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**Hearing On:**
**H.R. 3195, the "ADA Restoration Act of 2007"**
**Committee on Education and Labor**
**United States House of Representatives**
**Washington, D.C.**
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It is a pleasure to be here as you consider changes to the Americans with Disabilities Act, the most important piece of civil rights legislation of our generation.

It is especially great to be back in this place where I formed wonderful memories of my teenage years – as both a Congressional Page, and as an intern for Senator Paul Sarbanes. And what an honor it is to be in front of this Committee, with representatives from my hometown, Baltimore (Congressman Sarbanes), and my current home, Long Island (Congressman Bishop).

My name is David Fram, and I'm the Director of ADA and EEO Services for the National Employment Law Institute. In this role, I train a wide range of groups on how to comply with and how to enforce the ADA. These groups include virtually every federal agency (including the U.S. House of Representatives and the U.S. Senate), most Fortune 500 companies, colleges and universities, non-profits, unions, and plaintiffs' organizations. I have also written a book, Resolving ADA Workplace Questions, now in its 23rd edition, which analyzes every major ADA case from the Supreme Court and the federal Courts of Appeals, as well as any new positions from the Equal Employment Opportunity Commission.

Prior to my work with the Institute, I was a Policy Attorney at the EEOC from 1991 through 1996. In that job, I was part of the ADA Division, working on EEOC documents interpreting and enforcing the ADA and the Rehabilitation Act.

A number of employers and employer-oriented organizations expressed concerns to me about the changes proposed by the ADA Restoration Act. Because of my experience on both sides of these issues, these groups have encouraged me to testify concerning my personal concerns on the proposed legislation. I cannot in all candor, however, tell you that these groups will necessarily agree with *everything* I'm about to say.

Before anyone can intelligently discuss those changes, it's critical to briefly review the most important provisions of the ADA as it currently exists.

The employment provisions of the ADA accomplish two major goals. First, the law says that an employer cannot discriminate against a qualified individual with a disability in, among other

things, hiring, firing, employment terms and conditions, and insurance coverage. Second, the law says that these non-discrimination provisions require an employer to provide "reasonable accommodations" to otherwise qualified individuals, so that these individuals can perform the essential functions of the job.[1]

In addition to these basic provisions, the ADA also prohibits employers from asking any disability-related questions or requiring medical examinations of applicants, and allows employers to ask these questions and require these exams of employees only when these are considered "job-related and consistent with business necessity."[2]

As you have heard from other witnesses, the law specifically defines someone with a "disability" as an individual who currently has, has a "record of," or is "regarded as" having an "impairment" that "substantially limits" a "major life activity."[3] This language was specifically taken from the Rehabilitation Act of 1973.[4] Courts have interpreted broadly what is considered an impairment – any physical or mental disorder is an impairment.[5] So, this would include a chipped tooth, the flu, or a broken finger. The reason these conditions would not be considered disabilities is that they do not "substantially limit" a major life activity. In determining whether an impairment "substantially limits" a major life activity, courts analyze the individual's abilities compared to those of the average person.[6] Ever since the ADA came into force, one important question has been whether to analyze the individual's condition in a medicated or mitigated state (if s/he medicates or mitigates), or whether to analyze what the condition would be like without medication or mitigation. On its face, the statutory language arguably suggested that an individual should be analyzed with medications or mitigating measures. However, based on the ADA's legislative history, the EEOC instructed employers to look at what the individual's condition would be like without medication or mitigation, and many federal courts followed this approach.[7]

Indeed, shortly before the Supreme Court weighed in on the issue, the Fifth Circuit Court of Appeals noted the "most *reasonable* reading of the ADA" was to consider mitigating measures in determining when an individual had a disability.[8] But, the court also pointed out that the EEOC's Guidelines, the legislative history and the majority of other federal courts provided that an individual's mitigating measures should not be considered in determining whether an individual had a disability.[9] The Fifth Circuit adopted a middle of the road approach recognizing that while Congress intended that courts should consider people in their unmitigated state in deciding whether an individual was disabled, it didn't make sense for courts not to consider some mitigating measures in situations where a person's condition has been permanently corrected or ameliorated. In fact, the court held that serious conditions similar to those mentioned in the legislative history and EEOC guidelines, such as diabetes, epilepsy, hearing impairments, etc. would be considered in their unmitigated state.[10] The Supreme Court, however, held the opposite when it decided Sutton v. United Airlines,[11] which I'll talk about shortly.

Once the individual is determined to have a covered disability, the next question is whether the individual is "qualified," which means that the individual satisfies the job's background

requirements and that s/he can perform the job's "essential functions," with a reasonable accommodation if needed.[12] As with other discrimination laws, courts use the McDonnell Douglas framework,[13] requiring the individual to show as part of his prima facie case that s/he has a disability and that s/he is qualified. In this regard, the courts have put the burden of proof on the employer to demonstrate which functions are essential, and then put the burden on the individual to show that s/he can do those essential functions.[14]

I would like to address the three major changes proposed by the ADA Restoration Act: (1) changing the definition of disability to cover all impairments, regardless of the seriousness of the impairment; (2) reversing the Supreme Court cases instructing courts to analyze conditions as controlled with medication or mitigating measures if the individual uses such measures; and (3) changing the burden of proof to require an employer to show that an individual is not qualified.

1. Changing the Definition of Disability

The "ADA Restoration Act" would change the definition of disability to cover any physical or mental impairment, and to remove the requirement that the impairment "substantially limit" a major life activity. This, therefore, does away with the notion that the impairment has to have some degree of seriousness and some degree of duration. As a result, a chipped tooth, the flu, and a broken finger would automatically be covered as disabilities. It also means that alopecia (having a hair impairment, like mine) would be a covered disability.

It is simply incorrect to say that this restores the ADA to what it once was. The statute, on its face, states that the impairment has to substantially limit a major life activity.[15] The Rehabilitation Act, on which the ADA was based, states that the impairment has to substantially limit a major life activity.[16] The EEOC's regulations (and the Appendix to the regulations, and the EEOC's own Compliance Manual instructions on the definition of disability), all state that the impairment must substantially limit a major life activity.[17] In fact, in my years at the EEOC and in all of my years with the Institute, I've never heard anyone say that the ADA was meant to cover people with any impairment. So, it is not accurate to say that this is a "restoration" act. Rather, this would be a new law that is vastly broader than the ADA.

Would it be good policy to change the law in such a sweeping way? I understand that the proponents of the bill want to change the ADA so that the issue becomes whether discrimination has occurred, rather than focusing on whether an individual's condition is a disability.[18] The problem with this view is that the ADA is not like the traditional discrimination laws. The ADA goes several steps further. As we've talked about, it requires reasonable accommodation for the individual with a disability. In fact, as the Supreme Court has noted, the ADA requires employers to give preferential treatment to individuals with disabilities. If the proposed changes were enacted, it would mean that an employer would have to provide reasonable accommodation for the person with a chipped tooth or the flu. An employer would have to provide reasonable accommodation for someone with a sprained ankle. An employer would have to provide

reasonable accommodation for someone who is bald who wants time off to get a hair transplant. This couldn't be what Congress intended.

In addition, rewriting the definition of "disability" would have detrimental effects in the workplace. Because employers have limited resources, it means that the person with a sprained ankle could be competing with the veteran who has no legs for the accessible parking space. It means that the person with the flu could be competing with someone with AIDS for the modified schedule. This couldn't be what Congress intended.

The ADA also covers employer-provided health insurance. What this means is that disability-based distinctions in health insurance plans might be illegal.[19] If the definition of disability were changed to cover all impairments, employers could be acting illegally if they had different medical coverage for dental conditions than for other types of medical conditions. Employers would be acting at their peril if they denied medications or medical treatment for baldness, because that would be a disability-based distinction. This couldn't be what Congress intended.

As I also have mentioned, the ADA prohibits pre-offer questions likely to disclose an applicant's disability, and it prohibits those questions of employees unless they are specifically related to the job. But if the definition of disability is changed to cover all impairments, that would make it flatly illegal to ask applicants about any impairments, and to ask employees about any impairments unless specifically related to the job. This means that if an employee comes to work with a broken leg and the supervisor says, "How did you break your leg?" the supervisor has engaged in illegal conduct under the ADA. It also means that if an employee comes to work sneezing and coughing, and his supervisor says, "Do you have a cold?" the supervisor has engaged in illegal conduct under the ADA. This couldn't be what Congress intended.

An even more basic question is whether the ADA is intended to give someone with a sprained ankle the same protections as someone who has paraplegia? Is the ADA intended to put someone with the flu in the same category as someone who has breast cancer and is undergoing chemotherapy and radiation? Is the ADA intended to give someone with a toothache the same rights as someone who has insulin-dependent diabetes? This couldn't be what Congress intended.

2. Reversing the Supreme Court Cases on Mitigating Measures

To me, it is clear that the ADA was never intended to cover every individual with any impairment. But, it also is my view that the effects of the Sutton decision have excluded individuals whom Congress wanted to protect under the law. For example, in one recent Court of Appeals case, a court said that a woman with breast cancer, who had undergone chemotherapy and radiation, had suffered severe nausea, and had been unable to care for herself or to work, was not considered covered under the law.[20] In other cases, individuals with insulin-dependent diabetes and epilepsy were not considered covered under the law even though the legislative history identified those conditions as impairments which were likely to reach the level of disabilities.

A fair reading of the ADA's legislative history supports the notion that the law was to be read expansively and that individuals were to be analyzed in their unmedicated (i.e., unmitigated) state.[21] This approach was grounded in the idea that Congress did not want to exclude people because they took steps to alleviate their conditions. It also was grounded in the idea that otherwise, individuals would be stuck in a Catch 22 – they might only have disabilities if they did not take their medications, but they might not be qualified if they did not take their medications. As I said earlier, the EEOC and most federal courts followed the legislative history.

The Supreme Court, however, decided not to follow the legislative history. In Sutton v. United Airlines,[22] the Supreme Court considered whether the plaintiffs, who wore glasses, should be analyzed with or without their glasses in determining whether their vision impairments were substantially limiting. The Court concluded that individuals should be analyzed with mitigating measures if they used these measures. The Supreme Court arguably could have carved out an exception for glasses (since glasses are so common in our society, and an individual's condition is analyzed as compared to the average person). But they chose instead to say that all individuals, regardless of condition, should be analyzed as mitigated.[23] After Sutton, many plaintiffs have not been able to proceed with a disability discrimination claim because they took medication (even for a serious condition) or used prostheses.[24] This result appears to be inconsistent with legislative intent expressed in legislative history.

3. Changing the Burden of Proof

The ADA Restoration Act also changes the burden of proof in ADA cases, by removing the plaintiff's responsibility to show that s/he is qualified for the job. Instead, the Act puts the burden of proof on the employer to show that the individual is *not* qualified. This is simply not consistent with other employment discrimination laws, which use the McDonnell-Douglas standard, discussed earlier. In addition, from a practical perspective, it makes sense to require the plaintiff to prove that s/he is qualified, since that individual has the critical evidence on this issue. Moreover, the burden of proof has simply not been a problem under the ADA.

Therefore, to change this burden would make the ADA burden of proof scheme different from the other EEO laws, and would not make sense from an evidentiary or practical perspective.

* * *

Conclusion

It boils down to this: the legislation would likely only "restore" the ADA in the sense that it would require courts to analyze an individual's disability status without regard to medication or mitigating measures. But changing the definition of disability to cover everyone in America would not be "restoring" the ADA. In fact, it would dilute the importance of the law for people who have serious conditions, and could lead to a deluge of unintended consequences.

[1] 42 U.S.C. §§ 12101-12213.

[2] 42 U.S.C. §§ 12112(d).

[3] 42 U.S.C. § 12101(2).

[4] 29 U.S.C. § 705(20)(B).

[5] 29 C.F.R. § 1630.2(h). For example, in Agnew v. Heat Treating Services of America, 2005 U.S. App. LEXIS 27884 (6th Cir. 2005)(unpublished), the court noted that a bad back would be an impairment. Similarly, in Benoit v. Technical Manufacturing Corp., 331 F.3d 166 (1st Cir. 2003), the court noted that back and knee strains, caused either by the employee's improper lifting techniques or by his weight gain, were "impairments." In Arrieta-Colon v. Wal-Mart, Inc., 2006 U.S. App. LEXIS 826 (1st Cir. 2006), the court did not disturb the jury's finding that the plaintiff's erectile dysfunction, which required a penile implant (having the side effect of a "constant semi-erection"), was an impairment. Likewise, in Sinclair Williams v. Stark, 2001 U.S. App. LEXIS 5367 (6th Cir. 2001)(unpublished), the court noted that the plaintiff's headaches were an impairment. In Cella v. Villanova University, 2004 U.S. App. LEXIS 21740 (3d Cir. 2004)(unpublished), the court held that the plaintiff's "tennis elbow" was an impairment under the ADA.

[6] 29 C.F.R. § 1630.2(j). See Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499 (7th Cir. 1998)(adopting EEOC's definition of "substantially limits"). Courts compare the individual's condition to the average person in order to determine whether the condition is serious enough. For example, in Collins v. Prudential Investment and Retirement Services, 2005 U.S. App. LEXIS 148 (3d Cir. 2005)(unpublished), the court found that the employee's ADHD did not "substantially limit" her ability to think, learn, concentrate, and remember, where she sometimes became distracted from her tasks, had trouble placing tasks in priority order, and had trouble showing up for events on time. The court noted that "many people who are not suffering from ADHD/ADD must regularly cope with" such limitations. In Bowen v. Income Producing Management of Oklahoma, Inc., 202 F.3d 1282 (10th Cir. 2000), the plaintiff, who suffered a brain injury, claimed that he was substantially limited in learning in light of his memory loss, inability to concentrate and difficulty performing simple math. The court found that he was not "substantially limited" because he had "greater skills and abilities than the average person in general." Similarly, in Wong v. Regents of the University of California, 410 F.3d 1052 (9th Cir. 2005), the court held that the plaintiff was not substantially limited in "learning" or "reading" when compared to the general population. Concerning "learning," the court noted that the plaintiff had completed the first two years of medical school with good grades and without any special accommodations. Concerning reading, the plaintiff claimed that he read very slowly and did much better when he did not have time constraints. The court stated that the plaintiff's evidence that he was limited (compared to his own reading abilities without time limits) was not the relevant issue. Instead, the court held that he had not presented evidence as to the "appropriate standard" -- comparing himself to "what is important in the daily life of most people," such as his ability to read newspapers, government forms, and street signs.

On the other hand, many plaintiffs have shown that, compared to the average person, their impairments were serious enough to be substantially limiting. For example, in Jenkins v. Cleco Power LLC, 487 F.3d 309 (5th Cir. 2007), the court held that where the employee could, with intermittent breaks, sit only for up to three hours per day, he was substantially limited in sitting. In Heiko v. Colombo Savings Bank, F.S.B., 434 F.3d 249 (4th Cir. 2006), the court held that the plaintiff, who had kidney failure, was "substantially limited" in eliminating waste because he "was required to spend at least four hours, three days a week undergoing dialysis in order to remove waste from his body." In Battle v. UPS, Inc., 438 F.3d 856 (8th Cir. 2006), the court held that the plaintiff may have been substantially limited in performing cognitive functions where there was testimony that he "thinks and concentrates at a laborious rate,""has to spend significant extra time working on projects," "cannot think and concentrate about matters unrelated to work," and, therefore, cannot make "household or financial decisions, or discipline[] his children, because he does not have the ability to deal with extraneous or unexpected issues, conflicts, or demands outside of work." In EEOC v. Sears, 417 F.3d 789 (7th Cir. 2005), the court held that where the plaintiff could not "walk the equivalent of one city block without her right leg and feet becoming numb," she could be substantially limited in walking.

[7] Many courts stated that the effects of medication or prosthetic devices were irrelevant in determining whether someone's impairment substantially limits a major life activity. See, e.g., Arnold v. United Parcel Service, Inc., 135 F.3d 1089 (1st Cir. 1998)(diabetes); Taylor v. Phoenixville School District, 174 F.3d 142 (3rd Cir. 1999)(mental disability)(decision vacated); Washington v. HCA Health Services of Texas, 152 F.3d 464 (5th Cir. 1998)(Adult Still Disease); Baert v. Euclid Beverage, Ltd., 149 F.3d 626 (7th Cir. 1998)(diabetes); Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997), cert. denied, 118 S. Ct. 693 (1998)(monocular vision); Holihan v. Lucky Stores, Inc., 87 F.3d 362 (9th Cir. 1996), cert. denied, 117 S. Ct. 1349 (1997); Harris v. H&W Contracting Co., 102 F.3d 516 (11th Cir. 1996)(Graves disease).

[8] Washington v. HCA Health Services of Texas, Inc., 152 F.3d 464, 469 (5th Cir. 1998) (emphasis in original).

[9] Id. at 469-471.

[10] Id. at 470-71.

[11] 527 U.S. 471, 119 S.Ct. 2139 (1999).

[12] 42 U.S.C. 12111(8); 29 C.F.R. § 1630.2(m).

[13] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[14] For example, in Bates v. UPS, Inc., 2007 U.S. App. LEXIS 29870 (9th Cir. 2007), the court noted that the employer must "put forth evidence establishing" which functions are essential (because this information "lies uniquely with the employer"), and the employee "bears the ultimate burden of persuading the fact finder that he can perform the job's essential

functions." Similarly, in Fenney v. Dakota, Minnesota & Railroad Co., 327 F.3d 707 (8th Cir. 2003), the court noted that although "the plaintiff retains the ultimate burden of proving that he is a qualified individual," the employer must show which functions are essential (if that issue is disputed). In EEOC v. Wal-Mart Stores, Inc., 477 F.3d 561 (8th Cir. 2007), the court noted that the employer has the burden of proving which functions are essential when it disputes the plaintiff's claim that he is qualified. However, as noted above, the individual bears the burden of proving that s/he can perform the essential job functions. For example, in Hammel v. Eau Galle Cheese Factory, 407 F.3d 852 (7th Cir. 2005), the court held that the plaintiff has the burden of demonstrating that he is capable of performing the essential functions of the job. In this case, the court held that the plaintiff could not make this showing, where his performance had been deficient in many respects. Similarly, in Breitfelder v. Leis, 2005 U.S. App. LEXIS 21821 (6th Cir. 2005)(unpublished), the court held that the plaintiff had the "burden of showing he could perform the essential tasks" of the job.

[15] 42 U.S.C. § 12101(2).

[16] 29 U.S.C. § 705(20)(B).

[17] 29 C.F.R. § 1630.2(g). Appendix to Regulations, Compliance Manual Section 902: Definition of the Term Disability, March, 1995.

[18] See Testimony of Chai Feldblum before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the Committee on the Judiciary, United States House of Representatives (10/4/07) at p. 17.

[19] See EEOC Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-based Distinctions in Employer Provided Health Insurance June, 1993.

[20] Garrett v. University of Alabama, 2007 U.S. App. LEXIS 26476 (11th Cir. 2007).

[21] H.R. REP. NO. 101-485, pt. 2, at 52 (1990); see also H.R. REP. NO. 101-485, pt. 3, at 28-29 (1990); S. REP. NO. 101-116 at 23 (1989).

[22] 527 U.S. 471, 119 S.Ct. 2139 (1999).

[23] The Sutton case was decided along with Murphy v. United Parcel Service, 527 U.S. 516, 119 S.Ct. 2133 (1999) and Albertsons, Inc. v. Kirkingburg, 527 U.S. 555, 119 S.Ct. 2162 (1999). These three cases are commonly referred to as the Sutton triology, and stand for the proposition that individuals should be analyzed as they are, not what they might or could be. For example, in Albertson's, a monocular vision case, the Supreme Court stated that "people with monocular vision 'ordinarily' will meet the Act's definition of disability." However, the Court noted that in determining whether an individual's monocular vision is "substantially limiting," it will analyze the individual's ability *with* any behavioral modifications that the individual has

undertaken to compensate for his impairment.

[24] For example, in Darwin v. Nicholson, 2007 U.S. App. LEXIS 8153 (11th Cir. 2007)(unpublished), the court held that the plaintiff's hearing impairment was not a disability because, with his hearing aids, he was not substantially limited in hearing as compared with "the general populace." In Knapp v. City of Columbus, 2006 U.S. App. LEXIS 17081 (6th Cir. 2006)(unpublished), a class action, the court held that the plaintiffs' ADHD did not substantially limit their major life activity of learning where it was admittedly controlled with Ritalin. In Greathouse v. Westfall, 2006 U.S. App. LEXIS 27882 (6th Cir. 2006)(unpublished), the court held that the plaintiff was not substantially limited in sleeping where he admittedly slept well with the use of medication. In Nasser v. City of Columbus, 2004 U.S. App. LEXIS 4737 (6th Cir. 2004)(unpublished), the court held that the plaintiff's back impairment was not a disability because, in part, "he relieved his back pain through exercises and medicine." Similarly, in Mancini v. Union Pacific Railroad Co., 2004 U.S. App. LEXIS 8213 (9th Cir. 2004)(unpublished), the court held that the plaintiff's epilepsy was not a disability because "the manifestations of his epilepsy, i.e., the seizures, are 'totally controlled' through the consistent use of medication." In Collins v. Prudential Investment and Retirement Services, 2005 U.S. App. LEXIS 148 (3d Cir. 2005)(unpublished), the court noted that the employee's ADHD might not be a disability where the condition was corrected with medication. The court stated that the mitigating measure need not "constitute a cure." In Manz v. County of Suffolk, 2003 U.S. App. LEXIS 3361 (2d Cir. 2003)(unpublished), the court found that the plaintiff's vision impairments were not a disability because he used very strong glasses which allowed him to see sufficiently well. Likewise, in Casey v. Kwik Trip, Inc., 2004 U.S. App. LEXIS 22569 (7th Cir. 2004)(unpublished), the court found that the plaintiff was not substantially limited in performing household chores where she admitted that she performs these chores by using adaptive measures, such as using both hands or certain tools or equipment (such as an electric can opener) to grip and manipulate objects. In Carr v. Publix Super Markets, Inc., 2006 U.S. App. LEXIS 2845 (11th Cir. 2006)(unpublished), the court held that the employee's impaired arm did not substantially limit his major life activities because he had learned to compensate through the use of his other arm. Similarly, in Didier v. Schwan Food Co., 465 F.3d 838 (8th Cir. 2006), the court held that despite his hand injury, the employee was not substantially limited in performing manual tasks and caring for himself. The court noted that although the employee "has difficulty with shaving and other grooming activities, he learned to do these things left-handed." Interestingly, in Walton v. U.S. Marshals Service, 492 F.3d 998 (9th Cir. 2007), the court held mitigating measures includes not only "measures undertaken with artificial aids, like medications and devices," but also "measures undertaken, whether consciously or not, with the body's own systems." In this case, the court held that the plaintiff's inability to "localize sound" was mitigated by her own "visual localization." In Berry v. T-Mobile USA, Inc., 490 F.3d 1211 (10th Cir. 2007), the court held that the plaintiff was not substantially limited in her major life activities since she can perform her activities "given sufficient rest," she can "walk with the aid of a cane," and she "can treat her symptoms with medication." Using curious legal reasoning, the court also held that the plaintiff's "family's assistance with the household chores" can be considered in determining whether she is substantially limited "as that is part of daily living in

most families."

In Orr v. Wal-Mart Stores, Inc., 297 F.3d 720 (8th Cir. 2002), the court found that the plaintiff did not show that his diabetes, as controlled with insulin, substantially limited his major life activities. The court noted that it would not analyze "what would or could occur if Orr failed to treat his diabetes or how his diabetes might develop in the future. In Sinclair Williams v. Stark, 2001 U.S. App. LEXIS 5367 (6th Cir. 2001)(unpublished) and Hill v. Kansas City Area Transportation Authority, 181 F.3d 891 (8th Cir. 1999), the courts found that the employees' hypertension was not a disability because they controlled the condition with medications such that it did not substantially limit their major life activities. In Cotter v. Ajilon Services, Inc., 287 F.3d 593 (6th Cir. 2002), the court held that the individual's colitis "must be viewed in its medicated – and thus substantially controlled – state." Likewise, in Hein v. All America Plywood Co., 232 F.3d 482 (6th Cir. 2000), the court held that the plaintiff's hypertension, as medicated, was not a disability because he functioned "normally" and had "no problems 'whatsoever'" (quoting the plaintiff). In this case, the plaintiff, a truck driver, had asked the court to analyze his unmedicated condition because he was fired for refusing to take a driving assignment that he claimed would prevent him from getting a refill of his medication. The court concluded that he could have obtained the refill if he had been more diligent. In Spades v. City of Walnut Ridge, 186 F.3d 897 (8th Cir. 1999), the court held that the employee's depression was not a disability since he conceded that he functioned well with his medications. Similarly, in EEOC v. R.J. Gallagher Co., 181 F.3d 645 (5th Cir. 1999), the court noted that it did "not doubt" that the plaintiff's condition, "if left untreated, would affect the full panorama of life activities, and indeed would likely result in an untimely death." Nonetheless, the court concluded that "the predicted effects of the impairment in its untreated state for the purposes of considering whether a major life activity has been affected by a physical or mental impairment has, however, been foreclosed" by the Supreme Court. In Muller v. Costello, 187 F.3d 298 (2d Cir. 1999), the court concluded that the plaintiff's asthma did not substantially limit his ability to breathe, after taking into account his inhalers and other medications. Similarly, in Ivy v. Jones, 192 F.3d 514 (5th Cir. 1999), the court held that whether the plaintiff's hearing impairment "substantially limited" her hearing should be determined as corrected by her hearing aids. The court noted that the plaintiff's hearing might not be substantially limited in light of the evidence showing that her hearing was "corrected to 92% with one hearing aid and 96% with two hearing aids."