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# Mitigating Measure under the Americans with Disabilities Act: Interpretation and Deference in the Judicial Process

Jonathan Bridges

# NOTE

# MITIGATING MEASURES UNDER THE AMERICANS WITH DISABILITIES ACT: INTERPRETATION AND DEFERENCE IN THE JUDICIAL PROCESS

In its recent landmark case interpreting the Americans with Disabilities Act (ADA),[1] *Bragdon v. Abbott*,[2] the Supreme Court acknowledged but declined to address a dispute which has split the circuit courts.[3] The dispute centers around the definition of disability under the ADA and, more precisely, whether the use and availability of mitigating measures (such as medications or prosthetic devices) should be considered in determining whether an impairment is substantially limiting.[4] Although the split was brought to its attention,[5] the Court found addressing this issue unnecessary to resolving the case.

In order to qualify for protection under the ADA, a plaintiff must have an "impairment" which "substantially limits one or more of the [plaintiff's] major life activities."[6] An Equal Employment Opportunity Commission (EEOC) interpretation of this requirement states, "The

1 42 U.S.C. §§ 12101–213 (1994).

2 118 S. Ct. 2196 (1998).

3 *See id.* at 2206.

4 For further discussion, see Erica Worth Harris, *Controlled Impairments Under the Americans with Disabilities Act: A Search for the Meaning of "Disability"*, 73 WASH. L. REV. 575 (1998); Arthur F. Silbergeld & Stacie S. Polashuk, *Chronic Serious Health Impairments and Worker Absences Under Federal Employment Laws*, 14 LAB. LAW. 1 (1998); Carolyn V. Counce, Note, *Corrective Devices and Nearsightedness Under the ADA*, 228 U. MEM. L. REV. 1195 (1998); Michael J. Puma, Note, *Respecting the Plain Language of the ADA: A Textualist Argument Rejecting the EEOC's Analysis of Controlled Disabilities*, 67 GEO. WASH. L. REV. 123 (1998); *Recent Cases*, 111 HARV. L. REV. 2456 (1998) (discussing the Tenth Circuit's decision in *Sutton v. United Airlines, Inc.*, 130 F.3d 893 (10th Cir. 1997); *see also* Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 (1991).

5 *See* Amicus Brief for the United States at 18, n.10, *Bragdon* (No. 97-156).

6 42 U.S.C. § 12102(2)(A).

determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices."[7] In cases where a plaintiff's impairment is controlled by a mitigating measure, the ADA may apply even if the plaintiff does not experience any substantially limiting effects.[8] Facing the issue in cases involving vision impairment,[9] diabetes,[10] epilepsy,[11] stress-induced depression,[12] Graves' disease,[13] and Adult Stills disease,[14] the circuit courts have split—some deferring to the EEOC interpretation, some finding the EEOC interpretation contrary to the statute.

The judicial process by which a court addresses the issue of mitigating measures appears to affect its outcome in the case. This Note attempts to provide a useful analysis of that process as it is applied by the circuit courts. It examines the evolution of the judicial process and the dialogue among the circuits which helped to shape its development, paying particular attention to the courts' interpretation of the ADA and their deference to the EEOC. In its conclusion, this Note recommends a new framework in which courts should analyze this issue.

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7 29 C.F.R. § 1630.2(j), app. (1998). The Department of Justice also interprets the requirement in this way. *See* 28 C.F.R. § 35.104, app. A (1998).

8 *See* Harris, *supra* note 4. Professor Harris describes the application of the EEOC interpretation:

> When applied to cases of controlled impairments, the no mitigating measures guideline produces counterintuitive results. A "controlled impairment" is one that would substantially limit a major life activity if untreated, but that does not limit any such activity when treated with some mitigating measure. . . . According to the [EEOC] guideline, such individuals [with controlled impairments] have disabilities even if they do not experience, and have never experienced, any limitation from their condition.

*Id.* at 580.

9 *See* Sutton v. United Airlines, Inc., 130 F.3d 893 (10th Cir. 1997); Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997); Roth v. Lutheran General Hosp., 57 F.3d 1446 (7th Cir. 1995).

10 *See* Baert v. Euclid Beverage, Ltd., 149 F.3d 626 (7th Cir. 1998); Arnold v. United Parcel Serv., Inc., 136 F.3d 854 (1st Cir. 1998); Gilday v. Mecosta County, 124 F.3d 760 (6th Cir. 1997).

11 *See* Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933 (3d Cir. 1997).

12 *See* Holihan v. Lucky Stores, Inc., 87 F.3d 362 (9th Cir. 1996).

13 *See* Harris v. H & W Contracting Co., 102 F.3d 516 (11th Cir. 1996). Graves' disease is "an endocrine disorder affecting the thyroid gland." *Id.* at 518.

14 *See* Washington v. HCA Health Servs. of Tex., Inc., 152 F.3d 464 (1998). Adult Stills disease is "a degenerative rheumatoid condition affecting [the] bones and joints." *Id.* at 466.

The mitigating measures issue reached the Eleventh Circuit later that year in *Harris v. H & W Contracting Co.*[21] In *Harris*, the court reversed summary judgment for the defendant, taking "judicial notice that Graves' disease is a condition that is capable of substantially limiting major life activities if left untreated by medication."[22] Citing *Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc.*,[23] the court stated that the EEOC's interpretation "should be given 'considerable weight' and should not be disturbed unless it appears from the statute or legislative history that Congress intended otherwise."[24] The court found no conflict between the EEOC's interpretation and the statutory requirement that an impairment must "substantially limit a major life activity."[25] Instead, the court determined that the text was either "silent or ambiguous with respect to the specific issue," and found support for its reading in the ADA's legislative history.[26]

In June, 1997, just six months after *Harris*, the Eighth Circuit addressed this issue in *Doane v. City of Omaha*.[27] In *Doane*, the court found that the plaintiff, who was blind in one eye, did qualify as disabled under the ADA.[28] While stressing its duty to "consider each situation on a case by case basis," the court stated that its analysis of this case would "not include consideration of mitigating measures," even though the only mitigation occurred subconsciously—in the plaintiff's "brain."[29] As in *Roth* and *Holihan*, the court reached this conclusion without discussing whether deference was appropriate or whether the EEOC's interpretation was a permissible construction of the ADA, even though it found that the plaintiff did qualify as disabled.[30]

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21 102 F.3d 516 (11th Cir. 1996).

22 *Id.* at 522. Graves' disease is "an endocrine disorder affecting the thyroid gland." *Id.* at 517.

23 467 U.S. 837 (1984).

24 *Harris*, 102 F.3d at 521 (quoting *Chevron*, 467 U.S. at 844–45). *But see* Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 866 (1st Cir. 1998) (criticizing *Harris* for applying full *Chevron* deference).

25 *Id.* at 520 (citing 42 U.S.C.A. § 12102(2)(A) (West 1995)).

26 *Id.* at 521 (quoting *Chevron*, 467 U.S. at 843 and citing H.R. REP. No. 101-485(II), at 52 (1990) *reprinted in* 1990 U.S.C.C.A.N. 303, 334; H.R. REP. No. 101-485(III), at 28–29 (1990) *reprinted in* 1990 U.S.C.C.A.N. 445, 451; S. REP. No. 101-116, at 23 (1989)).

27 115 F.3d 624 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998).

28 *See id.* at 627–28.

29 *Id.*

30 The court refused to follow the Fifth Circuit's finding (under the ADA's precursor, the Rehabilitation Act) which held that "a person is not handicapped if his vision can be corrected to 20/200." Chandler v. City of Dallas, 2 F.3d 1385, 1390 (5th Cir. 1993).

These early circuit decisions share a common theme: with very little discussion of whether deference to the EEOC is appropriate or whether its interpretation is permitted by the text, these decisions agree not to consider mitigating measures. One exception to this trend was the Fifth Circuit's opinion in *Ellison v. Software Spectrum, Inc.*[31] Although the court found it unnecessary to decide the issue, it did criticize the EEOC's interpretation, stating that Congress could easily have "provided for coverage . . . for impairments that have the *potential* to substantially limit a major life activity" had that been its intent.[32] Along with several district court decisions, *Ellison* helped to spark debate.

## II. Debate Begins

When the Eighth Circuit released its decision in *Doan*, the Sixth Circuit had just finished oral argument in *Gilday v. Mecosta County*.[33] After a rehearing, the court endorsed Judge Cornelia G. Kennedy's opinion, which held that whether the plaintiff's non-insulin-dependent diabetes mellitus constitutes a disability under the ADA must be determined *with* regard to his ability to control the disease with diet, exercise, and oral medication.[34] Judge Kennedy stated, "The EEOC's position on mitigating measures appears not in the regulations themselves, but in an appendix to the regulations labeled 'Interpretive Guidance on Title I of the Americans with Disabilities Act.'"[35] Judge Kennedy concluded that these rules were "interpretative, rather than legislative," and as such did not merit full *Chevron* deference.[36] Quoting *Reno v. Koray*,[37] Judge Kennedy explained that the EEOC's interpretation would merit "some deference" were it a "permissible construction of the statute."[38] The opinion also acknowledged that

31 85 F.3d 187 (5th Cir. 1996).

32 *Id.* at 191–92 n.3 (emphasis added).

33 124 F.3d 760 (6th Cir. 1997) (en banc).

34 *See id.* at 761, 766 (Kennedy, J., concurring in part and dissenting in part).

35 *Id.* at 766 (Kennedy, J., concurring in part and dissenting in part) (citing 29 C.F.R. § 1630.2(j), app. (1997)).

36 *Id. But see* Wilson v. Pennsylvania State Police Dep't, 964 F. Supp. 898, 902 (E.D. Pa. 1997) (stating that the EEOC "guidelines were subject to public notice and comment procedures, similar to those which normally apply to regulations. . . . Thus, the guidelines arguably have more force than would an ordinary interpretive rule."). *See also* 56 Fed. Reg. 8578 (1991); 56 Fed. Reg. 35726–28 (1991).

37 515 U.S. 50, 61 (1995).

38 *Gilday*, 124 F.3d at 766 (Kennedy, J., concurring in part and dissenting in part). Judge Kennedy appears to be applying the type of deference the Supreme Court described in *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944). For a description of *Skidmore* deference, see *infra* note 75.

the "ADA's vast legislative history [does] lend some support to the EEOC's position."[39] Judge Kennedy continued, "Where the statutory text is unambiguous, however, as I believe it is here, that ends the matter."[40]

This decision represented a major departure from earlier cases. Rather than deferring without comment, the court began a dialogue with the EEOC regarding the appropriateness of deference and the permissibility of the EEOC interpretation. The majority of courts confronting this issue after *Gilday* have continued the discourse.[41]

Judges Karen Nelson Moore and Ralph B. Guy wrote separately in *Gilday*, discussing the appropriate level of deference and the EEOC's construction of the statute. Stating that some deference to the EEOC was appropriate,[42] Judge Moore found its construction permissible and persuasive in light of the text, purpose, and legislative history of the ADA.[43] Judge Guy concluded that the issue "must be decided on a case by case basis."[44] On these facts, however, he agreed with Judge Kennedy that the text "cannot bear the interpretation adopted by the EEOC."[45]

Nineteen days after the *Gilday* decision, the Third Circuit joined the dialogue with *Matczak v. Frankford Candy & Chocolate Co.*[46] In *Matczak*, the court reversed summary judgment for the defendant, finding that the plaintiff's epileptic condition should be considered without regard to his "use of medication."[47] Although the court agreed with the Sixth Circuit that something less than full *Chevron* deference was due the EEOC interpretive guidelines, it still gave the EEOC's position "controlling weight" as an interpretation of the

39 *Gilday*, 124 F.3d at 767 (Kennedy, J., concurring in part and dissenting in part).

40 *Id.*

41 *See* Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 865 (1st Cir. 1998) (collecting circuit opinions considering the EEOC's interpretation); Sutton v. United Airlines, Inc., 130 F.3d 893 (10th Cir. 1997) (collecting district and circuit opinions); *see also* Harris, *supra* note 4, at 602–03 nn.92–93; Puma, *supra* note 4, at 126–139.

42 *See Gilday*, 124 F.3d at 763, n.2.

43 *See id.* at 763–64.

44 *Id.* at 768 (Guy, J., concurring in part and dissenting in part).

45 *Id.* (quoting Kennedy, J., concurring in part and dissenting in part). Quoting *Ohio Public Employees Retirement Systems v. Betts*, 492 U.S. 158, 171 (1989), Judge Guy stated, "Of course, no deference is due to agency interpretations at odds with the plain language of the statute itself." *Id.*

46 136 F.3d 933 (3d Cir. 1997).

47 *Id.* at 937.

agency's own regulations.[48] The court identified the ADA's legislative history as a "second source of guidance."[49] Also, the court implied that the statutory text was ambiguous, stating that "[t]he ADA itself does not say whether mitigating measures should be considered in determining whether" an individual is disabled.[50] Although *Matczak* reached the opposite conclusion, its reasoning, indeed its judicial process, reveals the influence of *Gilday*.

The week following *Matczak*, the Tenth Circuit announced its decision in *Sutton v. United Airlines, Inc.*[51] In *Sutton*, the court held that the plaintiffs' uncorrected vision did not constitute a disability because it was corrected by eyeglasses or contact lenses.[52] Aligning itself with the Sixth Circuit, the court stated that the EEOC's interpretation "is in direct conflict with the plain language of the ADA."[53] The court also agreed with *Gilday* and *Matczak* that something less than full *Chevron* deference was appropriate.[54]

These three late 1997 cases also share a theme. Beginning with *Gilday*, though perhaps prompted by district court decisions,[55] the circuit courts began to look at the statutory text and the interpretive guidelines with an increasing amount of scrutiny. At the same time, the conclusions of the courts became increasingly unpredictable, best illustrated by the separate opinions in *Gilday*.

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48 *Id.* (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) and Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)). Citing *Appalachian States Low-Level Radioactive Waste Commission v. O'Leary*, 93 F.3d 103, 112–13 (3d Cir. 1996), the court also acknowledged a lesser degree of deference due interpretive rules. *See id.*

49 *Id.* (citing H.R. REP. No. 101-485(II), at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334; S. REP. No. 101-116, at 23 (1989)).

50 *Id.*

51 130 F.3d 893 (10th Cir. 1997) *cert. granted*, No. 97-1943, 1999 WL 5326 (Jan. 8, 1999).

52 *See id.* at 903.

53 *Id.* at 902.

54 The court stated that "while the EEOC's Interpretive Guidance may be entitled to some consideration in our analysis, it does not carry the force of law and is not entitled to any special deference under *Chevron*." *Id.* at 899 n.3. As in *Gilday*, the court appears to be applying *Skidmore* deference. For a description of *Skidmore* deference, see *infra* note 75.

55 *See Sutton*, 130 F.3d at 901 n.7–8 (collecting cases on both sides of the issue); Puma, *supra* note 4, at 126–39 (same); *see also* Harris, *supra* note 4, at 576 n.7.

## III. NARROWING DEFERENCE

In 1998, four circuit courts considered the issue. In *McGuinness v. University of New Mexico School of Medicine*[56] and *Baert v. Euclid Beverage, Ltd.*,[57] the Tenth and Seventh Circuits followed their respective decisions in *Sutton v. United Airlines, Inc.*[58] and *Roth v. Lutheran General Hosp.*[59] with little discussion of the issue. The First and Fifth Circuit decisions in *Arnold v. United Parcel Service, Inc.*[60] and *Washington v. HCA Health Services of Texas, Inc.*[61] provide a more thorough discussion of the issue.

In *Baert*, the Seventh Circuit held that the plaintiff's diabetes must be evaluated without regard to his ability "to control the effects of the disease with insulin."[62] As in *Roth*, the court deferred to the EEOC without discussing whether it was appropriate to do so or whether the interpretation was a permissible construction of the text. The court did, however, acknowledge the existence of differing opinions.[63]

In *McGuinness*, an unpublished opinion,[64] the Tenth Circuit found that the plaintiff's anxiety disorder was not a disability under the ADA because the plaintiff could "mitigate his anxiety in chemistry and math [classes] by altering his study habits."[65] Without reference to the EEOC position or the circuit split, the court stated that "[u]nder the law of this circuit, we must consider the plaintiff's ability to mitigate his impairment in determining if that impairment substantially limits a major life activity."[66]

In *Arnold*, the First Circuit held that the plaintiff's "diabetes, in its untreated state, is a disability protected from discrimination by the ADA."[67] The court considered "the legislative history and the broad remedial purposes of the Act," as well as its structure, in holding that

56 No. 97-2249, 1998 WL 777070 (10th Cir. Nov. 4, 1998).

57 149 F.3d 626 (7th Cir. 1998).

58 130 F.3d 893 (10th Cir. 1997).

59 57 F.3d 1446 (7th Cir. 1995).

60 136 F.3d 854 (1st Cir. 1998).

61 152 F.3d 464 (5th Cir. 1998).

62 *Baert*, 149 F.3d at 630.

63 *See id.*

64 See 10th CIR. R. 36 (stating terms and conditions for citing unpublished opinions).

65 McGuinness v. University of New Mex. Sch. of Med., No. 97-2249, 1998 WL 777070 at *4 (10th Cir. Nov. 4, 1998).

66 *Id.*

67 Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 866 (1st Cir. 1998).

mitigating measures should not be considered.[68] The court also found that the district court erred in "failing to afford adequate consideration" to the EEOC's interpretation,[69] even though "something less than full *Chevron* deference" was required.[70] However, the court explicitly limited its holding to the facts, stating that it "might reach a different result" on facts such as those the Tenth Circuit faced in *Sutton*.[71]

In September, the Fifth Circuit addressed the issue in *Washington*.[72] In this case, the court held that "mitigating measures should not be taken into account when assessing" the plaintiff's Adult Stills disease.[73] Reluctantly, the court deferred to the EEOC, expressing its sympathy for the *Gilday/Sutton* line of reasoning:

> We are not unsympathetic to this [line of] reasoning. In fact, we think that these cases, which have held that mitigating measures must be taken into account, offer the most *reasonable* reading of the ADA. However, we also recognize that we cannot simply ignore the legislative history and EEOC Guidelines that dictate the opposite result. Only if we determine that the statute was unambiguous on its face and the agency interpretation was contrary to the plain meaning of the statute, can we ignore the EEOC's interpretation.[74]

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68 *Id.* at 863. *But see* Harris, *supra* note 4 (discussing the ADA's purposes as stated in the act at 42 U.S.C. § 12101(a)(7) (1994)). Professor Harris' analysis suggests that the purposes of the ADA are not served by a rule requiring courts to ignore mitigating measures:

> Individuals with controlled impairments do not suffer from a fundamental difference in living historically and have not been subjected to discrimination. No social stigmas attach to controlled impairments precisely because they are controlled. No stereotypes or misperceptions attach to controlled impairments because they have no obvious effect on the daily activities of the individuals. Individuals with controlled impairments do not suffer from discrimination on the basis of characteristics they cannot control because they can and do control their impairments. No evidence or objective reason supports the belief that individuals with controlled impairments are the subject of invidious discrimination.

*Id.* at 595.

69 *Arnold*, 136 F.3d at 863.

70 *Id.* at 864 (quoting Commonwealth of Mass. v. F.D.I.C., 102 F.3d 615, 621 (1st Cir. 1996)). Again, as in *Gilday* and *Sutton*, the court appears to be applying *Skidmore* deference. For a description of *Skidmore* deference, see *infra* note 75.

71 *Id.* at 866 n.10.

72 Washington v. HCA Health Servs. of Tex., Inc., 152 F.3d 464 (5th Cir. 1998).

73 *Id.* at 471. Adult Stills disease is "a degenerative rheumatoid condition affecting [the] bones and joints." *Id.* at 466.

74 *Id.* at 469.

The court listed several factors that determine how much deference it must give an agency interpretation, and applying them, concluded that "more than minimum deference" was appropriate.[75] Much like the First Circuit in *Arnold*, however, the court limited its holding to "serious impairments and ailments that are analogous to those mentioned in the EEOC Guidelines and the legislative history [such as] diabetes, epilepsy, and hearing impairments."[76]

If there is a common theme in the recent cases, other than stare decisis, it appears to be a tendency to examine the facts "on a case by case basis," as Judge Guy advised in *Gilday*.[77] The courts appear to be narrowing the amount of deference they are willing to give the EEOC interpretation. Yet they are deferring to that interpretation as they criticize it. It remains unclear whether this trend is a temporary compromise or the result of a more carefully crafted judicial process, but time—or the Supreme Court—will soon tell.

## IV. ANALYSIS

Several questions remain regarding the development of the judicial process by which this issue is addressed. Is the ADA definition of "disabled" ambiguous or not? How much authority did Congress actually delegate to the EEOC? Precisely how much deference is owed to the EEOC interpretation? Is the ADA's legislative history helpful in determining congressional intent? And ultimately, is it really appropriate to ignore mitigating measures? This section attempts to answer these questions.

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75 *Id.* at 470. Citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944) and *Bragdon v. Abbott*, 118 S. Ct. 2196, 2207 (1998) (quoting *Skidmore*), the court discussed "varying degrees of deference":

> The amount of deference that a court must give to agency interpretations depends on several factors. The factors include: "the circumstances of their promulgation, the consistency with which the agency has adhered to the position announced, the evident consideration which has gone into its formulation, and the nature of the agency's expertise."

*Washington*, 152 F.3d at 470 (quoting Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1014 n.20 (5th Cir. 1996)). *See also* Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. AM. U. 187, 208–09 (1992) (discussing the role of *Skidmore* deference today); Harris, *supra* note 4, at 602–04 (discussing deference in the context of the mitigating measures issue).

76 *Washington*, 152 F.3d at 470.

77 Gilday v. Mecosta County, 124 F.3d 760, 768 (6th Cir. 1997) (Guy, J., concurring in part and dissenting in part).

### A. *Applying* Chevron

In *Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc.*,[78] the Supreme Court created a two-step test for determining whether deference to an agency interpretation of law is appropriate. A court facing the mitigating measures issue should only defer to the EEOC interpretation after conducting a *Chevron* analysis and determining that deference is appropriate.

#### 1. Ambiguous or Not?

Step one of the *Chevron* test requires the court to determine whether Congress has "unambiguously expressed" its intent, or whether it "has not directly addressed the precise question at issue."[79] Professor Robert A. Anthony phrases this inquiry: "Is there specific congressional intent on the precise question at issue?"[80] Quoting *Morton v. Ruiz*,[81] he asks whether the statute requires the administering agency "to fill any gap left, implicitly or explicitly, by Congress."[82]

Justice Antonin Scalia asks, "How clear is clear?"[83] He says, "It is here, if *Chevron* is not abandoned, that the future battles over acceptance of agency interpretations of law will be fought."[84] Professor Cass R. Sunstein states the test in this way: "*Chevron* is inapplicable when the particular context suggests that deference would be a poor reconstruction of congressional desires."[85] Former Judge Kenneth W. Starr also describes the inquiry:

> First, the court must consider whether Congress "has directly spoken to the precise question at issue." This inquiry into legislative intent should focus first on the plain language of the statute. If the answer is not found in the statute itself, then the court should look to the measure's legislative history. As the Court declared, "if the intent of Congress is clear, that is the end of the matter; for the

78 467 U.S. 837 (1984).

79 *Id.* at 843.

80 Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 17 (1990).

81 415 U.S. 199 (1974), *quoted in Chevron*, 467 U.S. at 842–43.

82 Anthony, *supra* note 80, at 17.

83 Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520–21.

84 *Id.*

85 Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2091 (1990).

> court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[86]

Professor Michael Herz simply asks, "[D]oes the statute provide an answer?"[87]

Applied to mitigating measures, the question is this: is the ADA clear or is it ambiguous regarding whether the court should consider mitigating measures when assessing a plaintiff's alleged disability? Professor Herz recommends a new metaphor, "the scheme of biological classification,"[88] for this analysis:

> In its broadest enactments, Congress has identified the kingdom and nothing else. Congress occasionally gets down to the species level, but that task is generally left for agencies. Under this metaphor, the courts' role is to ensure that as the agency becomes more specific it remains within the larger boundaries established by Congress. . . . The gap-filling metaphor implies that . . . Congress has said nothing, i.e., left a gap . . . . The biological classification metaphor, in contrast, implies that Congress always has said something and reminds us that an agency cannot reach what Congress has not. The statute may identify only the broadest outlines, but it always limits the agency's authority to some extent. The role of the court is to ensure that as the agency spells things out with increasing specificity it stays within the boundaries established by Congress.[89]

Herz's metaphor emphasizes that Congress does not have to specify a particular construction in order to exclude another.[90]

When it is applied to the issue of mitigating measures under the ADA, Herz's metaphor suggests that, even if the statutory definition of disability is ambiguous, it does exclude plaintiffs who are not substan-

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86 Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 288 (1986) (quoting *Chevron*, 467 U.S. at 842–43).

87 Herz, *supra* note 75, at 216. For further discussion of *Chevron*, see Theodore L. Garrett, *Judicial Review After* Chevron: *The Courts Reassert Their Role*, 10 NAT. RESOURCES & ENV'T 59 (1995); Ronald M. Levin, *The Anatomy of* Chevron: *Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997); Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225 (1997); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987).

88 Herz, *supra* note 75, at 230.

89 *Id.* at 230–32. While this analysis may seem appropriate under step two of the *Chevron* inquiry, it is also relevant here. A statute may be amenable to differing interpretations and yet provide a clear answer to what *Chevron* calls "the precise question at issue." *Chevron*, 467 U.S. at 843.

90 *See* Washington v. HCA Health Servs. of Tex., Inc., 152 F.3d 464, 469 (1998) (quoting Ohio Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 171 (1989)) ("[N]o deference is due to agency interpretations at odds with the plain language of the statute itself."); Gilday v. Mecosta County, 124 F.3d 760, 767 (1997) (same).

tially limited in a major life activity, as the text unequivocally requires.[91] Thus, the requisite judicial process of the step-one inquiry asks first, whether the statute clearly defines the judicial role in considering the use and availability of mitigating measures, and second, whether the statute clearly excludes ignoring mitigating measures in making the disability determination.

While the answer to the former is probably "no," the answer to the latter is "yes." Congress' use of broad, undefined terms such as "substantially limits" implies that it intended to delegate to the agencies a role in developing the definitions of key statutory terms. But however disability is defined, Congress clearly intended to exclude from ADA protection plaintiffs who are not substantially limited in a major life activity.[92]

Of course, the EEOC interpretation is meaningless if applied only after a plaintiff meets the "substantially limits" requirement. Such a construction would assist only those plaintiffs who already qualify in qualifying as disabled. It is only a plaintiff who is not substantially limited in a major life activity, but who might be so considered under the EEOC interpretation, that can benefit from this construction. Because they are not limited in any substantial way, the text excludes such plaintiffs.

The *Gilday* court may have overstated the case in claiming that the "statutory text is unambiguous."[93] But the *Sutton* court correctly addressed the issue in spite of any ambiguity, finding that "the EEOC's Interpretive Guidance is in direct conflict with the plain language of the ADA."[94] Thus, this issue should be resolved in *Chevron*'s first step, negating the need for a step-two inquiry. Nonetheless, courts continue to apply a step-two analysis.

### 2. How Much Deference?

The court must apply step two of the *Chevron* test if it finds in step one that the statute does not answer "the precise question at issue."[95] Step two requires that the court defer to an agency interpretation if it

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91 *See* 42 U.S.C. § 12102(2) (1994).

92 *See id.*

93 *Gilday*, 124 F.3d at 767 (Kennedy, J., concurring in part and dissenting in part). *Cf.* Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 859 (1st Cir. 1998) ("The statutory language, on its face, gives no clue as to which interpretation Congress intended.").

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

95 Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).

is "based on a permissible construction of the statute."[96] Professor Anthony states this inquiry in two parts: "[I]s there express delegation of authority to elucidate by regulation? If not, is there implicit delegation of some sort of authority to fill the gap?"[97]

The Court stated in *Chevron*, "If there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," it is given controlling weight unless "arbitrary, capricious or manifestly contrary to the statute."[98] Where the delegation is implicit, deference is appropriate providing the agency's interpretation is reasonable.[99] However, where there is no delegation of lawmaking authority, or where the issue in question is beyond the scope of any delegation, the court is not bound by the agency's interpretation. Rather, in Professor Anthony's words, it should extend "to the agency's view such special consideration as it finds helpful."[100]

Professor Anthony also states that *Chevron* deference is inappropriate for interpretations "expressed only in an informal format—such as in interpretive rules and policy statements."[101] Professor Herz agrees that interpretive rules lack *Chevron* credentials, stating that "agency views of congressional meaning" merit only *Skidmore* deference.[102] An agency opinion in such a format is "not ordinarily . . . a tool [by which] Congress intends to implement its delegation of lawmaking authority."[103]

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96 *Id.*

97 Anthony, *supra* note 80, at 17 (numbering omitted). Phrasing the step-two inquiry in terms of delegation rather than reasonableness is preferable to avoid what Professor Ronald M. Levin describes as "internal incoherence":

> Under the structure of the *Chevron* formula, a court should not reach step two unless it has already found during step one that the statute supports the government's interpretation or at least is ambiguous with respect to it. In other words, the agency's view is not clearly contrary to the meaning of the statute. If the court has made such a finding, one would think that the government's interpretation must be at least "reasonable" in the court's eyes. Why, then, is the second step not superfluous? Obviously, if it is to be meaningful, the step two inquiry has to involve qualitatively different considerations from those implicated during step one.

Levin, *supra* note 87, at 1261.

98 *Chevron*, 467 U.S. at 844.

99 *See id.*

100 Anthony, *supra* note 80, at 40–41 (referring to *Skidmore* deference).

101 *Id.* at 43.

102 Herz, *supra* note 75, at 215.

103 Anthony, *supra* note 80, at 46. Professor Anthony describes this rationale as follows:

> [A] practice of routine acceptance for interpretations expressed in [informal] formats would, in abdication of judicial duties under *Marbury*, endow

Whether Congress has delegated authority to an agency is significant because separation of powers doctrine requires the courts to recognize the will of Congress. The judicial branch, however, reserves the power to say what the law is.[104] Thus, it is the court that determines whether there has been a delegation, but an agency interpretation controls where it is within the scope of such delegation. *Chevron* presumes that an unreasonable interpretation falls outside the permissible scope of any implicitly delegated authority. Where the delegation is explicit, *Chevron* presumes that the authority is exceeded only when the agency position is "arbitrary, capricious or manifestly contrary to the statute."[105]

In considering the issue of mitigating measures under the ADA, recent circuit decisions have recognized that something less than full *Chevron* deference to the EEOC is appropriate.[106] Most apply a degree of deference similar to that required by *Skidmore*.[107] Because the EEOC's interpretation is expressed informally in an appendix to its rules, this lesser degree of deference is appropriate.[108] Furthermore, it is unclear whether the scope of Congress' delegation of law-making authority to the EEOC reaches this issue.[109] Thus, *Chevron*'s second

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> them with force of law where Congress did not intend them to have such force. By this process, the agency would bind the public without itself being bound by interpretations in these formats. And since these formats are exempt from APA public participation requirements, an especially odious frustration is visited upon the affected private parties: they are bound by a proposition they had no opportunity to help shape and will have no meaningful opportunity to challenge when it is applied to them.

*Id.* at 57–58.

104 *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

105 *Chevron*, 467 U.S. at 844.

106 *See* Washington v. HCA Health Servs. of Tex., Inc., 152 F.3d 464, 470 (1998); Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 864 (1998); Sutton v. United Airlines, Inc., 130 F.3d 893, 899 n.3 (1997); Gilday v. Mecosta County, 124 F.3d 760, 763 n.2 (6th Cir. 1997); *id.* at 766 (Kennedy, J., concurring in part and dissenting in part).

107 *See supra* note 106 (collecting cases discussing deference).

108 *See Washington*, 152 F.3d at 469–70; *Arnold*, 136 F.3d at 864; *Sutton*, 130 F.3d at 899 n.3; *Gilday*, 124 F.3d at 766 (Kennedy, J., concurring in part and dissenting in part). *But see* Wilson v. Pennsylvania State Police Dep't, 964 F. Supp. 898, 902 (E.D. Pa. 1997) (citing 56 Fed. Reg. 8578 (1991) and 56 Fed. Reg. 35,726 (1991)).

109 *See supra* text accompanying note 100; *see also* Burgdorf, *supra* note 4, at 463 (citing 42 U.S.C.A. §§ 12116–17 (West Supp. 1990)). Professor Robert L. Burgdorf describes Congress' delegation:

> The [EEOC] is directed to promulgate regulations for carrying out title I [of the ADA] .... The EEOC, the Attorney General and the Office of Federal Contract Compliance Programs are directed to develop and issue ... regulations containing "coordinating mechanisms" to avoid duplica-

step confirms that courts are not bound by the EEOC's position on mitigating measures.

It remains unclear, however, precisely how much deference is required under *Skidmore*. The circuit courts speak of "some deference,"[110] "some consideration,"[111] "some weight on judicial review,"[112] or "something less than full *Chevron* deference."[113] The Fifth Circuit conducts a factor analysis to determine the appropriate amount of deference.[114] Coupled with a supportive legislative history,[115] this lesser degree of deference may be sufficient to persuade many courts to refuse to consider mitigating measures. Nonetheless, "a reviewing court must conduct an independent evaluation" of the issue rather than simply deferring to the agency's construction.[116]

### *B. Interpreting Legislative History*

In conducting an independent evaluation, many courts have sought guidance in the legislative history of the ADA.[117] A House Committee on Education and Labor Report (House Labor Report) addresses the issue:

> Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under

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tion and inconsistency with the requirements and enforcement of the Rehabilitation Act of 1973.

*Id.* (quoting 42 U.S.C.A. § 12117(b)). Professor Harris states that Congress "vested in the EEOC the authority and responsibility to promulgate regulations interpreting the Act." Harris, *supra* note 4, at 578.

110 *Washington*, 152 F.3d at 470; *Gilday*, 124 F.3d at 766 (Kennedy, J., concurring in part and dissenting in part) (quoting Reno v. Koray, 515 U.S. 50, 61 (1995)).

111 *Sutton*, 130 F.3d at 899 n.3.

112 *Gilday*, 124 F.3d at 763 n.2 (quoting KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW § 6.3 at 242–43 (3d ed. 1994)). The court stated that such "agency interpretation should be given effect if persuasive." *Id.*

113 *Arnold*, 136 F.3d at 864 (quoting Commonwealth of Mass. v. F.D.I.C., 102 F.3d 615, 621 (1st Cir. 1996)).

114 *See Washington*, 152 F.3d at 470.

115 *See infra* notes 118–19.

116 *Gilday*, 124 F.3d at 763 n.2.

117 *See Washington*, 152 F.3d at 467–68; *Arnold*, 136 F.3d at 859–60; Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937 (3rd Cir. 1997); *Gilday*, 124 F.3d at 764–65; Harris v. H & W Contracting Co., 102 F.3d 516, 521 (11th Cir. 1996).

> the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.[118]

A House Judiciary Committee Report and a Senate Report also address the issue in nearly identical language.[119]

In *Arnold*, the court examined the House and Senate Reports in light of the structure of the ADA and its broad remedial purpose:

> Both the explicit language and the illustrative examples included in the ADA's legislative history make it abundantly clear that Congress intended the analysis of an "impairment" and of the question whether it "substantially limits a major life activity" to be made on the basis of the underlying (physical or mental) condition, without considering the ameliorative effects of medication, prostheses, or other mitigating measures.[120]

In *Washington*, however, the court acknowledged that the Senate Report is "to some extent inconsistent with the House Reports in its treatment of individuals with controlled disabilities."[121] The Report includes language similar to that quoted above, stating that courts should not consider mitigating measures. But it goes on to describe one purpose of the third prong of the ADA. According to the Report, the third prong, which protects individuals from "being regarded as" disabled,[122] ensures "that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions."[123] This section of the report lists as examples "individuals with controlled diabetes or epilepsy."[124]

If controlled diabetes and epilepsy "do not . . . limit major life activities,"[125] as the Report suggests, then neither do they qualify as disabilities. In *Washington*, the court ultimately dismissed this argument, finding that the Senate Report merited less weight than the

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118 H.R. REP. No. 101-485(II), at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334.

119 *See* H.R. REP. No. 101-485(III), at 28–29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 451 ("The impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation."); S. REP. No. 101-116, at 23 (1989) ([W]hether a person has a disability should be assessed without regard to the availability of mitigating measures such as reasonable accommodations or auxiliary aids.").

120 *Arnold*, 136 F.3d at 859.

121 *Washington.*, 152 F.3d at 468.

122 42 U.S.C. § 12102(2)(C).

123 S. REP. No. 101-116, at 24 (1989).

124 *Id.*

125 *Id.*

House Reports.[126] In *Arnold*, the court also briefly addressed and dismissed this argument, finding that "the Senate Report is not actually inconsistent with that report's prior language (identical with that of the House Report) stating that courts should focus on the untreated impairments."[127] The court concluded that Congress' intent on the issue is "abundantly clear."[128]

Two additional inconsistencies exist within the House Labor Report. First, the Report clearly states that an impairment is not a disability "for the purposes of the ADA unless its *severity* is such that it results in a 'substantial limitation of one or more major life activities.'"[129] Whether an impairment is severe is closely related to the availability and use of mitigating measures. For example, cancer and AIDS are severe because of their life-threatening effects, but also because they are difficult to treat and often impossible to cure. Likewise, dehydration is not severe if it is readily treated by drinking and retaining liquids. It becomes serious, however, when one of these mitigating measures is unavailable. Thus, as far as the Report asks courts to determine whether an impairment is severe without considering mitigating measures, it is inconsistent.

Second, the Report clearly states that "[w]hether a person has a disability should be assessed without regard to the *availability* of mitigating measures."[130] The Report is not as clear regarding whether courts should consider the *use* of mitigating measures. An approach which considers use, but not availability, would be consistent with a "case by case," factual inquiry such as the EEOC interpretation requires.[131] Considering impairments in a hypothetical, unmitigated state, however, does not seem consistent with that requirement. The subsequent sentence in the Report states that "a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss *may be corrected* through the use of a hearing aid."[132] The language, "may be corrected," could be construed to include only availability and not actual use. However, the next sentence contradicts such an interpretation, stating that "impairments, such as epilepsy or diabetes . . . are covered under the first prong of the defi-

126 *See Washington*, 152 F.3d at 468.

127 Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 860 (1st Cir. 1998).

128 *Id.* at 859.

129 H.R. REP. No. 101-485(II), at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334 (emphasis added).

130 *Id.* (emphasis added).

131 29 C.F.R. § 1630.2(j), app. (1997).

132 H.R. REP. No. 101-485(II), at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334 (emphasis added).

nition of disability, even if the effects of the impairment *are controlled* by medication."[133] The court, then, is left with inconsistent obligations—to conduct a case by case, factual inquiry into an impairment, and to do so considering the impairment in its hypothetical, unmitigated state.

These inconsistencies in the ADA's legislative history render it less helpful than it at first appears. Although certain sections of the history bolster the EEOC interpretation, other sections implicitly contradict it. The EEOC may have the stronger argument, but the First Circuit overstated the case in finding the legislative history "abundantly clear"[134] on this issue.

## V. CONCLUSION

The courts addressing the mitigating measures issue have discussed the issue in terms of ambiguity and reasonableness. A more academic, and accurate, framework might phrase the inquiry in different terms—perhaps statutory meaning and delegation of law-making authority would be more precise. Such a framework follows.

When confronted with the mitigating measures issue, courts must perform a *Chevron* analysis. Step one of this process inquires first, whether the statute clearly defines the judicial role in considering the use and availability of mitigating measures. It does not. Step one also inquires, more specifically, whether the meaning of the statute clearly excludes ignoring mitigating measures in making the disability determination. It does. Because ignoring mitigating measures would grant ADA protection to plaintiffs the statute plainly excludes—plaintiffs who face no substantial limitation—the statute does answer this question. Because the statute resolves the issue, the inquiry should end here.

Even if a court decides the statute does not provide an answer, step two of the *Chevron* analysis allows it to consider mitigating measures. Step two inquires first, whether Congress has explicitly delegated law-making authority to the EEOC, and second, whether it has done so implicitly. Because the EEOC's interpretation is expressed informally, it falls outside the scope of any delegated authority. Thus, *Chevron*'s second step confirms that courts are not bound by the EEOC's position but must grant it "some deference"—a degree of deference which is not clearly defined.

A court may also look to the ADA's legislative history for guidance. Although sections of the history support the EEOC's position,

133 *Id.* (emphasis added).

134 Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 859 (1998).

other sections are implicitly inconsistent, both internally and externally. This inconsistency greatly limits its value as an interpretive tool.

While we may have to wait for a Supreme Court decision to settle the issue,[135] the evolution of the judicial process this issue warrants is nearly complete. The dialogue among the circuits, starting with *Gilday*, has contributed significantly to the development of this process. Recent scholarship may contribute similarly.[136] Although some debate remains regarding the degree of deference the EEOC's interpretation merits and the value of the ADA's legislative history, the decisions since *Gilday* are nearly unanimous regarding the framework of the *Chevron* analysis. With this framework intact, we can expect more consistent and predictable results as courts face the mitigating measures issue in the future.

*Jonathan Bridges**

135 This wait may be brief since the Court recently granted certiorari in *Sutton v. United Airlines, Inc.*, No. 97-1943, 1999 WL 5326 (Jan. 8, 1999).

136 *See supra* note 4.

* Candidate for Juris Doctor, Notre Dame Law School, 2000; M.A., Ball State University, 1993; B.A., Friends University, 1991.