

## TASC/NAPAS

### Q&A on the Impact of Potential Mitigating Measures on an Individual's Impairment

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**Q.** I am evaluating whether to move forward with an ADA Title I case and an ADA Title III case. In each case, the potential plaintiff has chosen not to use a mitigating measure that might lessen the impact of his impairment. Can a defendant successfully argue that the potential mitigating measure must be considered in determining whether a person is substantially limited in a major life activity?

**A.** Since 1999, when the Supreme Court decided what has come to be known as the *ASutton* Trilogy,<sup>@</sup> lower courts have divided on the question of whether a person who fails to use available mitigating measures will be found to have a disability (and, thus, be protected by the ADA). This Q&A discusses what *Sutton* says about this question; both the pre-*Sutton* and post-*Sutton* case law; and some practical tips for consideration when faced with this issue.

#### **1. The Sutton Trilogy**

In 1999, the Supreme Court decided three cases that addressed the role of mitigating measures in determining whether a person has a "disability" in order to be protected by the ADA. In the lead case, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), the Court held that "if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures B both positive and negative B must be taken into account when judging whether that person is >substantially limited' in a major life activity and thus >disabled' under the Act." *Id.* at 482. The Court ruled that the plaintiffs, who had severe visual myopia that was corrected to 20/20 when wearing glasses, did not have disabilities because they were not substantially limited in any major life activity when they used their corrective lenses. *Id.* at 475, 488. The Court noted that there are a number of medical devices that might be deemed mitigating measures (such as hearing aids and prosthetic limbs). *See id.* at 485, 488. The two companion cases concluded that mitigating measures might also include medication and the body's own ability (consciously or subconsciously) to compensate for an impairment. *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 521 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565-66 (1999).

*Sutton*, *Murphy*, and *Albertson* involved plaintiffs who availed themselves of mitigating measures. There is nothing in *Sutton* that suggests that ADA plaintiffs who do not use available mitigating measures are not protected by the ADA or that ADA plaintiffs' impairments must be assessed based on a hypothetical mitigated state. To the contrary, an examination of the key rationales underlying *Sutton* suggests that courts should not take into account *potential* mitigating measures that are not used by the plaintiff. In *Sutton*, the Court emphasized that the ADA's definition of disability (*i.e.*, a "physical or mental impairment that substantially limits one or more ... major life activities") is phrased in the present tense. *Sutton*, 527 U.S. at 482. The Court noted that this suggests that the language is appropriately construed as requiring that an impairment is presently B not potentially or hypothetically B substantially limiting. *Id.* The Court further stressed that the ADA requires an individualized assessment to determine whether a person has a disability and that it would be inappropriate to speculate about whether a person who uses a mitigating measure would be substantially limited if he did not do so. *Id.* at 483. To hold otherwise, the Court observed, "would create a system in which persons often must be treated as members of a group of people with similar impairments, rather than as individuals. This is contrary to both the letter and spirit of the ADA." *Id.* at 483-84. The Court specifically wrote: "The use or nonuse of a corrective device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual with an impairment *actually* faces are in fact substantially limiting." *Id.* at 488 (emphasis in original).

Following these rationales, one commentator has suggested that *Sutton's* criticism of speculation as a basis for assessing a person's disability supports the argument that courts should not consider a person's failure to use mitigating measures to assess disability under the ADA. Sarah Shaw, *Why Courts Cannot Deny ADA Protection to Plaintiffs Who Do Not Use Available Mitigating Measures for their Impairments*, 90 Cal. L. Rev. 1981 (2002). In this article, the author notes that consideration of potential mitigating measures will require courts and litigants to speculate about 1) the effectiveness of the proposed treatment; 2) the potential side effects of treatment (since *Sutton* requires analysis of both the positive and negative effects of corrective measures); and 3) the plaintiff's ability to comply with treatment. *Id.* at 2007-13. The author also notes that employers' interests can be protected without consideration of an individual's failure to use mitigating measures to assess whether he has a substantially limiting disability. The failure to use mitigating measures might often result in rejection of the plaintiffs' cases for other reasons (*e.g.*, because they will not be qualified to perform the essential job functions or because the failure might lead to a valid reason for his termination). *Id.* at 2020-25.

While the rationales supporting *Sutton* would seem to preclude consideration of the potential impact of mitigating measures on an individual's impairment, lower courts B both before and after *Sutton* B have generally taken a more hostile approach to plaintiffs

who do not use available mitigating measures.

## **2. Pre-Sutton Cases**

Even before *Sutton*, courts had suggested that a plaintiff's failure to use available mitigating measures would B for one reason or another B doom her case. In *Siefken v. Village of Arlington Heights*, 65 F.3d 664 (7th Cir. 1995), the court ruled in favor of the defendant in an ADA claim brought by a police officer to challenge his termination. The plaintiff had a severe diabetic reaction while on duty, which caused him to drive his squad car at high speeds in a residential neighborhood. The court suggested that his termination was not caused by his diabetes, but, rather, by his failure to properly monitor his diabetes. While the court's analysis was phrased in terms of causation rather than whether the plaintiff's diabetes substantially limited his major life activities, it also indicated that the plaintiff was not qualified because he could not meet the employer's legitimate job expectations "due to his failure to control a controllable disability." *Id.* at 667. The Eighth Circuit followed the *Siefken* analysis in *Burroughs v. Springfield*, 163 F.3d 505, 507-09 (8th Cir. 1998), which similarly involved a police officer who did not take steps to control his diabetes.

While *Siefken* and *Burroughs* may be construed as situations in which the plaintiffs' failure to take mitigating measures rendered them a direct threat in their positions as police officers, *see Why Courts Cannot Deny ADA Protection to Plaintiffs Who Do Not Use Available Mitigating Measures for their Impairments*, 90 Cal. L. Rev. at 2001, other courts in pre-*Sutton* cases have considered the plaintiffs' failure to use mitigating measures in less dire contexts. In *Pangalos v. Prudential Co. of America*, No. 96-0167, 1996 WL 612469 (E.D. Pa. Oct. 15, 1996), *aff'd mem. on other grounds*, 118 F.3d 1577 (3d Cir.), *cert. denied*, 522 U.S. 1008 (1997), for example, the court held, *inter alia*, that an insurance salesman with ulcerative colitis did not have a disability because his impairment "could readily be remedied surgically" by removal of his colon. *Id.* at \*3. In *Bowers v. Multimedia Cablevision, Inc.*, No. 96-1298, 1998 WL 856074 (D. Kan. Nov. 3, 1998), the court held that a plaintiff who stopped taking his prescribed anti-depressant medication did not have a disability because, if he took his medications as prescribed, his mental impairments would not be substantially limiting. *Id.* at \*4. The court reasoned that a person cannot secure protection under the ADA "by unilaterally deciding, without justification, not to use prescribed medication which corrects or alleviates his condition." *Id.* \*4.

One pre-*Sutton* case that recognizes some limits to the relevance of available (but not used) mitigating measures is *Testerman v. Chrysler Corp.*, No. 95-240, 1997 WL 820934 (D. Del. Dec. 30, 1997). In that case, the plaintiff had depression and diabetes, but he "did not consistently monitor his condition, take his insulin, or otherwise control his diabetes to the greatest extent possible." *Id.* at \*12. The court held that, even if the plaintiff's diabetes would not have been substantially limiting if it had been "more

diligently treated," the defendant was not entitled to summary judgment because of the possibility that the plaintiff's depression affected his ability to mitigate his diabetes. *Id.* at \*13. The court ruled that, if the plaintiff could show that the depression led to his non-compliance with diabetes treatment, then he should not be "penalized" for failure to mitigate his diabetes and would be evaluated in "the state presented." *Id.*

### **3. Post-Sutton Cases**

The cases after *Sutton* have similarly skewed toward consideration of a plaintiff's failure to use available mitigating measures. In *Hein v. All America Plywood Co., Inc.*, 232 F.3d 482 (6th Cir. 2000), an employer fired a truck driver who refused to make an out-of-town delivery because he would have run out of his hypertension medication prior to his return. The court held that "it was Hein's voluntary failure to obtain medication, rather than the physical condition of hypertension itself, that was the direct cause of his temporary inability to work." at 487.

Other cases that presented more straightforward fact situations in which plaintiffs did not use mitigating measures also resulted in losses for the plaintiffs.

Ë In *Tangires v. The Johns Hopkins Hosp.*, 79 F. Supp.2d 587 (D. Md.), *aff'd mem.*, 230 F.3d 1354, 2000 WL 1350647 (4th Cir. 2000), the plaintiff refused to follow her physicians' recommendations to take steroids for her asthma based on her persistent, but unsubstantiated, concerns about the impact of steroids on her health. Noting that asthma is readily treatable with medication and citing *Sutton*, the court ruled: "Since plaintiff's asthma is correctable by medication and since she voluntarily refused the recommended medication, her asthma did not substantially limit her in any major life activity." 79 F. Supp.2d at 596.

Ë The court in *White v. Coyne International Enterprises Corp.*, No. 3:02-CV-7505, 2003 WL 22060545 (N.D. Ohio July 23, 2003), unequivocally ruled that *Sutton* required consideration of failure to use mitigating measures. In that case, a truck driver with diabetes claimed he had intermittent episodes of hyperglycemia or hypoglycemia. The plaintiff did not consistently take his medication or control his diet, and his physician stated that the plaintiff would not be restricted in his ability to work with proper diet and medication. While the case involved Ohio's employment discrimination statute (rather than the ADA), the court held that the laws should be interpreted

consistently and concluded that "[i]t would go against the holding of *Sutton* to label plaintiff >disabled,' even though he did not take available mitigating measures." *Id.* at \*4.

Ë The court in *Hewitt v. Alcan Aluminum Corp.*, 185 F. Supp.2d 183 (N.D.N.Y. 2001), held that an employee, who voluntarily chose not to take medication that he admitted corrected his post-traumatic stress disorder and enabled him to work, did not have a disability under the ADA. *Id.* at 189. The court noted that he had not taken his medication for a year prior to his discharge (which stemmed from several accidents at work) and had offered no valid reason for his failure to do so. *Id.* The plaintiff's assertion that he had one brief period of adverse side effects from the medication several years prior to his discontinuing the medication was not a sufficient justification. *Id.* The court alternatively ruled that the plaintiff was not discharged due to his disability, but because he was a threat to himself and others at the workplace. *Id.* at 189-90.

Ë In *Brashear v. Simms*, 138 F. Supp.2d 693, 695 (D. Md. 2001), the court determined that the plaintiff's smoking/nicotine addiction was not a disability protected by ADA because it is "readily remediable, either by quitting smoking outright through an act of willpower (albeit easier for some than others), or by use of such items as nicotine patches or nicotine chewing gum. If the smokers' nicotine addiction is thus remediable, neither such addiction nor smoking itself qualifies as a disability with the coverage of the ADA, under well-settled Supreme Court precedent." *Id.* at 695 (citing *Sutton*).

One court extended this analysis to hold that the failure to take the steps necessary to secure an appropriate diagnosis precluded the plaintiff from establishing a disability under the ADA. In *Rose v. Home Depot U.S.A., Inc.*, 186 F. Supp.2d 595 (D. Md. 2002), the plaintiff alleged he had vasomotor rhinitis which substantially limited his ability to breathe, sleep, and work. The court determined that this is a "common, treatable condition," but further ruled that plaintiff might not have suffered from it at all. *Id.* 614. The court found that plaintiff "did not follow the proper protocol in determining whether he had vasomotor rhinitis (including, for example, quitting smoking so that other causes for his symptoms could be eliminated). *Id.* at 614-15. Consequently, as a matter of law, he did not receive a proper treatment plan for his impairment. [His] failure to take proper measures to gain a proper diagnosis necessary to a proper treatment is the legal equivalent of a refusal to avail oneself of proper treatment." Thus, the court concluded,

he had no disability as defined in the ADA. *Id.* at 614.

In addition to being a questionable application of the *Sutton* holding (*see* discussion on page 2, above), cases such as these also arguably are inconsistent with the Supreme Court's holding in *Bragdon v. Abbott*, 524 U.S. 624 (1998). In *Bragdon*, a woman with asymptomatic HIV argued that she was substantially limited in the major life activity of reproduction. The Court rejected defendant's argument that plaintiff was not substantially limited because she in fact could have a child but chose not to because of her illness. While *Bragdon* was decided before the *Sutton* Trilogy, the Court seems to say that whether a person has a disability does not depend on personal choices. "In the end, the disability definition does not turn on personal choice. When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable." 524 U.S. 624, 641 (1998)

There are, however, a few post-*Sutton* cases that holding that the ADA does not preclude recovery by plaintiffs who decline to use mitigating measures. In *Finical v. Collections Unlimited, Inc.*, 65 F. Supp.2d 1032 (D. Ariz. 1999), a woman with a hearing impairment contended that her employer failed to provide her with a reasonable accommodation (a telephone headset to amplify conversations) to enable her to perform her job as a telephone collector. The plaintiff's own expert testified that the plaintiff might benefit from hearing aids. The plaintiff indicated that she had tried hearing aids, but stopped using them because they picked up background noise that she found annoying. The court rejected the defendant's argument that *Sutton* required consideration of whether the plaintiff's hearing impairment would be substantially limiting if she used hearing aids as corrective devices. The court noted that, in *Sutton*, speculation as to whether the plaintiffs' vision would be substantially limited without the mitigating measures (*i.e.*, corrective lenses) they used was inappropriate and, so too, it would be inappropriate to speculate on whether the plaintiff's hearing would be substantially limited if she did use a corrective device (*i.e.*, hearing aids). "Neither approach assesses the limitations the individual actually faces in the present." *Id.* at 1038.

The court in *Capizzi v. County of Placer*, 135 F. Supp.2d 1105 (E.D. Cal. 2001), adopted a more novel approach to the issue. In that case, the defendant presented evidence that available therapies (such as anti-inflammatory medications, cortisone injections, or surgery) would likely provide relief for the plaintiff's bilateral elbow tendinitis and argued that her failure to use cortisone injections or surgery precluded a finding that she had a disability. *Id.* at 1112-13. The court held that *Sutton* did not preclude recovery by the plaintiff. The court determined, however, that Title I allows for a reduction in back pay for the time that the plaintiff could have mitigated her disability by reasonable diligence. *Id.* at 1112. Thus, the court concluded that a failure to mitigate (if proven to be reasonable) would warrant a reduction in the back pay award, but would not defeat the plaintiff's claim. *Id.* at 1112-13. <sup>[1]</sup>

### **D. Practice Tips**

Since a person who does not have a disability cannot sustain an ADA claim, advocates need to obtain information related to mitigation issues from their clients as soon as possible in order to evaluate properly the chances of prevailing in a case. Issues to be considered include the following:

- Has the client taken necessary steps to get appropriate treatment? If not, why not? Has the client complied with the steps necessary to secure appropriate treatment? Has the client shopped for advice among various practitioners and/or received conflicting advice from various practitioners?
- To what extent can the client's impairment be controlled or cured by medication? by corrective devices? by physical, occupational, speech, or other type of therapy? by surgery?
- Has the client complied with the treatment recommendations of her treatment professionals?
- If the client has not complied with the treatment recommendations, what are his reasons for non-compliance (*e.g.*, likelihood of side effects, fear, mental impairments) that limit ability to comply?
- To what extent does the client's failure to use mitigating measures impact other aspects of the case (*e.g.*, did the failure to mitigate cause the client's termination; did it result in the client's becoming a "direct threat," did it render him unqualified to perform his essential job functions)?
- Plaintiffs are more likely to overcome the failure to use mitigating measures when they can demonstrate that there is a good reason why they failed to take the mitigating measures in question, such as problematic side effects or ineffectiveness. *See, e.g., Finical and Testerman*, discussed above.
- Plaintiffs may need to educate courts perhaps using expert testimony on whether mitigating measures being advanced by defendants in fact would be effective. For example, in cases involving psychiatric disabilities, expert testimony may be necessary to overcome assumptions and speculation regarding

the nature of mental illness, the effectiveness of medications, and what constitutes appropriate treatment. Plaintiffs can attempt to demonstrate that medications vary tremendously from one person to another in their effectiveness and the disabling side effects they cause and that finding an effective medication or combination of medications and an effective dosage can be an extremely complicated endeavor. Such plaintiffs could show that it would be problematic for a court to determine that using a particular psychiatric medication would mitigate a person's illness absent demonstrated effectiveness of the medication for that individual.

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[1] While the EEOC has taken the position that available but unused mitigating measures should not be considered when determining whether someone has a substantial limitation, the value of this position is questionable given the Supreme Court's refusal in *Sutton* to give much weight to the EEOC's interpretation of its regulations on the definition of disability.