Diabetes is generally broken down into two main types: Type I, or insulin-dependent diabetes, and Type II, or non-insulin-dependent diabetes.

An individual with Type I diabetes develops problems because her “pancreas stops making insulin or makes only a tiny amount . . . . Since insulin is necessary to life, all people with Type I diabetes must receive insulin every day . . . [and] would die within a matter of days if not given insulin artificially.”

While insulin injections, and other life modifications, allow many individuals with diabetes to live long and happy lives, diabetes is still incurable. “These treatments, . . . do not correct diabetes . . . [because] a person with diabetes cannot obtain glucose control that is comparable—or as good as—what the body does naturally in the person without diabetes.”

Type II diabetes is the more common form of the disease. Not all people with Type II diabetes must use insulin; sometimes diet and exercise may be enough. But Type II diabetes can still create the same hypoglycemic and hyperglycemic reactions if blood sugar is not properly controlled through insulin or other lifestyle modifications.

A. Treatment

All individuals with diabetes need to monitor their blood sugar every day through a variety of methods and decisions because trying to achieve a safe blood sugar level is “a very delicate, and very crucial, balancing act.” People with diabetes monitor their conditions through blood tests, urine tests, and attention to their bodies’ signals. Depending on the test results, people with diabetes must act accordingly to bring blood sugar levels under control.


81. AMERICAN DIABETES ASSOCIATION, WHAT IS TYPE 1 DIABETES?, at http://www.diabetes.org/ada/Type1.asp (last visited Feb. 24, 2001) [hereinafter ADA, TYPE 1 DIABETES].

82. See Bailey & Golden, supra note 80, at 74-73.

83. ARENT, BACKGROUND MATERIALS, supra note 78.

84. Id. (emphasis removed).

85. ADA, FACTS AND FIGURES, supra note 4.

86. Id.

87. ARENT, BACKGROUND MATERIALS, supra note 78.

88. Id.

89. Id.
Possible treatments may include insulin shots, eating, or drinking. Individuals with diabetes must also monitor their food intake constantly to keep themselves healthy and sometimes even to keep themselves alive. It is vital that people with diabetes have the break time needed to test their blood sugar because it is "extremely important to their ability to be healthy."

B. Complications

These measures may not always keep the blood sugar level normal. There are still dangers of both hypoglycemia (low blood sugar levels due to too much sugar going to the cells) and hyperglycemia (high blood sugar—usually more common in untreated or undertreated diabetes). Individuals with insulin-dependent diabetes usually do not have a set routine of insulin injections; the number of injections varies from day to day. The body’s blood glucose levels may be affected by variations in exercise, stress or illness, and even a woman’s menstrual cycle. These external forces can affect blood sugar levels in unpredictable ways.

Even the most stringent awareness and the most diligent balancing of these factors cannot eliminate the inherent limitations of diabetes.... While one may know how much insulin to administer... in the normal course of the normal day, one cannot know how much insulin to give to ameliorate the effects of uncontrollable external forces.

When these external forces are working on a person with diabetes, serious reactions to manual blood sugar control can result. The most common complications of diabetes result from hypoglycemia reactions. At its worst, a hypoglycemic reaction can take the form of

90. ADA, TYPE 1 DIABETES, supra note 81; ARENT, BACKGROUND MATERIALS, supra note 78.
91. ARENT, BACKGROUND MATERIALS, supra note 78.
92. Telephone Interview with Katie Kimmel, RN, CDE, St. Charles Medical Center, (Mar. 3, 2000).
93. ADA, TYPE 1 DIABETES, supra note 81.
94. ARENT, BACKGROUND MATERIALS, supra note 78.
95. Id.
97. ARENT, BACKGROUND MATERIALS, supra note 78.
98. Bailey & Golden, supra note 80, at 74-33.
of a coma. Low blood sugar may also make a person with diabetes feel shaky, confused or nervous.

People with both types of diabetes can also encounter blood sugar levels that are too high, if the amount of insulin is insufficient, and experience short-term side effects like blurry vision and frequent urination. People with Type I diabetes can have diabetic ketoacidosis. If insulin is unavailable, glucose cannot get into the cells. In response to the lack of energy, the person’s body produces an acidic substance called ketones that can cause breathing problems, nausea, or even a coma.

People with diabetes also need to be aware of other possible complications that arise from the disease. Many complications are severe and may be life-threatening. They include blindness, kidney disease, heart disease, stroke, nerve disease, and amputations. The nerve damage is especially severe; sixty to seventy percent of people with diabetes have some kind of damage and diabetes is the leading cause of “non-traumatic lower limb amputations.” Amputation becomes necessary when the nerves on the feet are damaged, because “the diabetic may not notice blisters or small sores and may continue to walk on them, preventing them from healing and leading to infections that do not heal because of inadequate blood supply to the feet.”

People with diabetes face challenges every day in keeping healthy. They must maintain an awareness of their bodies and actions that most Americans do not have. People with Type I diabetes must be especially aware because they will die without proper insulin. Beyond the disease itself, diabetes often brings up other health complications of which people should be aware. While diabetes is controllable and many people live long and happy lives, diabetes is a chronic and potentially debilitating disease that deserves protection from discrimination based on fear and stereotypes.

99. Id.
100. ADA, TYPE 1 DIABETES, supra note 81.
101. ARENT, BACKGROUND MATERIALS, supra note 78.
102. ADA, TYPE 1 DIABETES, supra note 81.
103. ARENT, BACKGROUND MATERIALS, supra note 78.
104. Diabetes is the number-one cause of blindness in people between the ages of 20 and 74. ADA, FACTS AND FIGURES, supra note 4.
105. Id.
106. Id.
III. Litigation Challenges after Sutton

A handful of cases concerning individuals with diabetes have come down since the Supreme Court ruled on the Sutton trilogy. They not only illustrate the difficulties that now face individuals with disabilities under the ADA (and similar state laws) but also the possible strategies that plaintiffs might use to succeed in post-Sutton litigation. These new cases, along with pre-Sutton diabetes cases, provide insight on the problems that the decisions create.

Deschene v. Pinole Point Steel Co. illustrates one of the problems with considering disability in the light of mitigating measures.\textsuperscript{108} Al Deschene, an individual with diabetes, was terminated by Pinole Point Steel ("PPS") and claimed, among other things, that he was terminated because of his medical conditions.\textsuperscript{109} Although PPS did not contest that Deschene was disabled, the court noted the possible effect that Sutton might have on people with diabetes.\textsuperscript{110} The court noted that Sutton "leave[s] open the question of whether under the ADA a given individual whose medical condition can be mitigated may still be disabled because the mitigation is either incomplete or itself limits the employee's ability to perform on the job."\textsuperscript{111}

The Sutton Court feared that considering a disability in its unmitigated state would lead to speculation.\textsuperscript{112} This fear of speculation is somewhat more logical when a person’s diabetes, or any other condition, has been successfully treated and controlled for a number of years and it would be difficult to imagine her life otherwise.\textsuperscript{113} But this analysis is deficient when comparing employers because different policies and different reasonable accommodations can cause just as much speculation.\textsuperscript{114}

The Deschene case illustrates this well. Part of Deschene’s claim was that his supervisor “had refused to accommodate his medical condition ... by refusing to allow him to inject himself with insulin in a clean location, refused to permit him to eat frequently or rest

\textsuperscript{108} 90 Cal. Rptr. 2d 15, 18 (Ct. App. 1999).
\textsuperscript{109} See id. at 18. Deschene sued under California’s Fair Employment and Housing Act (FEHA), not the Americans with Disabilities Act (ADA), but the court found that the FEHA is modeled on the federal statute and is useful in interpreting the California law. See id. at 23 n.8.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} See supra Part I.C.
\textsuperscript{113} Interview with Paul D. Grossman, Civil Rights Attorney, Department. of Education, in San Francisco, Cal. (Feb. 24, 2000) [hereinafter Grossman Interview].
\textsuperscript{114} See id.
Because Deschene's disability status was not at issue, the alleged lack of reasonable accommodation did not factor into the case. If Deschene was unable to monitor his diabetes effectively, he could experience a variety of symptoms that would substantially limit his major life activities. However, another employer, with more accommodating policies, might never put him in a position where his diabetes would be limiting. This situation is full of speculation. Sutton leaves open the question of whether a court should speculate as to Deschene's disabilities in the ideal employment situation or take him as he is in the current situation.

One of the leading pre-Sutton diabetes cases identifies one of the most troubling issues raised as a result of Sutton. In Arnold v. United Parcel Service, the First Circuit rejected the notion that disabled people should be considered with regard to their mitigating measures. The Arnold court pointed out that this reading would treat differently a plaintiff... (who takes his medications and thus would not be protected by the ADA...) and a plaintiff who is also diabetic... but who cannot afford to take his medications. The latter plaintiff would be protected by the ADA.... We do not think Congress intended such an anomalous result.

The Arnold court also stressed that an individual who could not afford treatment for her impairment would be covered under the ADA in hiring, but once she started work and was covered under the health plan, she would get her treatment and no longer be disabled or covered by the ADA.

The Arnold court highlighted a crucial difference between reasonable accommodations and mitigating measures. Professor Paul Grossman describes this as the difference between independent actions or mitigating measures and dependent actions or reasonable accommodations. If an individual with a disability can control her illness with her own independent actions, such as insulin administration, she will need fewer, if any, reasonable

115. 90 Cal. Rptr. 2d 15, 23 (Ct. App. 1999).
116. See id. at 23 n.8.
117. 136 F.3d 854, 863 (1st Cir. 1998). Sutton overruled Arnold's finding that individuals with diabetes should be viewed without considering mitigating measures. 527 U.S. 471, 475 (1999). The Arnold case is still helpful, however, in identifying problems that the Sutton Court did not address.
118. Arnold, 136 F. 3d at 862.
119. Id.
120. Id. at 863 n.7.
121. Grossman Interview, supra note 113.
accommodations. This saves the employer money, protects more Americans with disabilities in the workplace, and encourages people to take care of their work and health. Also, it is contrary to the Act 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 workers who act independently to overcome their disabilities, thereby creating a disincentive to self-help." \[122\]

One of the largest problems facing people with diabetes, and many other individuals with disabilities, is that the Sutton decisions effectively rob them of a forum to fight discrimination.\[124\] For example, Mary is an individual with diabetes who controls her disease through insulin.\[125\] Part of Mary's ability to effectively control her disease involves checking her blood sugar levels with a blood test numerous times a day. If Mary's employer is unwilling to allow her to take these necessary breaks, she should be able to sue under the ADA.

The ADA was passed for just such a situation: to ensure that a qualified individual with diabetes has the opportunity to work with reasonable accommodations. Sutton, however, works a contrary result. A court could choose to look at Mary's controlled diabetes and decide that she is not disabled. But if she cannot check her blood sugar often enough, she could experience hyperglycemic reactions that will keep her from work and cause her to lose her job. But is she still not disabled when the employer is not letting her use her mitigating measures? Sutton robs Mary of her forum—she never has a chance to prove that she is a qualified individual or, if the employer provided reasonable accommodations, that she could perform her job as well as, if not better than, any other average person.\[126\]

This hypothetical situation was touched upon in Nawrot v. CPC International.\[127\] That court found a question of material fact as to whether the employer had denied Nawrot's request for reasonable accommodations.\[128\] Unfortunately the court was unable to reach the issue because the plaintiff was not disabled under Sutton.\[129\] The court reasoned that,

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122. See Arnold, 136 F. 3d at 863 n.7.
123. Id.
125. This is a hypothetical, and not based on any real person named Mary.
126. See, e.g., Barhorst, supra note 38, at 165 n.244.
128. Id. at *20.
129. Id. at *19-20.
[The] Sutton rationale leads to a distorted result. Although a court must consider the effect of mitigating measures when determining whether . . . impaired plaintiffs are entitled to statutory protection from discrimination, the alleged failure to accommodate can preclude a plaintiff from utilizing those mitigating measures on the job . . . . In the aftermath of Sutton, ADA plaintiffs are placed in a legal bind; the employer strips the plaintiff of all ameliorative measures, but in court, the judge pretends that the plaintiff is always clothed in these measures.130

This "legal bind" is not determinative however. There are strategies that can aid plaintiffs with diabetes receive the full protection of the law.

IV. Creative Solutions

The Sutton decision leaves unanswered questions and increases difficulties for people with diabetes. But these difficulties can be overcome with a little creativity. Solutions include: focusing on the complications stemming from diabetes, not the disease itself; ingenious "major life activities"; using the "record of" and "regarded as" prongs of the disability definition; and possibly even distinguishing Sutton.

A. Complications and Reactions

Diabetic complications can provide a way around the Sutton pitfalls. In Seaman Unified School District v. Kansas Commission on Human Rights, the court quickly disposed of the employee's complaints under Sutton because the "defendant was able to control his diabetes with proper diet and monitoring and his physical activities were not limited.131 But Seaman still brings up an interesting point. Reed, the employee, was unable to perform janitorial jobs, including lifting, because of a corrective surgery he had undergone to correct a diabetes-related eye problem.132 While this surgery only minimally restricted his major life of activity of working, it is a good example of how diabetes is not so clear-cut. Many complications are associated with diabetes even if the individual is dedicated to taking his insulin and maintaining a proper diet.133

Gerald Needle was recognized as an individual with a disability because he also focused on the complications caused by diabetes.134

130. Id. at *19-21.
132. Id. at 157.
133. See supra Part II.
Needle did not even allege that his treated diabetes limited any life activity. Instead, the court found that Needle was substantially limited in the major life activity of walking because his right toes had been amputated, his left heel surgically removed, and his vision impaired. These are not rare complications, but they provide alternative paths to disabled status when the disease itself is effectively treated.

Another creative and helpful case in detailing the complications and reactions produced by insulin is Coghlan v. HJ Heinz Co. and Ore-Ida Foods, Inc. Coghlan explained how his major life activities of eating, sleeping and caring for himself were affected even though he took insulin to control his diabetes. The insulin he took caused potentially debilitating hypoglycemic reactions:

I have awakened in the middle of the night in the most advanced state of hypoglycemia prior to unconsciousness. While in this state I was, and I am, only able to muster the physical movement of obtaining and drinking a glass of juice or eating a piece of fruit to alleviate the hypoglycemic episode. During these episodes caring for myself is problematic and I am unable to sleep. I have experienced severe hypoglycemic episodes short of unconsciousness and this is a result, in part, of a tight insulin control of my blood sugar levels, which are considered medically recommended for my condition.

The court denied defendant’s motion for summary judgement based on this testimony and evidence that Coghlan’s diabetes has so seriously affected his eyes that an operation was required to correct the damage.

B. Major Life Activities

The major life activity that the plaintiff focuses on can be determinative of a court’s disability determination. Most plaintiffs in employment discrimination cases claim a substantial limit in their life activity of working. This can be difficult because having a substantially limited life activity of working means that the plaintiff is limited in “the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to

135. Id.
137. Id. at 814.
138. Id.
139. See id. at 814-15.
perform a single; particular job does not constitute a substantial limitation."¹⁴⁰ This standard is troublesome because it "creates a Catch-22 for plaintiffs who must prove that they are so limited in order to prove coverage under the statute that the next inquiry about whether he or she is qualified is undermined."¹⁴¹ The working activity is also problematic because Sutton called into question its viability as a category generally.¹⁴²

If plaintiffs do include working as a major life activity, they must be sure to explain the specific complications and reactions that people with diabetes experience. Most of the hypo- and hyperglycemic reactions arising from diabetes would preclude people from a wide range of jobs, not just a particular class of jobs or a specific job. If Mary becomes dizzy, confused, or even lapses into a coma, this will affect any job from airline pilot to assembly line worker, from janitor to lawyer.¹⁴³

One of the best examples of being creative with major life activities is found in the pre-Sutton case of Erjavac v. Holy Family Health Plus.¹⁴⁴ Sandra Erjavac had insulin-dependent diabetes. She brought suit under the ADA after she quit her job due to the employer’s unwillingness to accommodate her.¹⁴⁵ Even though Erjavac took insulin to keep her diabetes under control, she still needed to urinate constantly and her employer did not provide her with enough access to the bathroom.¹⁴⁶ The court found that Erjavac was substantially limited in the major life activity of waste elimination, noting that the “average adult does not need such frequent access to the bathroom that they soil themselves while waiting to use it.”¹⁴⁷ Erjavac was also required to eat specific foods at numerous times during the day to control her blood sugar levels. “[W]hen her blood sugar drops, Erjavac must stop all other activities and pursue the kinds of foods that will bring her levels back to normal.”¹⁴⁸ Even though waste elimination does not appear on the EEOC’s non-exclusive list of major life activities, the court reasoned that “eating and waste elimination are both essential to remaining

¹⁴³. See supra Part II.
¹⁴⁵. Id. at 740-41.
¹⁴⁶. Id. at 740, 746.
¹⁴⁷. Id. at 747.
¹⁴⁸. Id. at 746.
alive. As such, these activities are even more significant than the listed activities of working or learning, neither of which is essential to sustain life.\footnote{149}

Notably, the court also found Erjavac disabled in her untreated state.\footnote{150} The court was aware of the Tenth Circuit's decision in \textit{Sutton}.\footnote{151} Therefore, it most likely went through the analysis of diabetes in its treated state to avoid a possible conflict with the \textit{Sutton} ruling. The court focused on the major life activity of life itself; stating that without proper control a drop in blood sugar levels could put the plaintiff in a coma or worse.\footnote{152} The \textit{Erjavac} court recognized that diabetes is a serious, chronic disease, a recognition that the \textit{Sutton} Court seemed to ignore. Given the spirit and intent of the ADA, it seems truly unbelievable that an individual who takes medicine to stay alive does not have a disability. Insulin and glasses are not analogous mitigating measures and courts should not treat them as such.

Another potentially valuable major life activity is walking. Not only can diabetic complications lead to amputations,\footnote{153} diabetes can also cause neuropathy or nerve damage in the lower extremities.\footnote{154} Neuropathy can severely limit an individual's ability to walk long distances or for extended periods of time.\footnote{155} Limitations on walking have saved at least two plaintiffs from summary judgement.\footnote{156}

Diabetes is a very complex disease that affects people in a variety of ways, with or without mitigating measures. Pamela Shirley's diabetes produced digestive tract problems that caused frequent vomiting and diarrhea.\footnote{157} So, even though her insulin kept her blood sugar more or less under control, she had to monitor her diet extremely carefully to avoid these severe and sudden digestive problems.\footnote{158} The court found that her major life activity of eating was therefore substantially limited.\footnote{159}

\begin{itemize}
\item \footnote{149} [Id. at 747.]
\item \footnote{150} [Id. at 746.]
\item \footnote{151} [See id. at 745 n.3.]
\item \footnote{152} [Id. at 746.]
\item \footnote{153} [See supra Part II.]
\item \footnote{154} [EEOC v. Sears, Roebuck & Co., 233 F.3d 432, 435 (7th Cir. 2000).]
\item \footnote{155} [Id.]
\item \footnote{156} [Id. at 438-40; Davis v. Rockford Springs Co., No. 98 C 50351, 2000 U.S. Dist. LEXIS 18131, at *13, 14 (N.D. Ill. Dec. 12, 2000).]
\item \footnote{158} [Id. at *8.]
\item \footnote{159} [See id.]
\end{itemize}
C. "Record of" and "Regarded as"

Another solution for many people with diabetes is to try to prove they have a record of a substantially limiting impairment. This is a viable claim for individuals with Type II diabetes especially, because this disease often develops much later in life. Individuals may not know that they have a disease until "severe symptoms occur or they are treated for one of its serious complications." This often means that there is a record of hospitalization, implying that the individual was arguably substantially limited in some major life activity depending on the specific complication. Courts have continued to find that hospitalization for diabetes and related complications can be considered a record. The Sutton decision ignores the "immediate detrimental affects that diabetics... suffer at the onset" and so the record prong becomes a useful way around the decision.

While the Sutton Court may have modified the "regarded as" prong, plaintiffs can still argue that they are regarded as disabled even if their mitigating measures keep them from being disabled. If the employer makes a decision not to hire an individual because she believes that the individual is substantially limited, whether or not the individual has an impairment, then the individual is regarded as disabled. Because of the stringent blood testing and insulin injections people with diabetes require, an employer may wrongly view someone with diabetes as substantially limited. To people with limited knowledge of diabetes, it must seem extremely limiting to have to inject yourself during the normal working day. Or an employer may restrict a current employee’s workload after witnessing a hypoglycemic episode, even though the employee ability to work has not been affected. This is exactly the kind of myth from which the ADA protects individuals. Employers might exclude an

160. ADA, FACTS AND FIGURES, supra note 4.
161. See Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 281 (1987) (finding that an "impairment... serious enough to require hospitalization, [is]... more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment. Thus, Arline's hospitalization... suffices to establish that she has a 'record of... impairment.'").
163. Barhorst, supra note 38, at 164.
167. See id.
individual with diabetes because of safety or liability concerns or cost or even acceptance by coworkers.168

Morris v. Dempsey Ing, Inc.169 illustrates that these stereotypes do still exist and that the "regarded as" prong is still a viable option in the post-Sutton courtroom. Morris did not consider himself disabled but claimed that the employer regarded him as disabled.170 There are still stereotypes and misconceptions about diabetes; Morris alleged that his employer told him that diabetes was a liability.171 Morris did not plead this charge correctly. The court denied defendant’s motion for summary judgement and encouraged Morris to replead.172

D. Factual Distinction

Another avenue that is so far untried is to attempt to distinguish Sutton from cases like our hypothetical Mary’s.173 The Southern District Court of Indiana was not persuaded that Sutton would allow employers to interfere with an employee’s use of corrective measures with no legal consequences.174 Sutton is factually distinguishable. United Air Lines had a job qualification based on an applicant’s untreated state, while cases like Mary’s involve an employer prohibiting the use of “corrective measures that were essential to ... health and life as well as to ... ability to do the job.”175 The court did not explore this factual distinction or decide the issue but found it “inconceivable that such actions by an employer would be entirely beyond the reach of the ADA on the theory that the employee does not have a ‘disability’ under the ADA.”176 This is a difficult argument to make because Sutton is clearly not a narrow holding.177

Conclusion

The issues that arise from Sutton are just beginning to be debated and litigated. The Sutton trilogy will have lasting and substantial effects on the ADA and on the millions of Americans with

168. Id.
170. Id.
171. Id. at *8.
172. Id. at *9.
173. See supra Part III.
175. Id. at *27.
176. Id.
disabilities. While a restrictive ruling in the eyes of disability advocates, *Sutton* does not mean the death of the ADA.

It is unfortunate that the future of the ADA was placed in jeopardy by a vision requirement. Without diminishing the severity of the Sutton sister’s vision impairment, it is not life threatening. Glasses are not as necessary to survival as insulin is. The *Sutton* decision draws a broad rule from a very discrete and narrow factual situation, and then extends it over the entire ADA—that disability should be determined with regard to mitigating measures.

This broad rule suggests that the Court had a lack of information or understanding about disabilities such as diabetes which require constant and vigilant monitoring. Putting on a pair of glasses in the morning is not the same kind of mitigating measure as injecting yourself with insulin numerous times a day. Perhaps a future court will recognize the seriousness of diabetes, and other impairments, and narrow *Sutton*’s reach. Until then or until society’s “accumulated myths and fears” have disappeared, individuals with diabetes must be creative in their litigation to protect themselves from the specter of discrimination.