IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 99-7619

REGINA A. SCHAEFER,

Plaintiff-Appellee

v.

THE STATE INSURANCE FUND; MARTIN A. FISCHER, ESQ.; CECILIA E. NORAT; RAYMOND C. GREEN, ESQ.; ALBERT K. DIMEGLIO; AND THE STATE OF NEW YORK,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEE IN PART AND URGING THE COURT TO VACATE AND REMAND

INTEREST OF THE UNITED STATES

Plaintiff, an individual who has Type 2 Diabetes Mellitus, alleges that her public employer terminated her employment in violation of Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12131-12134 (JA 13).[1] The Department of Justice is responsible for issuing regulations implementing Titles II and III of the ADA. See 42 U.S.C. 12134, 12186(b). The Department is also responsible for enforcing Titles II and III through litigation and for providing technical assistance. See 42 U.S.C. 12188(b), 12206. The United States, therefore, has

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[1] "JA __" refers to the page number of the Joint Appendix. "Br. __" refers to the page number of the Brief filed by the Appellants.

an interest in ensuring that courts properly interpret the scope of protection that the ADA provides to persons with disabilities.

STATEMENT OF THE ISSUE

Whether plaintiff, who prevailed before a jury on her ADA claim based on instructions that were incorrect in light of subsequent Supreme Court precedent, should have the opportunity to prove her claim under the appropriate legal standards.

STATEMENT OF THE CASE

1. Since at least 1990, plaintiff Regina Schaefer has had Type 2 Diabetes Mellitus (Type 2 diabetes) (JA 508, 511). In March 1991, she was hospitalized for several days due to complications arising from the disease (JA 529, 533). During the time period at issue here, Schaefer took a prescribed medication called Micronase (also known as Glyburide) to control the effects of her diabetes (JA 511).

2. From approximately 1973 to 1991, Schaefer worked at the New York Office of General Services as an office clerk (JA 515-533). After her office was targeted for a reduction in force, in April 1991, Schaefer took a probationary job as a file clerk with defendant State Insurance Fund (JA 534). Near the end of her six month probationary period, her supervisor told her that she probably would not be retained because of her unsatisfactory job performance (JA 544-545). In September 1991, Schaefer obtained another probationary position as a keyboard specialist with the same office (JA 545-547). On March 11, 1992, at the conclusion

of her probationary period, Schaefer's employment was terminated (JA 555-556).

Having lost her health care benefits, Schaefer was unable to purchase the prescribed diabetes medication and could not take it on a regular basis (JA 563-564). As a result, she became very ill and almost died (JA 564-565, 580-584).

3. Schaefer filed suit in January 1995, alleging, inter alia, that defendants discharged her in violation of Title II of the ADA (JA 13).[2] Plaintiff alleged generally that she was a person with a disability under the ADA and also that she was "perceived by her supervisors and co-workers as suffering from a disability" (JA 16-17).

On March 19, 1998, the district court denied defendants' motion for summary judgment (JA 489-506). Noting that plaintiff had suffered serious complications when she had not taken medication, the court concluded that there was "no question that plaintiff's condition when uncontrolled by medication does limit major life activities, but when controlled it does not" (JA 500). Noting that the Second Circuit had not spoken on the issue,[3] the

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[2] Title II of the ADA, which prohibits discrimination by public entities, took effect on January 26, 1992, and therefore was in effect when Schaefer was terminated in March 1992. See 42 U.S.C. 12131 note (citing Pub. L. No. 101-336, § 205(a), 104 Stat. 338).

[3] Six months after the district court's decision, the Second Circuit held that whether a person is disabled should be assessed without regard to the availability of mitigating measures or self-accommodations. See Bartlett v. New York State Bd. of Law Exam'rs, 156 F.3d 321, 329 (1998), vacated and remanded for reconsideration, 119 S. Ct. 2388 (1999).

district court ruled that mitigating measures should not be considered in determining whether plaintiff's condition substantially limited a major life activity (JA 500-502). The court relied on statements in the legislative history of the ADA, the applicable regulations, and the decisions of the majority of courts of appeals that had considered the issue (JA 500-502). Applying that standard, the court held that Schaefer was disabled under the first prong of the ADA's definition of disability (JA 502).

4. In November 1998, Schaefer's claims proceeded to trial (JA 508). Schaefer presented evidence that, as a result of her diabetes, she had to visit her doctor approximately every two weeks (JA 538-541). As a result, Schaefer contended, she was forced to use her sick leave as it accrued (JA 553). Although she never used more sick leave than that to which she was entitled, her accrued sick leave was sometimes lower than the target that Schaefer's supervisor had established for the office (JA 197-198, 793-794). Schaefer also presented evidence that when her supervisor reprimanded her about using too much of her sick leave, she told the supervisor that she was a diabetic and that she had to use her sick leave for medical appointments approximately every two weeks (JA 536, 786).

Plaintiff argued that she was terminated because of her diabetes. In the alternative, plaintiff argued that defendants fired her for using her sick leave, and thus failed to reasonably

accommodate her need to use more sick leave than the average employee. Defendants contended that Schaefer was frequently absent and that she was fired because her work performance was unsatisfactory (JA 786-792).

The court instructed the jury that Schaefer was a person with a disability within the meaning of the ADA:

> The ADA defines "disability" as (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.
>
> I charge you that the plaintiff has a disability within the meaning of the statute and that she is otherwise qualified for the position.

(JA 761) (emphasis added). The jury found that defendants had terminated plaintiff's employment in violation of the ADA and awarded $70,000 in damages (JA 774). The court entered a final judgment awarding Schaefer $87,298.55 ($70,000 plus prejudgment interest), and awarding $149,000 in attorneys' fees (JA 797-798). Defendants appealed.

5. While defendants' appeal was pending, the Supreme Court decided Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999), and Murphy v. United Parcel Service, Inc., 119 S. Ct. 2133 (1999). The Court held, contrary to the decision of the district court below, that corrective and mitigating measures should be considered in determining whether an individual is substantially limited in a major life activity. See Sutton, 119 S. Ct. at 2146-2149; Murphy, 119 S. Ct. at 2137.

SUMMARY OF ARGUMENT

1. Persons with diabetes were clearly within the group of persons Congress intended to protect by enacting the ADA. The legislative history of the ADA reveals that Congress believed that persons with diabetes had been unfairly discriminated against in employment because of their medical condition and intended that those persons with diabetes be protected by the Act.

Nothing in the Supreme Court's decisions in Sutton and Murphy holds that persons with diabetes are no longer protected by the Americans with Disabilities Act. On the contrary, the Supreme Court emphasized that trial courts should not make categorical decisions based on the disease but must, in each case, make an individualized determination whether the person with an impairment is substantially limited in a major life activity. In some cases, persons with diabetes who are taking medication may still be disabled under the first part of the three-pronged definition found in Section 12102 of the ADA, either because the medication does not alleviate all the effects of their impairment, or because the medication itself causes disabling side effects.

In addition, persons with diabetes may be covered by the statute because they have a record of, or are regarded as, being disabled under the second and third prongs of the definition. Out of misunderstanding or bias, employers may harbor myths,

fears, and stereotypes about diabetes and those who have it. As Congress recognized, such attitudes may lead employers to unfairly exclude or discriminate against individuals with diabetes. Moreover, persons with diabetes may well have a record of a substantially limiting impairment even if, at present, the effects of diabetes appear to be under control.

2. At the time of the district court's summary judgment ruling, the case law, the legislative history of the ADA, and the implementing regulations all supported the view that mitigating measures should not be considered in determining whether an individual was substantially limited in a major life activity. Indeed, this Court had ruled to that effect by the time of trial in this case. The Supreme Court's decision in Sutton made a significant change in the law. Since this case was tried under an erroneous view of the law, it is appropriate to vacate the judgment below. But that should not be the end of the case. It should be remanded to the district court for further proceedings, which should include an individualized determination whether Schaefer is a person with a disability under the correct standards.

ARGUMENT

THE JUDGMENT SHOULD BE VACATED AND THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS

The court's instruction to the jury that, as a matter of law, plaintiff was a person with a disability, was premised on the now erroneous view that mitigating measures should not be

considered in determining whether Schaefer's diabetes substantially limited a major life activity. Because this error of law may have affected the verdict, it is appropriate to vacate the judgment. But this Court should not accept the State's argument that the judgment should be reversed and the case dismissed.

To reach its verdict for Schaefer, the jury had to find either that (1) defendants fired Schaefer because she had diabetes or (2) Schaefer, because of her diabetes, was entitled to a reasonable accommodation to use her sick leave as it accrued for her appointments to see her doctor, and defendants refused to modify their sick leave accrual policy as it applied to Schaefer to accommodate that request (JA 759-760). The State does not challenge the jury's necessary finding that there was a causal connection between Schaefer's diabetes and her termination. The jury clearly rejected the State's proffered reasons for her firing. Nor does the State question the court's instruction to the jury (JA 761) that Schaefer was "qualified" for the position. Thus, on remand, if the jury finds that Schaefer is a person with a disability, she may well succeed in establishing all of the elements of a violation of the ADA.

A. Persons With Diabetes Mellitus Will Often Meet The Definition Of Disability Within The Meaning Of The Americans With Disabilities Act

Title II of the ADA prohibits discrimination by public entities against a "qualified individual with a disability." 42 U.S.C. 12132. The ADA defines "disability" as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.

42 U.S.C. 12102. Because diabetes is a "physiological disorder or condition" that affects a number of body systems, including the digestive system, see pp. 11-14, infra, it is an impairment. See Bragdon v. Abbott, 524 U.S. 624, 632 (1998) (citing 45 C.F.R. 84.3(j)(2)(i) (1997)) (discussing definition of impairment); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 52 (1990) (diabetes is an impairment); H.R. Rep. No. 485, Pt. 3, 101st Cong., 2d Sess. 28 (1990) (same); S. Rep. No. 116, 101st Cong., 1st Sess. 22 (1989) (same). The relevant consideration is, therefore, whether an individual with diabetes has a disability under one of the three alternative definitions set forth in the ADA.

1. The Legislative History Of The ADA Reveals That Congress Intended That Persons With Diabetes Would Be Within The Class Of Persons Protected By The Act

The legislative history of the ADA makes clear that Congress both intended and anticipated that persons with diabetes would, in at least some circumstances, be persons with disabilities within the meaning of the ADA. Prior to enacting the ADA,

Congress heard testimony that persons with diabetes suffered discrimination and needed protection.[4/] A number of the legislative reports noted that persons with diabetes were often wrongly denied jobs because of their medical condition. The Senate Report noted that "individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified. Such denials are the result of negative attitudes and misinformation." See S. Rep. No. 116, supra, at 24. Some legislative reports, in explaining the ADA provision that restricts employers from inquiring as to whether a prospective applicant has a disability, further noted that employers had often used information about an applicant's physical or mental condition "to exclude applicants with * * * so-called hidden disabilities such as * * * diabetes * * * before their ability to perform the job was even evaluated." See id. at 39; see also H.R. Rep. No. 485, Pt. 2, supra, at 72; H.R. Rep. No. 485, Pt. 3, supra, at 42. Not surprisingly, both the legislative reports and the floor statements of individual legislators reflect a

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[4/] See, e.g., The Americans with Disabilities Act of 1989: Joint Hearing on H.R. 2273 Before the Subcomm. on Employment Opportunities and the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor, 101st Cong., 1st Sess. 103 (1989) (testimony of Arlene B. Mayerson) (citing Jackson v. Maine, 544 A.2d 291 (Me. 1988)); Americans with Disabilities Act: Hearing Before the House Comm. on Small Bus., 101st Cong., 2d Sess. 149 (1990) (same); Americans with Disabilities Act of 1988: Joint Hearing Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources and the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor, 100th Cong., 2d Sess. 11-12 (1988) (testimony of Tony Coelho).

consensus that persons with diabetes would often be protected by the ADA. See, e.g., H.R. Rep. No. 485, Pt. 2, supra, at 52; S. Rep. No. 116, supra, at 24; 135 Cong. Rec. S10,779 (daily ed. Sept. 7, 1989) (statement of Sen. Domenici); id. at S10,801 (statement of Sen. Conrad).

2. Diabetes Is A Serious Disease Which Will Often Substantially Limit A Major Life Activity, Even When Persons Take Medication To Control Its Effects

Given the clear congressional purpose to protect persons with diabetes, the Court's decision in Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999), cannot be read to hold that diabetes can never be a disability. Id. at 2149. In Sutton, the Supreme Court emphasized that the use of medication or other mitigating measures does not necessarily mean an individual is not disabled. See ibid. Rather, determining whether a person is substantially limited in a major life activity requires a case by case determination as to whether, "notwithstanding the use of [medication or other mitigating measures], th[e] individual is substantially limited in a major life activity." Ibid. The Court noted that "individuals who take medicine to lessen the symptoms of an impairment so that they can function [may] nevertheless remain substantially limited." Ibid. The Court discussed diabetes as an example in explaining that disabilities should be subject to a case-by-case determination.[5/] Ibid.

[5/] Since Sutton was decided, courts have concluded that plaintiffs with impairments, the effects of which were partially (continued...)

A consideration of the nature of diabetes makes clear that it can substantially limit a major life activity, even when an individual is taking medication. Diabetes Mellitus is an incurable medical disorder that impedes the body's ability to move glucose from the bloodstream into the cells, thus affecting the body's metabolism of carbohydrate, protein, and fat. See Diabetes Mellitus: A Fundamental and Clinical Text 251 (Derek LeRoith et al. eds., 1996); Joslin's Diabetes Mellitus 193 (C. Ronald Kahn & Gordon C. Weir eds., 13th ed. 1994); Bombrys v. City of Toledo, 849 F. Supp. 1210, 1214 (N.D. Ohio 1993). Persons with diabetes have trouble secreting or using insulin, a crucial hormone that "drives" glucose from the bloodstream into the cells where it is metabolized. See Diabetes Mellitus, supra, at 263; American Diabetes Ass'n, Medical Management of Type 1 Diabetes 12-14 (3d ed. 1998). In Type 1 diabetes, the pancreas fails to secrete sufficient insulin. See id. at 12. In Type 2 diabetes, also known as adult onset diabetes, the body makes some insulin, but it either makes too little, has trouble using the insulin, or both. See Diabetes Mellitus, supra, at 253; Joslin's Diabetes Mellitus, supra, at 195.

[5/] (...continued)
controlled by medication, had raised triable issues as to whether they were substantially limited in a major life activity even after taking into account the effects of the medication. See, e.g., Taylor v. Phoenixville Sch. Dist., 184 F.3d 296 (3d Cir. 1999).

The lack of and/or inability to use insulin causes abnormally high levels of glucose to remain in the blood. This condition, known as hyperglycemia, causes excessive urination and extreme thirst in the short term and may also be accompanied by severe exhaustion, difficulty breathing, nausea, lack of appetite, and blurred vision. American Diabetes Association Complete Guide to Diabetes 170 (David B. Kelley et al. eds., 1997). If the hyperglycemia is not treated effectively, long term consequences may include weight loss, kidney damage, blindness, severe swelling, loss of circulation due to hardening of arteries, nerve cell damage, loss of consciousness, heart attack, stroke, and death. See id. at 293-294. Type 1 diabetes is generally treated through insulin injections, see id. at 36, while Type 2 diabetes is often treated by insulin or various oral medications, see American Diabetes Ass'n, Medical Management of Type 2 Diabetes 56-68 (4th ed. 1998).

The use of insulin and some oral medications, however, can cause too much glucose to cross the cell membranes, resulting in hypoglycemia. See Medical Management of Type 2 Diabetes, supra, at 56-68. Hypoglycemia (commonly referred to as "low blood sugar") may cause a number of serious symptoms, including confusion, slurred speech, excessive hunger, convulsions, tremors, palpitations, unconsciousness, or coma. See Medical Management of Type 1 Diabetes, supra, at 135-136; Medical Management of Type 2 Diabetes, supra, at 124; Bombrys, 849 F.

Supp. at 1214. In addition to possibly using insulin and/or other medication, those with diabetes generally must use some combination of diet and exercise, coupled with regular blood sugar monitoring, to maintain their blood sugar within safe levels. See Complete Guide To Diabetes, supra, at 34; Bombrys, 849 F. Supp. at 1214.

Although the adverse effects of diabetes can often be mitigated through the measures discussed above, the disease is never cured. See Complete Guide to Diabetes, supra, at 43. Controlling glucose levels by these various means can never replicate what the body does naturally in persons without diabetes. Moreover, the mitigating measures are not always effective and do not always completely eliminate the adverse effects of the disease. See id. at 43, 50. Even with proper medications and attentive monitoring of blood sugar levels, persons with diabetes may sometimes experience severe hyperglycemia or hypoglycemia. See id. at 156, 323. Complicating the task of managing diabetes is that an individual may feel fine and be unaware that high or low blood sugar is severely damaging certain body systems. See id. at 151; Bombrys, 849 F. Supp. at 1213-1214. Even with the use of mitigating measures, persons with diabetes are significantly more likely than persons in the general population to develop heart disease and cardiovascular complications, retinopathy (a disease of the retina that can eventually cause blindness), kidney disease,

damage to the nervous system, abnormally severe infections, and severe foot ulcers, which, if not properly treated in time, may make amputation of the foot or leg necessary. See Harrison's Principles of Internal Medicine 2074-2078 (Anthony S. Fauci et al. eds., 14th ed. 1998); Complete Guide to Diabetes, supra, at 33, 299-319. Diabetes also sometimes adversely affects reproduction and sexual function. See id. at 321-360.

In sum, many persons whose diabetes is partially controlled by medication may still be substantially limited in at least one major life activity. The medication may not completely control their condition, or it may cause hypoglycemia or other side effects that substantially limit a major life activity.

3. Many Persons With Diabetes May Also Be "Regarded As" Having, Or Have A Record Of, A Substantially Limiting Impairment

In addition, the ADA protects plaintiffs who suffer adverse employment decisions because their employer regards them as having a substantially limiting impairment, or because the person has a record of a substantially limiting impairment. See 42 U.S.C. 12102(2); Sutton, 119 S. Ct. at 2149. Persons with diabetes may well fall under one of these parts of the definition.

First, given the relative complexity of diabetes and the variety of ways that people respond to it, see Complete Guide to Diabetes, supra, at 32, there is a danger that employers may act on the basis of "stereotypic assumptions not truly indicative of

* * * individual ability." See 42 U.S.C. 12101(7); School Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987). For example, employers may wrongly assume that persons with diabetes cannot perform a job without taking into consideration their mitigating measures or their individual abilities. Similarly, an employer may unfairly assume that persons with Type 2 diabetes have their condition solely because they don't control their diet or weight. Even if the employer's perception is erroneous, it could constitute a "negative reaction[] * * * to the impairment" which could be "as handicapping as * * * the physical limitations that flow from actual impairment." See id. at 283-284. The legislative history indicates that Congress believed that persons with diabetes might suffer from such discrimination. See S. Rep. No. 116, supra, at 24 (recognizing that persons with diabetes may be regarded as having substantially limiting impairments); id. at 39; see also H.R. Rep. No. 485, Pt. 2, supra, at 72; H.R. Rep. No. 485, Pt. 3, supra, at 42.

Second, many persons with diabetes may have a record of a substantially limiting impairment, even though the diabetes is presently controlled. For example, persons who have been hospitalized in the past for their diabetes or its complications, such as Schaefer, may require specialized medical care or monitoring to ensure they do not suffer a relapse, even if at present their condition appears to be under control. Depending on the care and monitoring required, employers may be unwilling

to reasonably accommodate an employee's need for such medical care. Furthermore, an employer might refuse to hire an individual with a record of hospitalization or other health problems for fear that the person will require hospitalization or otherwise become severely ill again, which could constitute unlawful discrimination based on the individual's record of a substantially limiting impairment. Cf. Arline, 480 U.S. at 281.

B. Plaintiff May Be Able To Show That She Is A Person With A Disability

In light of the above considerations, plaintiff may well be able to establish that she is a person with a disability under one of the definitions of disability in Section 12102 of the ADA. First, plaintiff may be able to establish that she is substantially limited in a major life activity notwithstanding the mitigating measures she takes to control her diabetes. Her condition was sufficiently severe that she was hospitalized twice. Furthermore, although she testified that her diabetes did not affect her ability to hold a job, there was little in the record concerning whether she still remains substantially limited in one of the many life activities potentially affected by diabetes. In fact, plaintiff presented evidence that her diabetic condition required her to visit her doctor approximately every two weeks, requiring her to use more accrued sick leave than non-disabled employees. See Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 308 (3d Cir. 1999) (holding that plaintiff who took medication was still substantially limited where, inter

alia, her condition was sufficiently serious that she had seen her doctor 25 times in the previous year).

Moreover, the medication that Schaefer takes, Micronase, is an oral medication that commonly causes hypoglycemia unless (and sometimes even if) appropriate precautions are taken. See Physicians' Desk Reference 2496-2497 (53d ed. 1999). Micronase may also cause a number of other side effects in patients, including gastrointestinal troubles, skin allergies, and other significant problems. See id. at 2497. Schaefer may suffer side effects from her medication that substantially limit one or more of her major life activities.

Second, Schaefer may be able to show that she was terminated because of one of the myths, fears, and stereotypes that many employers may hold about the disease. She established that defendants knew that she had diabetes. Furthermore, the jury implicitly rejected as a pretext defendants' proffered explanation for her termination.

Third, plaintiff's prior hospitalization for diabetes is a record of a substantially limiting impairment sufficient to make her a person with a disability. See Arline, 480 U.S. at 281 (holding that person who previously had an impairment "serious enough to require hospitalization" was a person with a handicap under the "record of" prong of Rehabilitation Act).[6/] Thus,

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[6/] The definition of handicap set forth in the Rehabilitation Act is in all material respects identical to the definition of (continued...)

plaintiff may be able to prevail if she establishes that defendants terminated her employment because of her diabetes or as a result of their refusal to grant her a reasonable accommodation made necessary by the previous medical complications resulting from her diabetes. If Schaefer's record of hospitalization and severe complications from diabetes required her to visit the doctor frequently, for example, her employer would have an obligation under the ADA to reasonably accommodate her need for this specialized care. The defendants' failure to do so, by penalizing her for using more sick leave than is used by the average employee, might constitute a violation of the ADA.

C. The Case Should Be Remanded To The District Court So That It Can Determine What Further Proceedings May Be Necessary

It appears that Schaefer did not fully develop the above alternative theories of liability in response to defendants' summary judgment motion or at trial. Given the state of the law, however, plaintiff was not required to do so. At the close of briefing on defendants' motion for summary judgment on May 1, 1997, every court of appeals that had considered the issue had held that mitigating measures should not be considered in determining whether a person was substantially limited in a major

[6/] (...continued)
disability contained in the ADA. See Bragdon v. Abbott, 118 S. Ct. 2196, 2202 (1998).

life activity.[7] See Roth v. Lutheran Gen. Hosp., 57 F.3d 1446, 1454 (7th Cir. 1995); Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996), cert. denied, 520 U.S. 1162 (1997); Harris v. H & W Contracting Co., 102 F.3d 516, 520-521 (11th Cir. 1996). The applicable regulations also directed that the determination of whether an individual is substantially limited in a major life activity be made without regard to mitigating measures.[8] See 29 C.F.R. Pt. 1630, App., § 1630.2(j); 28 C.F.R. Pt. 35, App. A, § 35.104; 28 C.F.R. Pt. 36, App. B, § 36.104. And by the time of trial, the Second Circuit had also held that whether a person is

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[7] Similarly, at the time of the district court's decision denying defendants' motion for summary judgment, the majority of the courts of appeals had held that mitigating measures should not be considered in determining whether impairment substantially limits a major life activity. Compare Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 859-866 (1st Cir. 1998) (mitigating measures should not be considered); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937-938 (3d Cir. 1997) (same); Roth v. Lutheran Gen. Hosp., 57 F.3d 1446, 1454 (7th Cir. 1995) (same); Doane v. City of Omaha, 115 F.3d 624, 627-628 (8th Cir. 1997) (same), cert. denied, 522 U.S. 1048 (1998); Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996) (same), cert. denied, 520 U.S. 1162 (1997); and Harris v. H & W Contracting Co., 102 F.3d 516, 520-521 (11th Cir. 1996) (same); with Sutton v. United Air Lines, Inc., 130 F.3d 893, 902 (10th Cir. 1997) (mitigating measures must be considered in determining whether impairment substantially limits a major life activity), aff'd, 119 S. Ct. 2139 (1999); Gilday v. Mecosta County, 124 F.3d 760, 767 (6th Cir. 1997) (Kennedy, J., concurring in part and dissenting in part); and id. at 768 (Guy, J., concurring in part and dissenting in part).

[8] The committee reports suggested a similar result, with one house report mentioning diabetes as an example. See H.R. Rep. No. 485, Pt. 2, supra, at 52 ("persons with impairments, such as * * * diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication"); H.R. Rep. No. 485, Pt. 3, supra, at 28.

disabled should be assessed without regard to the availability of mitigating measures or self-accommodations. See Bartlett v. New York State Bd. Of Law Exam'rs, 156 F.3d 321, 329 (1998), vacated and remanded for reconsideration, 119 S. Ct. 2388 (1999). With the district court and this Court both having ruled that mitigating measures should not be considered, Schaefer understandably limited her proof at trial to the effects of her condition in its unmitigated state.[9/]

Courts decide cases before them in accordance with the law that is in effect at the time of the decision. The Supreme Court's decision in Sutton significantly changed the law. The case should, therefore, be remanded to the district court for it to apply the new law to the facts.

In similar circumstances, where an intervening decision changes the legal landscape, courts have ruled that parties may be entitled to amend their pleadings or introduce additional evidence in light of the new legal standard. See, e.g.,

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[9/] Although the court stated that Schaefer's condition when controlled by medication did not limit her major life activities (JA 500), it is clear that neither the court nor Schaefer examined in depth the extent to which Schaefer was substantially limited in a major life activity with her medication. Both Schaefer and the court, in reliance on the law in effect at the time, focused their attention on Schaefer's condition in its unmitigated state. Now that the intervening change in the law has rendered Schaefer's unmitigated state irrelevant to the question of whether she is substantially limited in a major life activity, Schaefer should not be precluded from introducing new evidence on whether she is substantially limited even when taking into consideration the effects of her medication. Cf. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765-766 (1998).

Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765-766 (1998) (remanding case where plaintiff had relied on existing case law that was superseded by Supreme Court decision); Millipore Corp. v. Travelers Indem. Co., 115 F.3d 21, 34 (1st Cir. 1997); Burrell v. Star Nursery, Inc., 170 F.3d 951, 956 (9th Cir. 1999); Coates v. Sundor Brands, Inc., 160 F.3d 688, 692 (11th Cir. 1998). Such a course is probably appropriate here, particularly since plaintiff structured her proof at trial in reliance on the district court's (and this Court's) ultimately erroneous rulings. The determination of the appropriate course of action should be made in the first instance by the district court. "The district court, with its extensive knowledge of the facts and proceedings in this case, is in a far better position than [the court of appeals] to address and to first apply" new case law. Satcher v. Honda Motor Co., 993 F.2d 56, 57 (5th Cir. 1993).

CONCLUSION

The judgment should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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