

***Dahill v. Police Department of Boston:* How the Massachusetts Supreme Judicial Court Provided Handicap Discrimination Protection to Half of the State's Population**

I. INTRODUCTION

In *Dahill v. Police Department of Boston*,¹ the Supreme Judicial Court of Massachusetts (SJC) decided that in determining whether a person is considered handicapped under the Massachusetts antidiscrimination statute,² any mitigating measures or prosthetic devices he uses may not be considered.³ This was the first time that the issue had been raised in a case brought under the Massachusetts antidiscrimination statute.⁴ In making its decision, the SJC refused to follow the lead of the United States Supreme Court.⁵ In *Sutton v. United Air Lines*, the Supreme Court ruled that mitigating measures or corrective devices should be considered when determining whether someone is eligible to bring an action under the Americans with Disabilities Act (ADA).⁶

1. 748 N.E.2d 956 (Mass. 2001).

2. See MASS. GEN. LAWS ch. 151B (2001). The Massachusetts antidiscrimination statute was amended by the State Legislature in 1983 to protect handicapped people from being discriminated against in employment situations. See Skoler, Abbott, & Presser, *Disability Discrimination: Not Disabled Doesn't Mean Not Handicapped—At Least in Massachusetts*, 12 No. 4 MASS. EMP. L. LETTER 1 (July 2001).

3. See *Dahill*, 748 N.E.2d at 962-63.

4. See *id.* at 957-58. The question decided was presented to the SJC on certification from Judge Douglas P. Woodlock of the United States District Court for the District of Massachusetts pursuant to the Massachusetts Uniform Certification of Questions of Law Rule. SUP. JUD. CT. R. 1:03.

5. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

6. See *id.* at 475; 42 U.S.C. §§ 12101-12213 (2000). The Americans with Disabilities Act was passed by the 101st Congress in 1990 for, among others, the express purposes of

There are enough similarities between the Massachusetts antidiscrimination statute and the ADA - as well as the respective definitions of "handicapped" contained within each - to expect that they would both be interpreted similarly.⁷ However, the different approaches the courts took in determining the legislatures' intended definitions of handicap led them to opposite conclusions on the issue of mitigating measures.⁸

This analysis will show how the SJC deferred to the judgment of an administrative agency, whose policy goes against the plain language of the statute, in order to broaden the reach of protection offered by the statute to a point where it covers half of the population of Massachusetts.⁹ Obviously, that number seems too high, and it is unlikely that the legislature intended to label that many people as handicapped under the statute.¹⁰

Part II of this Comment consists of a discussion of the relevant background information necessary to fully understand the issue.¹¹ Part II.A is a short exploration of the Federal Rehabilitation Act.¹² Part II.B is a discussion of the history of the Massachusetts antidiscrimination statute, including an examination of its similarities to the Federal Rehabilitation Act.¹³ Part II.C is an analysis of the Americans with Disabilities Act, focusing on what it has in common with the Massachusetts antidiscrimination statute.¹⁴ Part II.D is a recap of *Sutton*, focusing on how and why the Court arrived at its decision.¹⁵ Part III is a recitation of the background, facts and holding of the *Dahill* case.¹⁶

Part IV of this Comment is a thorough analysis of *Dahill*, including the effect the decision will have on the people of Massachusetts.¹⁷ Part IV.A discusses the reasons that the SJC found itself bound to defer to the existing administrative guidelines in defining disability, and suggests alternative

"provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities, ... [and] provid[ing] clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities" § 12101(b)(1), (2).

7. See § 12102(2) (defining "disability"); MASS. GEN. LAWS ch. 151B § 1(17) (2001) (defining "handicap").

8. See *Dahill*, 748 N.E.2d at 963; *Sutton*, 527 U.S. at 475.

9. See *infra* notes 240-69 and accompanying text.

10. See *id.*

11. See *infra* notes 23-91 and accompanying text.

12. See *infra* notes 23-34 and accompanying text.

13. See *infra* notes 35-45 and accompanying text.

14. See *infra* notes 46-52 and accompanying text.

15. See *infra* notes 53-91 and accompanying text.

16. See *infra* notes 92-151 and accompanying text.

17. See *infra* notes 152-311 and accompanying text.

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ways in which that court could have explained its dismissal of those guidelines.¹⁸ The next sub-part, Part IV.B, discusses how the SJC's ruling in *Dahill* unnecessarily extended protection under the Massachusetts antidiscrimination statute to people who already enjoy protection under other sections of the statute.¹⁹ Part IV.C focuses on how the decision in *Dahill* could lead to an incredible increase in the number of disability discrimination cases brought before the Massachusetts courts, and how this could create a potentially devastating strain on administrative resources.²⁰ Part IV.D is a discussion of how two other states have dealt with the issue and what the future holds for the question of mitigating measures in the rest of the country.²¹

Part V of this Comment, the conclusion, reiterates why the SJC should have ruled on the issue of mitigating measures using the same reasoning as the Supreme Court, thereby reaching the same result. The impact of the decision on Massachusetts' citizens and employers is also summarized.²²

II. BACKGROUND

A. The Federal Rehabilitation Act

The Federal Rehabilitation Act²³ was enacted by the federal government in 1973 for the express purpose of “empower[ing] individuals with disabilities to maximize employment, economic self-sufficiency, independence and inclusion and integration into society, through ... the guarantee of equal opportunity.”²⁴ The Act guarantees that no “otherwise qualified individual” with a disability can be discriminated against by any state or federal department or agency or any private organization that receives federal funding.²⁵

The term “disability,” in regard to the language of the statute reading “otherwise qualified individual with a disability,” is defined in the Federal Rehabilitation Act, as amended in 1974, as “any person who — (i) has a physical or mental impairment that substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.”²⁶

18. See *infra* notes 157-206 and accompanying text.

19. See *infra* notes 207-39 and accompanying text.

20. See *infra* notes 240-69 and accompanying text.

21. See *infra* notes 270-311 and accompanying text.

22. See *infra* notes 312-16 and accompanying text.

23. 29 U.S.C. § 701 (2000).

24. § 701(b)(1).

25. § 794(a).

26. § 705(20)(B).

When courts first applied this statute, the issue of whether the term “disabled” included reference to a person’s condition in its mitigated or corrected state was not considered relevant.²⁷ In these early employment discrimination cases, the courts held that people with controlled hearing impairments, as well as people with controlled epilepsy, were handicapped within the meaning of the statute and, thus, protected.²⁸ However, as the years passed, the question emerged as an issue in disability discrimination cases and court decisions would split regarding the correct resolution of the issue.²⁹

The language of the statute, depending on one’s interpretation of it, may or may not provide guidance in answering the question of whether mitigating measures are included in the definition of disabled.³⁰ However, there is simply nothing in the statute that expressly states whether to include mitigating measures in a disability analysis.³¹ A recent amendment to the statute may provide some illumination on the situation.³² Section 794(d) states that in order to determine if illegal employment

27. See *Dahill v. Police Dep’t of Boston*, 748 N.E.2d 956, 960 (Mass. 2001). An example of a handicap that would be considered corrected is the case of a person with 20/400 vision who can see perfectly—20/20—when wearing glasses. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999). The poor vision would be the handicap and the glasses would be the corrective device. When the glasses are worn, the vision, which would then be normal, would be considered to be in its corrected state. An insulin dependent diabetic would be considered a person with a mitigated handicap. The diabetes would be the handicap and the insulin would be the mitigating factor that controls the effect of the disability on the person’s life. See *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 857 (1st Cir. 1998).

28. See *Dahill*, 748 N.E.2d at 961 n.9 (citing as examples *Strathie v. Dep’t of Transp.*, 716 F.2d 227, 228-30 (3d Cir. 1983) (hearing impairment); *Davis v. Ohio Barge Lines, Inc.*, 535 F. Supp. 1324, 1325 (W.D. Pa. 1982) (controlled epilepsy)).

29. See *Dahill*, 748 N.E.2d at 961 (citing as examples *Chandler v. Dallas*, 2 F.3d 1385, 1390-91 (5th Cir. 1993) (correctable vision not handicap); *Davis v. Meese*, 692 F.Supp 505, 517 (E.D. Pa. 1988) (insulin dependent diabetic is handicapped); *Wallace v. Veterans Admin.*, 683 F. Supp. 758, 761 (D. Kan. 1988) (rehabilitated drug addict is handicapped)).

30. See 29 U.S.C. § 701 (2000). As will be seen below, the identical language in the ADA and the Massachusetts antidiscrimination statute has been interpreted in opposing ways. See *infra* notes 119-24 and accompanying text. The difference in interpretations is based on the fact that one way to look at the language is to assume that “substantially limits” a major life activity means that an actual objective limitation must exist. See *infra* notes 125-28 and accompanying text. The other way to interpret the language is to ignore the fact that the person is not objectively substantially limited and base your reasoning on a hypothetical analysis of how the person would be affected by the impairment if they did not mitigate it. See *infra* notes 133-39 and accompanying text.

31. See § 701.

32. See § 794(d).

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discrimination has occurred, the standards to be used in this section are the same as the standards used in Title I of the Americans with Disabilities Act.³³ Since the Supreme Court has decided in *Sutton* that the definition of disabled to be used in Title I of the ADA includes consideration of mitigating or corrective measures, the Federal Rehabilitation Act must, according to Section 794(d), also include consideration of mitigating measures or corrective devices when determining whether someone is to be considered disabled.³⁴

B. The Massachusetts Antidiscrimination Statute

In 1983, Massachusetts amended its antidiscrimination statute³⁵ to protect handicapped³⁶ people from employment discrimination.³⁷ The amended statute makes it illegal for an employer to discriminate in the hiring or firing of a person, alleging to be a qualified handicapped person, on the basis of the handicap alone.³⁸ A qualified handicapped person is defined in the statute as a “person who is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of a particular job with reasonable accommodation to his handicap.”³⁹

The statute was modeled after the Federal Rehabilitation Act and some of the language, including the three-pronged definition of handicapped, is nearly identical.⁴⁰ Similar to the Federal Rehabilitation Act, the language of the Massachusetts statute does not explicitly state whether mitigating measures should be considered in determining handicap, even if the effects

33. See *id.* Title I of the Act includes the sections that deal with handicap discrimination in relation to employment. See 42 U.S.C. §§ 12111-12117 (2000).

34. See § 794(d).

35. See MASS. GEN. LAWS ch. 151B (2001).

36. Federal legislation has stopped using the term “handicap” and has replaced it with the term “disability.” Massachusetts, however, continues to use the word “handicap.” This was not intended to change the meaning of the federal statutes, only an attempt by Congress to use the “currently acceptable terminology.” *Dahill*, 748 N.E.2d at 959 n.7. For the remainder of this Comment, the two words will be used interchangeably and no significance should be read into the use of one word over the other.

37. See *Dahill*, 748 N.E.2d at 959; MASSACHUSETTS BAR INSTITUTE, MCAD’S NEW DISABILITY GUIDELINES: THE FINAL VERSION (1998), available at <http://www.state.ma.us/mcad/disability.html> (last visited Jan. 20, 2003) [hereinafter MCAD GUIDELINES].

38. See MASS. GEN. LAWS ch. 151B, § 4(16) (2000). The Massachusetts statute applies equally to State and private discrimination. See § 1(5).

39. § 1(16). The statute states that for an accommodation to be considered unreasonable, the employer must show that it would impose an undue hardship on his business. See § 4(16).

40. See *Dahill*, 748 N.E.2d at 961 n.8. See also *supra* note 26 and accompanying text (defining disability under the federal statute).

of the handicap are completely mitigated by a prosthetic device or some other corrective measure.⁴¹ At the time the Massachusetts legislature adopted the changes to its statute to protect handicapped individuals, the question of mitigating measures was still not an issue under the federal statute.⁴² It was not until after the adoption of the Massachusetts antidiscrimination statute that federal courts began to split on the issue of the effect of mitigating measures under the Federal Rehabilitation Act.⁴³ Though it was clearly an issue in the federal courts, the Massachusetts legislature never changed or clarified the law on this issue.⁴⁴ It was fifteen years after the passage of the statute that the Massachusetts Commission Against Discrimination (MCAD) included a provision in its guidelines expressly authorizing the consideration of mitigating measures.⁴⁵

C. The Americans with Disabilities Act

The Americans with Disabilities Act (ADA) was enacted by Congress in 1990.⁴⁶ The purpose of the statute was “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”⁴⁷ Congress saw a need to address the continuing pervasive discrimination against handicapped people in a wide variety of areas including employment.⁴⁸ The three-pronged definition of disability used in the ADA is nearly identical to the one that was used in both the Federal Rehabilitation Act and the Massachusetts antidiscrimination statute.⁴⁹

As is the case with both the Federal Rehabilitation Act and the Massachusetts antidiscrimination statute, the ADA makes no express reference to mitigating measures or corrective devices.⁵⁰ This lack of express language again resulted in a jurisdictional split of authority regarding whether to consider mitigating measures or corrective devices when determining if an individual is to be considered disabled as defined in

41. Compare MASS. GEN. LAWS ch. 151B, § 1(17) (2001) with 29 U.S.C. § 705(20)(B) (2000). See also *supra* note 26 and accompanying text.

42. See *Dahill*, 748 N.E.2d at 960.

43. See *id.* n.9.

44. See MASS. GEN. LAWS ch. 151B, § 1(17).

45. See MCAD GUIDELINES, *supra* note 37 § II.A.7.

46. See 42 U.S.C. §§ 12101-12213 (2000).

47. § 12101(b)(1).

48. See § 12101(a)(3). Other areas addressed in the ADA include housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services. See *id.*

49. § 12102(2). See also *supra* notes 26 & 40 and accompanying text.

50. See §§ 12101-12213.

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the statute.⁵¹ Given the lack of consistency in the circuit courts' decisions, it was only a matter of time before the Supreme Court stepped in to decide the issue.⁵²

D. *Sutton v. United Air Lines*⁵³

In 1999, in *Sutton*, the United States Supreme Court ruled that when determining whether someone is disabled under the ADA, mitigating measures should be considered.⁵⁴ The Court looked at the issue as, among other things, one of simple statutory interpretation.⁵⁵ The decision was widely criticized as severely limiting the ability of disabled people to make use of the ADA.⁵⁶ The Court put to rest the question of mitigating measures under the ADA, but in the process also stirred controversy.

The *Sutton* case involved twin sisters, Karen and Kimberly Sutton, both of whom had vision in the 20/200 to 20/400 range.⁵⁷ Visual impairment at this level prevents a person from being able to drive a car or watch television.⁵⁸ However, with corrective lenses, both Karen and Kimberly

51. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 476-77 (1999) (citing *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 156 F.3d 321, 329 (2d Cir. 1998) (holding accommodations cannot be considered)); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 629-30 (7th Cir. 1998) (holding mitigating measures should not be considered); *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937-38 (3d Cir. 1997) (holding mitigating measures should not be considered); *Arnold v. United States Postal Serv., Inc.*, 136 F.3d 854, 859-66 (1st Cir. 1998) (holding mitigating measures should not be considered); *Washington v. HCA Health Services. of Tex., Inc.*, 152 F.3d 464, 470-71 (5th Cir. 1998) (holding only some impairments should be considered in their unmitigated state); *Sutton v. United Air Lines, Inc.*, 130 F.3d 893 (10th Cir. 1997), *aff'd* 527 U.S. 471 (1999) (holding fully correctable impairments are not disabilities).

52. See *Sutton*, 527 U.S. at 471.

53. 527 U.S. 471 (1999).

54. See *id.*

55. See *id.* at 477-89.

56. See, e.g., Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY J. EMP. & LAB. L. 53, 54 (2000) (arguing that Court could have easily reached an opposite outcome in case, thus allowing far more people access to courts through the ADA); Debra Burke & Malcom Abel, *Ameliorating Medication and ADA Protection: Use It and Lose It or Refuse It and Lose It?*, 38 AM. BUS. L.J. 785, 805 (2001) (questioning if a disabled person would be protected under the ADA if she chose not to use readily available means to mitigate her disability); Vicki Limas, *Of One Legged Marathoners and Legally Blind Pilots: Disabling the ADA on a Case-By-Case Basis*, 35 TULSA L.J. 505, 505 (2000) (accusing Supreme Court of using "contrived" reasoning in embracing "disturbing trend ... of narrowing the definition of disability").

57. See *Sutton*, 527 U.S. at 475.

58. See *id.*

could “function identically to individuals without a similar impairment.”⁵⁹

In 1992, both sisters applied for positions as airline pilots with United Air Lines.⁶⁰ The Court noted that the two women met all of the requirements for the job and were invited for interviews and testing in a flight simulator.⁶¹ However, once they arrived for their interviews both women were told that a mistake had been made and that they were actually not eligible to become pilots since their uncorrected eyesight was not 20/100 or better.⁶²

The sisters brought suit against the airline alleging discrimination based on their disability.⁶³ They claimed that their impaired vision was a “substantially limiting impairment” or, alternatively, that they had been “regarded as having such an impairment.”⁶⁴ The district court dismissed their claims, holding that since their disability was fully corrected it did not actually substantially limit any major life activity and therefore did not qualify as a disability under the ADA.⁶⁵ The United States Court of Appeals for the Tenth Circuit affirmed,⁶⁶ as did the United States Supreme Court.⁶⁷

The decision was based on several important factors, one of which was that the ADA expressly grants authority to various administrative agencies to issue regulations to implement particular sections of the Act.⁶⁸ However, no administrative agency has been given the authority to issue guidelines regarding the unassigned remaining sections of the Act.⁶⁹ The disputed term “disability” falls within one of these unassigned sections.⁷⁰

59. *Id.* (quoting Appellant’s Brief at 23).

60. *See id.*

61. *See id.* at 475-76. The other requirements to be eligible for the job included age, education, experience, and Federal Aviation Administration certification. *See id.*

62. *See Sutton*, 527 U.S. at 476.

63. *See id.*

64. *Id.* *See* 42 U.S.C. § 12102(2) (2000). These are two of the three ways to fall under the definition of disabled in the statute, the third is having a record of such an impairment. *See also supra* note 49 and accompanying text.

65. *See Sutton*, 527 U.S. at 476. *See also* *Sutton v. United Air Lines, Inc.*, No. 96-S-121, 1996 U.S. Dist. LEXIS 15106, at *1 (D. Colo. Aug. 28, 1996).

66. *See Sutton v. United Air Lines, Inc.*, 130 F.3d 893 (10th Cir. 1997), *aff’d* 527 U.S. 471 (1999).

67. *See Sutton*, 527 U.S. at 477.

68. *See id.* at 478. The Equal Employment Opportunity Commission has an affirmative obligation to issue guidelines regarding Title I of the ADA. *See id.* The Attorney General and the Secretary of Transportation have obligations to issue guidelines regarding Title II of the ADA. *See id.* The Secretary of Transportation alone has an obligation to issue guidelines regarding Title III of the ADA. *See id.* at 478-79.

69. *See id.* at 479.

70. *See id.* (citing 42 U.S.C. § 12102(2) (1994)).

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Both the Equal Employment Opportunity Commission (EEOC) and the Department of Justice (DOJ) had established guidelines requiring the interpretation of the term “disability” to not include mitigating measures.⁷¹ Regardless, the Supreme Court ruled that the guidelines were impermissible interpretations of the ADA.⁷² Since the agencies were not given the power to define the term, the Court had no obligation to defer to their interpretations,⁷³ and thus looked to the intent of the legislature.⁷⁴ The Court found the intent by examining the text of the statute.⁷⁵

The Court used textualism⁷⁶ to determine exactly what the legislature’s intent was when it wrote the statute.⁷⁷ Three provisions of the ADA, when read together, led the Supreme Court to its decision.⁷⁸ First, the term disability was defined in the ADA as “a physical or mental impairment that

71. See *Sutton*, 527 U.S. at 479. The EEOC guideline in place before this case, stated that “the 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.” *Id.* (citing 29 C.F.R. § 1630.2(g) (1998) (emphasis added)). However, this guideline has since been replaced by one reflecting the holding in *Sutton*. See Christopher A. Parlo, *The Americans With Disabilities Act: An Update on the Evolving Law Concerning Major Components of the Act*, in LITIGATION, at 501, 512 (PLI Litig. & Admin. Practice Course, Handbook Series No. 663, 2001) (citing 29 C.F.R. pt. 1630). The DOJ guideline states that “[t]he question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids and services.” *Id.* (citing 28 C.F.R. § 35.104 (1998)).

72. See *Sutton*, 527 U.S. at 479-83. In *Chevron U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, the Court stated that “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” 467 U.S. 837, 843 (1984). If it is not, the court is under no obligation to follow the recommendation of the administrative agency. See *id.*

73. See *Sutton*, 527 U.S. at 479-80.

74. See *id.* at 482-83. Since the Court made its decision in *Sutton*, the EEOC has issued revised guidelines concerning mitigating measures. See Parlo, *supra* note 71, at 512. The new guideline, codified at 29 C.F.R. § 1630, “emphasizes that the determination of whether an individual has an ADA disability must be made on a case-by-case basis *with* regard to all mitigating and corrective measures.” *Id.* (emphasis added). However, mitigating measures do not automatically disqualify someone from eligibility under the ADA if the person is still, even after mitigation, substantially limited in a major life activity. See *id.*

75. See *Sutton*, 527 U.S. at 487.

76. See Parmet, *supra* note 56, at 68-70. Textualism is a method of statutory interpretation that involves relying almost exclusively on the plain meaning of the words in the statute. See *id.* at 69. When a word is unclear, its “meaning may be discerned by analysis of the statute’s text as a whole, dictionaries, grammar books, and the traditional common law canons of statutory construction.” *Id.*

77. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482-89 (1999).

78. See *id.* at 482.

substantially limits one or more of the major life activities of an individual.”⁷⁹ Employing the textualist tool of grammatical construction, the Court noted that the term “substantially limits” is in the present indicative verb form.⁸⁰ According to the Court, this meant that for someone to be considered disabled under the ADA, they must be presently and substantially limited in a major life activity; potential or hypothetical limitation is not enough.⁸¹

Second, the Court noted that the definition of disability in the statute required disabilities to “be evaluated ‘with respect to an individual’ and to be determined based on whether an impairment substantially limits the ‘major life activities of such individual.’”⁸² This requires an individualized inquiry, on a case by case basis, to determine if a person has a disability that substantially limits one or more life activities.⁸³ In contrast, according to the Court, the agency guidelines suggest an approach that could force employers to look at how particular disabilities usually affect people in their unmitigated state—that is required under the Act—rather than the individualized inquiry, of how this person is currently being affected.⁸⁴

Third, the Court looked to language in the “findings” section of the Act, which states that, “43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a

79. *Id.* (quoting 42 U.S.C. § 12102(2)(A) (1994)).

80. *See id.*

81. *See id.* at 482-83. If the disability is indeed fully mitigated, the Court would have nothing to base its decision on regarding whether the disability substantially limits a life activity other than conjecture and hypothesis based on how most people with that disability are affected. *See id.* This goes against the intent of the Act, which was to evaluate the disability with respect to the individual person. *See id.* This is the reason the Court found the EEOC regulation impermissible. Under the *Chevron* doctrine two questions must be answered: First, did Congress directly address the statutory question?; and second, if not, did Congress delegate authority to the agency to create the regulation? *See Chevron U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). A further analysis is required under the second step that asks if the agency’s guideline is a permissive interpretation of the issue in the statute. *See id.* *See also* Limas, *supra* note 56, at 520. Though the Court decided that the guideline would fail the second step of the test, it went on to analyze the guideline and determined it would fail there as well. *See Sutton*, 527 U.S. at 482-84.

82. *Sutton*, 527 U.S. at 483 (quoting 42 U.S.C. § 12102(2) (1994)).

83. *See id.*

84. *See id.* at 483-84. The statute states that the disabilities are to be evaluated “with respect to [a particular] individual.” § 12102(2). Therefore, according to the Supreme Court, both the effects of the disability on the person’s major life activities, and the effects of any mitigating measures, must be considered as they objectively exist. *See Parnet*, *supra* note 56, at 79-81. Otherwise the individualized inquiry would be no more than hypothesizing and guess work. *See id.*

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whole is growing older.”⁸⁵ The Court, basing its decision on many cited studies, ruled that if disabilities were intended to be measured without considering mitigating measures, the number in the statute would have to be significantly higher.⁸⁶ Thus, it was concluded that Congress had not intended to protect those individuals whose disabilities were mitigated to the point where they were no longer significantly limited in a major life activity.⁸⁷

Under this reading of the Act, the Court concluded that the Sutton twins could not bring suit based on the first prong of the definition of disability as provided in the ADA.⁸⁸ Since their vision in its corrected state was normal, their disability did not significantly limit their ability to see, a major life activity contemplated in the statute.⁸⁹ The issue was settled as far as the federal statutes were considered; however, this holding was not binding on any state handicap discrimination statute.⁹⁰ Massachusetts became the first state to address the issue in its highest court.⁹¹

85. *Sutton*, 527 U.S. at 484 (quoting § 12101(a)(1)).

86. *See id.* at 484-88. The Court suggests, based on studies performed by various government agencies, that if the number were intended to include people with unmitigated disabilities, it would have been closer to 160 million. *See id.* at 487. The number of people that wear corrective lenses that would be able to claim protection under the Act, if mitigating measures were not allowed to be considered, is over 100 million and the number of people that need hearing aids is over 28 million. *See id.*

87. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 487 (1999).

88. *See id.* at 488-89. The Court agreed with the defendant’s claim that “an impairment does not substantially limit a major life activity if it is corrected.” *Id.* at 481.

89. *See id.* at 488-89. The Court did not decide whether working is considered a major life activity under the Act. *See id.* at 490-94. However, the Court seemed to be leaning toward the position that it was not, noting that even the EEOC would not consider it a major life activity unless there were no other major activity that the party could base their claim on. *See id.* at 492. At least one court after *Sutton* held that even if working in general is considered a major life activity, working at the job of your choice may not be what is meant by the term major life activity. *See Bolton v. Scrivener, Inc.*, 36 F.3d 939, 942 (10th Cir. 1994) (citing *Welsh v. City of Tulsa*, 977 F.2d 1415 (10th Cir. 1992)). The Supreme Court put an end to the dispute in January, 2002 with its decision in *Toyota Motor Mfg., Ky, Inc. v. Williams*, 534 U.S. 184 (2002). The Court decided that “[w]hen addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people’s daily lives, not whether the claimant is unable to perform the tasks associated with her specific job.” *Id.* at 200-01.

90. *See Federal Judge Certifies Disability Question to Massachusetts Court*, 14 No. 17 ANDREWS EMP. LITIG. REP. 9 (July 25, 2000). State and federal statutes are separately enacted and may be interpreted differently, providing citizens different protections. *See id.*

91. *See Dahill v. Police Dep’t of Boston*, 748 N.E.2d 956, 964 n.15 (Mass. 2001). *See also infra* notes 272-313 and accompanying text.

III. *DAHILL v. POLICE DEPARTMENT OF BOSTON*

A. Facts and Procedure

“Richard Dahill was born with a severe hearing impairment.”⁹² When he was three years old he started to receive medical care for his condition and also began wearing hearing aids.⁹³ His hearing continued to worsen until he reached the age of thirteen.⁹⁴ When he wears hearing aids, his hearing is corrected to within the normal range.⁹⁵ Without the hearing aids his hearing is substantially impaired.⁹⁶

Mr. Dahill has achieved much in his life in spite of his hearing impairment.⁹⁷ He was a successful student in school, graduating from both college and law school.⁹⁸ In addition, he was a certified high school English teacher and held jobs in a health club and as a lifeguard.⁹⁹

In 1996, Mr. Dahill applied for a job with the Boston Police Department as a police officer.¹⁰⁰ In February 1997, he received an offer of employment conditioned on his successfully meeting the State imposed medical standards for the job.¹⁰¹ After a physical examination by the department’s physician, Dr. Luther Arnold, it was determined that he would meet all of the standards put forth by the state, as long as he wore his hearing aids.¹⁰²

Mr. Dahill then entered the Boston Police Academy for a twenty-six week training program that is mandatory for all new police officers.¹⁰³

92. See *Dahill*, 748 N.E.2d at 958.

93. See *id.*

94. See *id.* Mr. Dahill’s hearing impairment had been diagnosed as “bilateral stable congenital sensorineural hearing loss.” *Id.* at 958 n.3.

95. See *id.* at 958.

96. See *id.*

97. See *Dahill v. Police Dep’t of Boston*, 748 N.E.2d 956, 958 (Mass. 2001).

98. See *id.*

99. See *id.*

100. See *id.*

101. See *id.* See also COMMONWEALTH OF MASSACHUSETTS HUMAN RESOURCES DIVISION, *Physicians Guide to Conducting Medical Examinations*, at <http://www.state.ma.us/hrd/PhysiciansGuide.htm#III>. (last visited Feb. 23, 2003) [hereinafter HUMAN RESOURCES DIVISION].

102. See *Dahill*, 748 N.E.2d at 958. The department’s physician determined that Mr. Dahill had a “Category B Condition,” which did not automatically disqualify him from eligibility to be a police officer. See *id.* A Category B Condition is one which, “based on its severity or degree, may or may not preclude an individual from performing the essential job functions of a municipal police officer, or present a significant risk to the safety and health of that individual or to others.” HUMAN RESOURCES DIVISION, *supra* note 101, § III(5)(b).

103. See *Dahill v. Police Dep’t of Boston*, 748 N.E.2d 956, 958 (Mass. 2001).

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While at the academy, his instructors observed several incidents, which they believed were related to his hearing impairment, that raised serious questions about his ability to safely perform the duties of a police officer.¹⁰⁴ One incident involved Mr. Dahill not responding to a command from an instructor after a training run to get water bottles.¹⁰⁵ Another incident involved Mr. Dahill not responding to a radio call.¹⁰⁶ A third incident involved Mr. Dahill not hearing a gunshot during a training exercise.¹⁰⁷

Mr. Dahill was again examined by Dr. Arnold, who subsequently sent him to a specialist for further auditory testing.¹⁰⁸ A report based on the findings of Dr. Arnold and the hearing specialist, as well as the reports of the Academy instructors, was forwarded to the commissioner of the Boston Police.¹⁰⁹ The report stated that there remained a question of safety regarding Mr. Dahill's ability to perform the functions of a police officer.¹¹⁰ Based on this report, Mr. Dahill's employment with the Department was terminated.¹¹¹ The official reason given for his termination was that his auditory deficiencies would not enable him to safely and effectively perform the essential duties of a police officer.¹¹²

104. *See id.*

105. *See id.* Mr. Dahill claims to have heard the order to retrieve the water bottles but failed to respond. *See* Memorandum and Order at 7, *Dahill v. Boston Police Dep't*, No. 98-11441-DPW (D. Mass. June 2, 2000) (on file with author). When asked by his instructor why he did not respond, he answered that he was not wearing his hearing aids. *See id.*

106. *See id.* at 6. The incident occurred during a foot chase drill, during which Mr. Dahill received a radio call and failed to respond. *See id.* The proper response would have been for Mr. Dahill to respond to the call on his radio that he was involved in a pursuit. *See id.*

107. *See Dahill*, 748 N.E.2d at 958. This incident involved a training procedure using a Firearms Training Simulator. *See Dahill*, No. 98-11441-DPW, at 7. The simulator projects sounds and images that the recruit has to immediately recognize as being threatening or non-threatening. *See id.* The object is to test the recruit's ability to exercise proper judgment in firing his weapon. *See id.*

108. *See Dahill*, 748 N.E.2d at 958. The hearing specialist determined that Mr. Dahill's level of hearing loss would make it difficult to engage in communication with another person unless he was looking directly at the other person and it was occurring in a quiet setting. *See id.* at 958 n.4.

109. *See id.*

110. *See id.*

111. *See id.* at 958-59.

112. *See id.* This reasoning is justified based on the definition of Category B Medical Conditions put forth by the Commonwealth of Massachusetts Human Resources Division. *See* HUMAN RESOURCES DIVISION, *supra* note 101, § IV(6)(c)(2) (explaining that Category B Conditions include: "a. perforated tympanum, b. auditory canal-atresia, severe stenosis, or tumor, c. severe external otitis, d. mastoid-severe mastoiditis or surgical deformity, e. Meniere's syndrome or labyrinthitis, f. otitis media, e. [sic] any other ear condition that

Mr. Dahill brought suit against the Boston Police Department in the United States District Court for the District of Massachusetts,¹¹³ claiming violations of the Massachusetts antidiscrimination statute,¹¹⁴ the Massachusetts equal rights statute,¹¹⁵ the Federal Rehabilitation Act¹¹⁶ and the Americans with Disabilities Act.¹¹⁷ Since the SJC had never decided whether the Massachusetts antidiscrimination statute requires consideration of mitigating devices when determining whether a person is handicapped, the district court certified the question to the SJC.¹¹⁸

B. Holding

The SJC held that the Massachusetts antidiscrimination statute does not require a court to consider “mitigating or corrective devices [when] determining whether a person has a handicap.”¹¹⁹ In coming to its decision, the court employed principles of statutory interpretation, legislative history, public policy and administrative deference to help determine what it believed to be the intended definition of handicap as applied in the statute.¹²⁰

The SJC refused to follow the lead of the United States Supreme Court, which had previously decided in *Sutton v. United Airlines, Inc.*¹²¹ that mitigating measures must be considered in determining whether someone has a disability under the Americans with Disabilities Act (ADA).¹²² Both the ADA and the Massachusetts antidiscrimination statute have nearly identical definitions of handicap.¹²³ However, the SJC ruled that it was not

results in an individual not being able to perform as a police officer.”).

113. See *Dahill v. Boston Police Dep’t*, No. 98-11441-DPW (D. Mass. June 2, 2000), certifying questions to 748 N.E.2d 956, 957-59 (Mass. 2001).

114. See *Dahill*, No. 98-11441-DPW, at 11. See also MASS. GEN. LAWS ch. 151B, § 4 (1996).

115. See *Dahill*, No. 98-11441-DPW, at 11; MASS. GEN. LAWS ch. 93, § 103 (1996).

116. See *Dahill*, No. 98-11441-DPW, at 11; 29 U.S.C. § 794 (1994).

117. See *Dahill*, No. 98-11441-DPW, at 11; 42 U.S.C. §§ 12101-12213 (1994).

118. See *Dahill*, No. 98-11441-DPW, at 25; *Dahill v. Police Dep’t of Boston*, 748 N.E.2d 956, 956-57 (Mass. 2001).

119. *Dahill*, 748 N.E.2d at 963.

120. See *id.* at 959-64.

121. 527 U.S. 471 (1999).

122. See *Dahill*, 748 N.E.2d at 963. See also *Sutton*, 527 U.S. at 475.

123. See *Dahill*, 748 N.E.2d at 959. Both the Massachusetts antidiscrimination statute and the ADA have similar definitions of handicap to the one contained in the Federal Rehabilitation Act. See *supra* note 26 and accompanying text. The only significant difference being that the Massachusetts Statute does not include, in its definition of handicapped, people currently using controlled substances illegally. See MASS. GEN. LAWS ch. 151B, § 1(17)(c) (2000).

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compelled to follow the Supreme Court's interpretation of the definitional language in the ADA, and justified its decision several different ways.¹²⁴

First, the SJC ruled that "[t]he language of the Massachusetts statute [was] not dispositive."¹²⁵ The statute protects only those people whose handicap "substantially limits" a "major life" activity,¹²⁶ yet, according to the court, the act does not define whether a handicap must be determined with or without consideration of mitigating or corrective measures.¹²⁷ This lack of clarity led the court to explore other devices to interpret the statute.¹²⁸

The SJC next turned to the legislative history of the statute.¹²⁹ The court held that since the Massachusetts antidiscrimination statute was modeled after the Federal Rehabilitation Act,¹³⁰ the Massachusetts legislature must have intended the language in the statute to be interpreted just as the language in the federal statute.¹³¹ Prior to the time when the Massachusetts statute was enacted, mitigating measures were either not considered to be relevant or just not considered at all in the analysis of cases based on the Federal Rehabilitation Act.¹³²

The SJC then proceeded to address the administrative agency's

124. See *Dahill*, 748 N.E.2d at 963-64. The SJC has noted that, though it is not bound to follow federal precedent analyzing similar statutes, it "may look to those decisions for guidance." *Cox v. New England Tel. & Tel. Co.*, 607 N.E.2d 1035, 1039 (1993).

125. *Dahill*, 748 N.E.2d at 960.

126. *Id.* See also MASS. GEN. LAWS ch. 151B, § 1(17)(a) (2000). The term major life activity is defined in the Massachusetts antidiscrimination statute as "functions, including, but not limited to, caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." § 1(20). Based on the SJC's decision in *Dahill*, the recent United States Supreme Court decision in *Toyota* may have no effect on the SJC's application of chapter 151B, § 1(20) in regard to considering working as a major life activity. See *Toyota Motor Mfg., Ky, Inc. v. Williams*, 534 U.S. 184, 201 (2002) (holding that the proper analysis requires determining whether the impairments prevent or restrict the individual from performing tasks that are of central importance to most people's daily lives).

127. See *Dahill*, 748 N.E.2d at 960.

128. See *id.* See also *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999) (holding that, according to provisions in the ADA, mitigating measures "must be taken into account when judging whether [a] person is 'substantially limited in a major life activity and thus disabled under the Act'").

129. See *Dahill*, 748 N.E.2d at 960.

130. See *id.* See also 29 U.S.C. § 701 (2000).

131. See *Dahill*, 748 N.E.2d at 960. The language of the Federal Rehabilitation Act was clearly the model for both the Massachusetts antidiscrimination statute and the ADA. See *supra* note 26 and accompanying text.

132. See *Dahill*, 748 N.E.2d at 960-61. However, in Federal Rehabilitation Act cases since the enactment of the Massachusetts statute, courts have been split "as to whether that statute requires consideration of mitigating measures." *Id.* at 961 n.9. See also *supra* notes 28-29 and accompanying text.

interpretation of the statute's language.¹³³ The Massachusetts Legislature explicitly delegated to MCAD the power to "formulate policies to effectuate the purposes" of the statute.¹³⁴ MCAD issued guidelines in 1998 "that provide that '[t]he existence of an impairment is generally determined without regard to whether its effect could be mitigated by measures such as medication, auxiliary aids or prosthetic devices.'"¹³⁵ According to the MCAD guidelines,¹³⁶ a deaf person, whose hearing can be corrected with hearing aids, could still be considered handicapped because his hearing impairment would interfere with the major life activity of hearing.¹³⁷ The court ruled that the MCAD interpretation of the statute, as put forth in its guidelines, was due substantial deference.¹³⁸ The SJC not only believed that the MCAD had the appropriate power to implement the guidelines, but also believed that the guidelines were a reasonable interpretation of the language and the intent of the statute.¹³⁹

Finally the court looked to issues of public policy.¹⁴⁰ The statute was enacted to protect handicapped people from discrimination in employment situations, while at the same time allowing employers to protect the safety of their other employees and the public.¹⁴¹ The court decided that determining whether someone is handicapped, without consideration of mitigation or corrective devices, is consistent with these public policies.¹⁴² The court noted that if mitigating measures were considered, the analysis would exclude "numerous persons who may mitigate serious physical or mental impairments to some degree, but who may nevertheless need reasonable accommodations to fulfill the essential functions of the job."¹⁴³

Overall, both the Massachusetts Supreme Judicial Court in *Dahill* and the United States Supreme Court in *Sutton* found sufficient evidence to

133. See *Dahill*, 748 N.E.2d at 960.

134. *Id.* at 961 (quoting MASS. GEN. LAWS ch. 151B, § 2 (2001)).

135. *Id.* at 961 (quoting MCAD GUIDELINES, *supra* note 37, § II.A.7).

136. See MCAD GUIDELINES, *supra* note 37, § II.A.7. If the SJC used the "plain language of the statute" reasoning employed by the Supreme Court in *Sutton*, the guideline at issue would have been determined an impermissible interpretation of the statute. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 481-82 (1999).

137. See *Dahill*, 748 N.E.2d at 961.

138. See *id.* The *Dahill* court made no reference to the *Sutton* decision, which held that the language "substantially limits" cannot mean "has the potential to substantially limit" or "would possibly substantially limit if it was not corrected." *Sutton*, 527 U.S. at 482-83.

139. See *Dahill*, 748 N.E.2d at 961.

140. See *id.*

141. See *id.* at 961-62 (citing *Cox v. New England Tel. & Tel. Co.*, 607 N.E.2d 1035 (1993) (quoting *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987))).

142. See *Dahill*, 748 N.E.2d at 962.

143. *Id.*

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come to their conclusions regarding their respective handicapped discrimination statutes.¹⁴⁴ However, the decision of the SJC is a far broader interpretation of the identical language contained in both statutes regarding the definition of handicap.¹⁴⁵

Serious questions arise when analysis of the broad reading of the statute is undertaken. One question is why the SJC unnecessarily broadened the definition of handicapped under the first prong when there was sufficient protection under the other two prongs.¹⁴⁶ Another question raised by the decision is whether the court had to give such strict deference to the MCAD guidelines as it claims that it did.¹⁴⁷ There appears to be several reasons why the guidelines could have been given less deference.¹⁴⁸

Another concern the SJC dismissed as unlikely was the possibility of a significant increase in litigation resulting directly from its decision in this case, both at the judicial and administrative levels.¹⁴⁹ A final problem with the SJC's decision is the fact that under its analysis, no consideration is given to whether the person is actually limited in their ability to perform a major life activity.¹⁵⁰ This type of individualized inquiry is required under both the Massachusetts antidiscrimination statute and the ADA.¹⁵¹ The answers to these questions and solutions to the problems remain, as yet, unanswered and unsolved, however the following analysis suggests some potential answers and explanations.

144. See *Sutton*, 527 U.S. at 475. See also *Dahill*, 748 N.E.2d at 963-64.

145. See *Mass. High Court Says Corrective Devices Need Not Be Considered*, 18 ANDREWS AIDS LITIG. REP. 5 (June 18, 2001).

146. Cf. *Sutton*, 527 U.S. at 487-94 (discussing an analogous situation under the ADA).

147. See *Dahill*, 748 N.E.2d at 961. See also *Case Law Development, Employment: Disability Defined*, 25 MENTAL & PHYSICAL DISABILITY L. REP. 581, 581-82 (2001) [hereinafter *Disability Defined*].

148. See *infra* notes 157-209 and accompanying text.

149. See *Dahill*, 748 N.E.2d at 964. *But cf. infra* notes 241-70 and accompanying text.

150. See *Disability Defined*, *supra* note 147, at 581-82. See also Jack Sullivan, *SJC Ruling on Disability Contradicts High Court*, BOSTON HERALD, May 26, 2001, at 4; Brief of Defendant-Appellee Boston Police Department at 7-11, *Dahill v. Police Dep't of Boston*, 748 N.E.2d 956 (Mass. 2001) (on file with author) [hereinafter *Brief of Defendant-Appellee*].

151. See *Cox v. New England Tel. & Tel. Co.*, 607 N.E.2d 1035, 1045 (Mass. 1993) (Liacos, C.J., Abrams, J. dissenting) (citing *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987)). The court noted that when looking to "construe and apply" the Massachusetts statute, decisions construing and applying the analogous federal statutes may be looked to for guidance. *Id.* at 1039 (citing *White v. Univ. of Mass. at Boston*, 574 N.E.2d 356 (1991)). Since an individualized inquiry is required under the federal statutes, by analogy an individualized inquiry must be required under the Massachusetts statute. See *id.*

IV. ANALYSIS

The SJC's decision in *Dahill* will have far reaching effects on employment discrimination cases in Massachusetts. By deferring to the MCAD's interpretation of the definition of handicap in the Massachusetts antidiscrimination statute, the court ignored several important factors that the Supreme Court considered in *Sutton*.¹⁵² The most important factor was the plain language of the statute, which clearly requires consideration of mitigating measures in making the determination of whether someone is handicapped.¹⁵³ Another consideration that was ignored by the SJC was the individualized inquiry, required by prior precedent but made impossible to perform due to the ruling in *Dahill*.¹⁵⁴

Further, the SJC may have misjudged the impact its ruling will have on both the judicial system and the administrative agency charged with screening all claims before they are ever looked at judicially.¹⁵⁵ Finally, the court did not adequately address the fact that the people to which it was extending coverage under this part of the definition of handicapped are already covered under the other two parts of the definition in the statute.¹⁵⁶ All of these factors considered together point to the likelihood that the SJC made the wrong decision in *Dahill* and it will only be a matter of time before this becomes evident.

A. The SJC Used Administrative Deference to Avoid the Plain Language in the Statute Requiring Individualized Inquiry of Actual Substantial Limitation of a Major Life Activity

In making its decision in *Dahill*,¹⁵⁷ the SJC gave substantial deference to the MCAD Guidelines regarding the Massachusetts antidiscrimination statute.¹⁵⁸ The guidelines state that determination of whether a person is considered handicapped under the Massachusetts antidiscrimination statute is generally made without regard to whether the handicap can be mitigated or corrected.¹⁵⁹ Just as the Supreme Court in *Sutton*¹⁶⁰ could have used the

152. See *Sutton*, 527 U.S. at 482.

153. See *infra* notes 173-80 and accompanying text.

154. See *infra* notes 181-87 and accompanying text.

155. See *infra* notes 241-70 and accompanying text.

156. See *infra* notes 208-40 and accompanying text.

157. *Dahill v. Police Dep't of Boston*, 748 N.E.2d 956 (2001).

158. See *id.* at 961. See also MCAD GUIDELINES, *supra* note 37, § II.

159. See *Dahill*, 748 N.E.2d at 961 (citing MCAD GUIDELINES, *supra* note 37, § II.A.7). An example given in the Guidelines states that "an employee who is legally blind, but whose vision is correctable with glasses, may be considered 'handicapped' because his impairment substantially limits his ability to perform the major life activity of seeing." MCAD GUIDELINES, *supra* note 37, § II.A.7 (emphasis added).

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Chevron doctrine¹⁶¹ to justify its decision that the EEOC's guidelines did not need to be followed,¹⁶² the SJC used Massachusetts case law to reach its own, opposite conclusion, which was that the MCAD guidelines should be followed.¹⁶³

Unlike Congress and the EEOC, the Massachusetts legislature, in enacting the antidiscrimination statute, gave the MCAD wide discretion in "formulating policies to effectuate the purposes of G.L. c. 151B."¹⁶⁴ Based on its prior decisions, including *Berrios v. Department of Public Welfare*,¹⁶⁵ the SJC found that the MCAD guidelines were entitled to substantial deference.¹⁶⁶ A significant number of cases have contributed to what has become an administrative deference rule in Massachusetts.¹⁶⁷

The rule states that regulations *properly adopted* by government agencies should be regarded as equal to statutes and that "all rational presumptions are to be made in favor of their validity."¹⁶⁸ Further, the guidelines cannot be declared void by a court unless it is clear that there is no reasonable way to interpret the guideline in accordance with the reasoning behind the statute.¹⁶⁹ Additionally, "enforcement of such regulations should be refused only if they are plainly in excess of

160. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

161. See *id.* at 477.

162. See *Sutton*, 527 U.S. at 480. The Court found no need to determine what deference the guidelines were due, based on the fact that the EEOC was not granted authority to promulgate the guidelines. See *id.*; 29 C.F.R. § 1630 (1998). See also *Limas*, *supra* note 56, at 520.

163. See *Dahill*, 748 N.E.2d at 961-62. See also MCAD GUIDELINES, *supra* note 37, § II.

164. *Dahill*, 748 N.E.2d at 961 (quoting MASS. GEN. LAWS ch. 151B, § 2 (2001)).

165. 583 N.E.2d 856 (Mass. 1992). This case concerned homeless plaintiffs who brought suit against the Department of Public Welfare claiming that the Department did not make available to them emergency funds in violation of chapter 18, section 2(D) of the Massachusetts General Laws. See *id.* at 858-59. The SJC determined that the administrative agency's interpretation of the term "shelter" was acceptable based on prior regulations, past practices of the legislature, and the dictionary definition of the word. See *id.* at 862.

166. See *Dahill*, 748 N.E.2d at 961 (citing *Berrios v. Dep't of Pub. Welfare*, 583 N.E.2d 856, 861 (Mass. 1992); *Bynes v. Sch. Comm. of Boston*, 581 N.E.2d 1019, 1022 (Mass. 1991); *Rock v. Mass. Comm'n Against Discrimination*, 424 N.E.2d 244, 248 (Mass. 1982)).

167. See *Berrios*, 583 N.E.2d at 861 (citing, for example, *Consol. Cigar Corp. v. Dep't of Pub. Health*, 364 N.E.2d 1202 (Mass. 1977); *Cleary v. Cardullo's, Inc.*, 198 N.E.2d 281 (1964); *Mass. Nurses Ass'n v. Bd. of Registration in Nursing*, 465 N.E.2d 1238, 1244 n.19 (Mass. App. Ct. 1984); *Druzik v. Bd. of Health of Haverhill*, 85 N.E.2d 232 (Mass. 1949)).

168. *Berrios*, 583 N.E.2d at 861 (citations omitted).

169. See *id.* (citations omitted).

legislative power.”¹⁷⁰

Here, the court decided that the guidelines, which stated that mitigating measures should not be considered, were valid since they could rationally be interpreted as employing the means to achieve the purpose for which the statute was enacted.¹⁷¹ According to the court, that purpose is “to protect ‘handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of [employers] as avoiding exposing others to significant health and safety risks.’”¹⁷²

However, the court ignored the plain language of the statute, which, clearly cannot be read as being consistent with the MCAD guidelines.¹⁷³ As a result, the MCAD guidelines should have been ruled an impermissible interpretation of the language of the statute, since it is not tenable that “substantially limits” can be reasonably read to mean “does not actually substantially limit, but it possibly could,” as the SJC believes.¹⁷⁴

The language of the statute expressly states that “[t]he term ‘handicap’ means . . . a physical or mental impairment which *substantially limits* one or more major life activities of a person.”¹⁷⁵ This language, when read literally, requires the handicap to substantially limit that person in a major life activity.¹⁷⁶ To be substantially limited in a major life activity means that one’s daily life is affected because of this handicap.¹⁷⁷ A person who

170. *Id.* (citing *Druzik*, 85 N.E.2d at 237).

171. *See Dahill*, 748 N.E.2d at 961 (citing *Cox v. New England Tel. & Tel. Co.*, 607 N.E.2d 1035, 1040-41 (Mass. 1993)).

172. *Id.* at 961.

173. *See id.* at 960 (finding language of the statute inconclusive). *See also Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482-83 (1999); *Burke & Abel*, *supra* note 56, at 805 (discussing how the Supreme Court interpreted the term “substantially limits” to eliminate the possibility that the legislature intended to include mitigating measures). The *Dahill* court made sure it was known that the statute was clearly intended to protect only “handicapped individuals” from discrimination, not everyone suffering from any form of physical limitation. *See Dahill*, 748 N.E.2d at 961-62. *See also infra* notes 174-80 and accompanying text.

174. *See Dahill*, 748 N.E.2d at 960-61; MCAD GUIDELINES, *supra* note 37, § II.A.4. *See also Sutton*, 527 U.S. at 482-83.

175. MASS. GEN. LAWS ch. 151B, § 1(17) (2000) (emphasis added).

176. *See Parmet supra* note 56, at 81-82 (noting that most courts that have decided to determine whether someone is disabled without regard to mitigating measures have looked outside the plain language of the applicable statute to find support for their decisions).

177. *See Edward G. Kramer & David G. Oakley, Escaping Common ADA Traps*, 37 TRIAL 27, 27 (Oct. 2001). To be substantially limited in a major life activity, “the person must be: (1) unable to perform a major life activity that the average person in the general population can perform: or (2) significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared

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successfully mitigates a handicap to the point where it does not affect his daily life should no longer be considered substantially limited in that major life activity.¹⁷⁸ For example, consider a person who is legally blind, but can see normally while wearing glasses. That person is no more substantially limited in his major life activity of seeing while he is wearing the glasses than someone with naturally normal vision.¹⁷⁹ Without the glasses he is handicapped for the purposes of the Massachusetts antidiscrimination statute, but since he is not substantially limited while he is wearing them, based on the plain language of the statute, he should not be considered handicapped.¹⁸⁰

The courts in Massachusetts, similar to the Supreme Court, have emphasized that an individualized inquiry is required when determining whether someone is covered under the antidiscrimination statute.¹⁸¹ The decision in *Dahill* runs contrary to this requirement due to the reality that if a handicap is mitigated, it is impossible to know whether the person would be substantially limited by it.¹⁸² The result is the SJC defining broad groups of people who suffer from the same impairment, whether individuals within the group are substantially limited or not, as handicapped within the meaning of the statute.¹⁸³

to ... the general population" *Id.* (citing 29 C.F.R. § 1630.2(j)(3)(i)-(ii) (2000)).

178. See *Sutton*, 527 U.S. at 482-83. For the same reasons, a person is not covered by the statute if he does not mitigate his condition, because the condition does not rise to the level of being substantially limiting. See *Dahill*, 748 N.E.2d at 960.

179. See *Sutton*, 527 U.S. at 482-83. Under the reasoning of the SJC however, the fact that his vision is corrected is not relevant. See *Dahill*, 748 N.E.2d at 960. It is the person's condition that is being considered in the determination, and not the actual impact of the condition itself on his ability to see. See *id.* at 960-61.

180. See MASS. GEN. LAWS ch. 151B, § 1(17) (2000); see also *Dahill*, 748 N.E.2d at 960; *Sutton*, 527 U.S. at 482-83; MCAD GUIDELINES, *supra* note 37, § II.A.6.

181. See *Cox v. New England Tel. & Tel. Co.*, 607 N.E.2d 1035, 1040 (Mass. 1993) (noting that SJC has looked to how the Federal Rehabilitation Act has been interpreted by the federal courts as guidance on how to interpret the Massachusetts antidiscrimination statute).

182. Of course, with mitigating measures such as eye-glasses and hearing aids, a determination of the effect of the mitigating measure can be made by simply removing the device. However, in the case of medications or more permanent devices, such as pacemakers, this determination would be much harder to make. See *infra* notes 203-04 and accompanying text.

183. See *Dahill*, 748 N.E.2d at 960. The court stated that "a person with a hearing impairment might experience a 'substantial limit' of a 'major life activity,' when not using his hearing aids, but not experience any such 'substantial limit' while the corrective devices were in use." *Id.* This question was answered by the court's holding. See *id.* at 963. In effect, the court ruled that while not actually substantially limited, the person would be covered by the statute because he had an impairment that could be substantially limiting. See *id.*

The SJC, by its decision in *Dahill*, is encouraging labeling of people and disparate treatment due to physical characteristics. The word “handicap” should not be used to describe a person, it should be used to describe a condition that afflicts a person.¹⁸⁴ When the person no longer suffers the effects of the handicap, the label should be removed.¹⁸⁵

This argument makes sense when considering the case of someone who is suffering from a debilitating disease. While suffering the effects of the disease, the person may be considered handicapped based on the definition in the statute.¹⁸⁶ However, if the person’s disease is cured, there is no understanding of the term “substantially limited” that could lead one to consider that person handicapped.¹⁸⁷ Likewise, someone who cures their handicap by mitigating the effects of it, even if only temporarily, is in the same situation as the person who has benefited from a more long-term cure.

Taking this comparison one step further shows the inconsistency in both the SJC’s and the MCAD’s position on mitigating measures more clearly. If the disease returned, the patient would again be considered handicapped, even though he was not the day before.¹⁸⁸ However, the person who puts on and takes off his glasses is considered disabled the whole time.¹⁸⁹ The permanence of the mitigating measure should not be the yardstick against which disability is measured when both of the people in the example would be in the same position with or without the use of mitigating measures except for the presence of an underlying, undetectable, non-affecting impairment.¹⁹⁰

The fact that the mitigating measure is artificial versus one that is natural should not be the benchmark either. Surely a person who had their hand

184. See 29 C.F.R. app. § 1630.2(j) (2002). “The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.” *Id.* See also Melissa Cole, *The Mitigation Expectation and the Sutton Court’s Closeting of Disabilities*, 43 How. L.J. 499, 506-10 (2000) (explaining how the categorization of people with disabilities based on nothing more than a medical diagnosis places them in a “closet” in which many of them do not belong).

185. See *Sutton*, 527 U.S. at 482.

186. See MASS. GEN. LAWS ch. 151B, § 1(17) (2000). This is true as long as that person is substantially limited in a major life activity. See *id.*

187. See *Cormier v. Littlefield*, 112 F. Supp.2d 196 (D. Mass. 2000) (holding disability from which plaintiff fully recovered was not a handicap under Massachusetts antidiscrimination statute). See also *Hallgren v. Integrated Fin. Corp.*, 679 N.E.2d 259 (Mass. App. Ct. 1997) (holding disability from which plaintiff fully recovered was not a disability under either the federal or state statutes).

188. This is true as long as the disease substantially limits a major life activity. See *Dahill*, 748 N.E.2d at 961; ch. 151B, § 1(17).

189. See *Dahill*, 748 N.E.2d at 961.

190. See *Sutton*, 527 U.S. at 488.

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amputated at the wrist would be considered handicapped under either the ADA or the Massachusetts antidiscrimination statute.¹⁹¹ Their claim of disability could be based on the fact that the major life activity of performing manual tasks is substantially limited by only having one hand.¹⁹² Under Massachusetts law, even if that person obtained a robotic prosthetic hand¹⁹³ that enabled him to do almost everything that he could do before he lost his hand, thus reducing his actual limitation to below the subjective level of “substantially limited,” he would still be considered handicapped.¹⁹⁴ However, if that same person received a hand transplant,¹⁹⁵ and functioned identically to the person with the prosthetic, it would be interesting to see whether he would be covered under the Massachusetts statute. The mitigating measure—the transplanted hand—is unlike a prosthetic hand, since a prosthetic can be removed. The effects of the impairment would be mitigated to the point where they no longer substantially limit a major life activity, but what if the hand was later rejected by the body?¹⁹⁶ This mitigating measure may not be permanent and, in Massachusetts, the person with the transplanted hand would likely be considered handicapped.¹⁹⁷ However, it is difficult to justify treating one person who has the hand with which he was born differently than a person with one natural hand and one transplanted hand. If both people function identically, then both should be treated similarly under the state law, as they would be under the ADA.¹⁹⁸

If the basis for a decision on a handicap relies on whether the mitigating

191. See 42 U.S.C. § 12102(2) (2000); MASS. GEN. LAWS ch. 151B, § 1(17) (2000).

192. See MCAD GUIDELINES, *supra* note 37, § II.A.6.

193. See Faye Flam, *Dexterity In His Grasp*, PHILA. INQUIRER, Feb. 25, 2002, at E1, available at 2002 WL 14964494 (discussing the new “bionic hand,” which holds promise to grant full relief of impairments to hand amputees).

194. See *Dahill*, 748 N.E.2d at 964; MCAD GUIDELINES, *supra* note 37, § II.A.7.

195. The first hand transplant in history occurred in September 1998. See *World's First Double-Hand Transplant Making Good Progress*, AGENCE FRANCE-PRESSE, Jan. 14, 2002, at 2002 WL 2316424. The first hand transplant in the United States occurred on January 24-25, 1999 at Jewish Hospital in Louisville, Kentucky. See *Information for Potential Hand Transplant Patients: The Procedure*, at <http://www.handtransplant.org/procedure/criteria.html> (last visited Jan. 20, 2003) [hereinafter *Hand Transplant*].

196. Hand transplant patients receive immunosuppressive drugs after the surgery to keep their bodies from rejecting the new hand. See *Hand Transplant*, *supra* note 195. The drugs must be taken for the life of the hand. See *id.* This drug treatment could be considered a mitigating measure under the ADA but would not be considered in an analysis under the Massachusetts antidiscrimination statute. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482-83 (1999); *Dahill*, 748 N.E.2d at 964.

197. See *Dahill*, 748 N.E.2d at 964 (assuming that state would find the new hand to be a mitigating measure).

198. See *Sutton*, 527 U.S. at 482.

measure is natural, then consider a person suffering from debilitating arthritis in his hip. If that person was substantially limited in his major life activity of walking, due to his condition, he would be considered handicapped.¹⁹⁹ However, if that person had surgery to receive an artificial hip, which consists of metal and plastic, and after the surgery was no longer substantially limited in his major life activity of walking, he should no longer be considered handicapped under the statute.²⁰⁰ However, after the decision in *Dahill*, there does not appear to be any way to classify a person with an artificial hip other than as handicapped.²⁰¹ It would be unreasonable to think that the legislature intended everyone who has had hip replacement surgery to be covered by the substantially limited prong of the statute.²⁰² This result, under the Massachusetts analysis, seems inevitable.

A similar analytical problem involves pacemakers. There are several cases interpreting the ADA that contemplate the use of pacemakers and whether someone who has one is considered disabled.²⁰³ However, there is no case law in Massachusetts on the issue. It would seem that based on the analysis above, a pacemaker would be considered a mitigating measure for the purposes of the Massachusetts antidiscrimination statute, and the pacemaker could not be considered in determining whether the user is handicapped, even though a pacemaker would be considered a permanent cure.²⁰⁴

By ignoring the plain language, the SJC was not able to overcome the

199. See MASS. GEN. LAWS ch. 151B, § 1(17) (2000); MCAD GUIDELINES, *supra* note 37, § II.A.5-6.

200. See *supra* notes 173-80 and accompanying text (defining substantial limitation).

201. Since the Massachusetts antidiscrimination statute does not require consideration of mitigating measures, a person would be considered to be in the condition he was in before the mitigating measure was implemented, in other words, before the surgery. See *Dahill*, 748 N.E.2d at 963.

202. See *id.* at 960-61 (discussing reliance on federal courts' interpretations of Federal Rehabilitation Act only up to the time when Massachusetts antidiscrimination statute was enacted as relevant). There is no state or federal case law discussing hip-replacement surgery and whether someone who has had it is covered under the definition of disability provided in the Federal Rehabilitation Act.

203. See *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 805-06 (5th Cir. 1997) (holding that a man with a pacemaker is not disabled within the meaning of the ADA due to lack of evidence showing he was substantially limited in the major life activity of working); *Gilday v. Mecosta County*, 124 F.3d 760, 763-64 (6th Cir. 1997) (discussing, in a pre-*Sutton* case, that a person with a pacemaker that corrects a substantially-limiting heart defect is disabled within the meaning of the ADA, but basing its reasoning on the fact that mitigating measures are not to be considered in the determination).

204. See *Gilday*, 124 F.3d at 763-64; *Dahill*, 748 N.E.2d at 963.

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major hurdle of administrative deference as the Supreme Court did.²⁰⁵ The SJC desired a broader definition of handicapped than that contained in the ADA and by its less-than-strict interpretation of the statutory language and bypassing the individualized inquiry required under federal law and prior Massachusetts precedent, it achieved this goal.²⁰⁶

B. The SJC Extended Protection Under the Statute to Include
Someone in One Prong of the Definition of Handicapped, When
He Was Already Covered Under the Other Two Prongs

Another question raised by the decision in *Dahill*²⁰⁷ is whether the SJC had to reach the decision that it did. Several factors seem to point to the conclusion that it did not. Most prominent among them is the fact that even if the court ruled in accord with the Supreme Court that mitigating measures must be considered when determining whether a person is handicapped under the Massachusetts antidiscrimination statute,²⁰⁸ many people, most likely including Richard Dahill, would still be covered under one of the two remaining prongs of the definition of handicapped.²⁰⁹

To warrant the protections created by the statute, a person's disability only needs to fit one of the three definitions of "handicapped" contained therein.²¹⁰ The first one, chapter 151B, section 1(17)(a), is the definition that was at issue in *Dahill*.²¹¹ Under this section a "handicap" is identified as a "physical or mental impairment which substantially limits one or more major life activities of a person."²¹² The SJC ruled that any measures that a person takes to reduce the effects of their handicap should not be considered in the analysis of whether they are substantially limited in a major life activity.²¹³ The result under this analysis would be easier to

205. See *Dahill*, 748 N.E.2d at 960 (stating that "[b]ecause the language of the statute does not end our inquiry, we turn to other sources to discern the Legislature's intent"); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999) (stating that "[b]ecause we decide that, by its terms, the ADA cannot be read in this manner, we have no reason to consider the ADA's legislative history").

206. See *Dahill*, 748 N.E.2d at 960, 962; *Sutton*, 527 U.S. at 483; *Cox v. New England Tel. & Tel. Co.*, 607 N.E.2d 1035, 1039-40 (Mass. 1993).

207. *Dahill v. Police Dep't of Boston*, 748 N.E.2d 956 (Mass. 2001).

208. See *supra* notes 53-71 and accompanying text (discussing the decision of the Supreme Court in *Sutton*).

209. See MASS. GEN. LAWS ch. 151B, § 1(17)(b)-(c) (2000). See also *supra* note 40 and accompanying text.

210. See § 1(17). Cf. *Burke & Abel*, *supra* note 56, at 800-01 (discussing the analogous provisions of the ADA).

211. See § 1(17)(a); *Dahill*, 748 N.E.2d at 959.

212. § 1(17)(a).

213. See *Dahill*, 748 N.E.2d at 963-64.

justify if many of the people the SJC intended to protect were not already covered by one, if not both, of the other two prongs of the definition of handicapped contained in the statute.²¹⁴

Under the Massachusetts antidiscrimination statute, section 1(17)(c), the third prong of the definition of “handicapped” includes “being regarded as” having an impairment that substantially limits a major life activity.²¹⁵ According to the statute, someone regarded as “handicapped” has the same ability to sue as someone who is actually handicapped.²¹⁶ Under this prong of the definition, an individual would be covered by the statute if the employer discriminates based upon a perceived disability, when in fact the person is not disabled.²¹⁷

Examples of this type of discrimination would include discrimination against people who have high blood pressure or are morbidly obese, but who have no substantially limiting impairments.²¹⁸ Under the third prong of the definition, a person would be considered to have a handicap if an employers regarded the conditions as such and consequently did not hire the person.²¹⁹ A person would also be covered under this prong if the employer mistakenly believes that the person has a disability that he does not, in fact, have.²²⁰ An example of this would include a person who bruises his knee in a touch-football game the day before a job interview, and is left with a temporary limp. If the employer who notices the limp

214. An example of this overlap is shown in the trial after the *Dahill* question was certified. The United States District Court for the District of Massachusetts tried the case and a jury awarded \$847,000 in damages to Richard Dahill. See John O. Cunningham, *Shift in Disability Law Key to \$800k Verdict: Cop's Bias Case Cements Earlier SJC Ruling*, MASS. LAW. WKLY., Feb. 19, 2002. However, the verdict was based on the fact that “police officials and experts made erroneous conclusions about Mr. Dahill’s hearing capacity and ability to perform his job.” *Id.* This decision would have to be based on chapter 151B, section 1(17)(c), because the police department regarded Mr. Dahill as being handicapped and discriminated against him on that basis. Under that prong of the definition, whether or not Mr. Dahill was handicapped under section 1(17)(a) is irrelevant. See *infra* notes 215-28 and accompanying text.

215. MASS. GEN. LAWS ch. 151B, § 1(17)(c) (2000).

216. See SCOTT C. MORIEARTY ET AL., 45 MASS. PRAC. L. SERIES: EMP. L. § 8.14 (SUPP. 2002).

217. See Burke & Abel, *supra* note 56, at 801. “The rationale for the ‘regarded as prong’ is to protect persons from the discriminatory reactions of others based upon myths, fears, and stereotypes.” *Id.* (citing 28 C.F.R. app. § 1630.2(1) (2000)).

218. See MCAD GUIDELINES, *supra* note 37, § II.A.4.

219. See *id.* The reason could be either: (a) that the employer regards the condition as a health risk; or (b) that the employer fears that hiring a “handicapped” person will raise group insurance rates raised. See *id.*

220. See Burke & Abel, *supra* note 56, at 801 (citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999)).

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thinks it was due to some disability, and bases his decision to deny employment on this belief, the person would be covered under this section of the statute.²²¹ The person does not actually have a disability, since such short-term temporary injuries are not considered disabilities for the purposes of the statute.²²² But this would not preclude protection since the discrimination was based on a mistaken belief regarding a disability.²²³

If corrected hearing was not considered a disability, as was the case with corrected vision in *Sutton*,²²⁴ Richard Dahill would still be able to claim protection under the third prong of the definition of disability in the statute since his termination was based on the Police Department's belief that he had a disability, which in fact he did not have.²²⁵ The Boston Police regarded him as being substantially limited in the life activity of hearing, when in reality he claims that with his hearing aid he was not.²²⁶ In order to succeed on his handicap discrimination claim, it makes no difference whether he claims to be actually disabled or is only regarded as such; the remaining requirements of the statute are not dependent upon which prong of the definition of disability the claimant depends.²²⁷

Under 151B, section 1(17)(b), protection is offered under the statute to people who have a record of an impairment that substantially limits a major

221. See MASS. GEN. LAWS ch. 151B, § 1(17)(c) (2000). An employer would be unlikely to ask why the person was limping due to the MCAD's strict prohibition on pre-employment inquiries regarding a potential employee's disabilities. See MCAD GUIDELINES, *supra* note 37, § IV.

222. See MORIEARTY ET AL., *supra* note 216, § 8.14 n.14 (citing *Hallgren v. Integrated Fin. Corp.*, 679 N.E.2d 259, 260-61 (Mass. App. Ct. 1997) (holding that a temporary knee injury from which the plaintiff fully recovered in one month was not a handicap under the state statute)). The Appeals Court looked to the similar interpretations of the ADA in reaching their conclusion. See *id.* *But cf.* *Dart v. Browning-Ferris Indus., Inc.*, 691 N.E.2d 526, 536 (Mass. 1998) (ruling that two-year temporary disability may be considered a disability for the purposes of the state statute).

223. MORIEARTY ET AL., *supra* note 216, § 8.14.

224. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999).

225. See *supra* notes 215-17 and accompanying text; MASS. GEN. LAWS ch. 151B, § 1(17)(c) (2000).

226. See *Dahill*, 748 N.E.2d at 958-59.

227. See ch. 151B, § 4(16). In order to bring a successful handicap discrimination case in Massachusetts the claimant must first prove that he is a qualified handicapped person. This is accomplished by first falling under one of the three prongs of the test in section 1(17) of chapter 151B to prove a handicap. See *id.* Next, it must be shown that the claimant would have been able to perform the essential functions of the position with reasonable accommodation, unless the accommodation would have imposed an undue hardship on the business. See *id.* Finally, it must be proven that an employer or an agent of the employer terminated, refused to hire, rehire or advance in employment the claimant on the basis of the discriminatory belief. See *id.*

life activity.²²⁸ This prong of the definition would protect someone who previously had a substantially limiting impairment, but no longer suffers from the effects of the disability.²²⁹ People mitigating their disabilities can often claim protection under this prong as well.²³⁰

For example, if a person's hearing was tested and fell below the requirements for a job, but the person was not re-tested after acquiring more powerful hearing aids, he would be considered handicapped under this prong of the definition if the record of the failed hearing test was used by the employer to deny that person employment.²³¹ This prong, the "record of" prong, would also cover someone who suffered from cancer five years before, but after successful treatment no longer has cancer and was refused employment based on the unfounded belief of the employer that the person was handicapped based on their medical history.²³²

Under the SJC's interpretation of the statute, disregarding mitigating measures in the analysis of what constitutes a handicap, the "record of" prong of the definition becomes almost entirely irrelevant. Anyone who has had a handicap and mitigated it, and who has a medical record of having the handicap is covered under the "record of" prong.²³³ However, all of these same people are now covered by the substantially limited prong because anyone who had a handicap—yet mitigated the limitations of the handicap—is now still considered to have the handicap.²³⁴ This is exactly the type of situation that the "record of" prong of the test is designed to cover, and because of it, there was no reason for the court to broaden its definition under the first prong.²³⁵

Since the mitigation issue is already covered by both the "regarded as" and the "record of" prongs in the definition of handicapped, it is hard to understand why the SJC would go out of its way to include the definition of handicapped in the first prong to include disabilities that are mitigated

228. ch. 151B, § 1(17)(b). The scope of this Comment is confined to the first requirement.

229. See Burke & Abel, *supra* note 56, at 800-11. See also MCAD GUIDELINES, *supra* note 37, § II.A.3.

230. The Sutton sisters did not claim protection under this prong of the definition. See *Sutton*, 527 U.S. at 476. However, Richard Dahill did claim such protection in both his ADA and state law claims. See Memorandum and Order at 14, 22, *Dahill v. Police Dep't of Boston*, No. 98-11441-DPW (D. Mass. June 2, 2000). His ADA claim failed to make it past summary judgment. See *id.* at 14.

231. See MCAD GUIDELINES, *supra* note 37, § II.A.3.

232. See *id.*

233. See *id.*

234. See *Dahill*, 748 N.E.2d at 959, 964.

235. See MCAD GUIDELINES, *supra* note 37 § II.A.3; Burke & Abel, *supra* note 56, at 800-01.

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when they would be clearly covered by the other two prongs of the definition.²³⁶

If Richard Dahill were to claim that he was regarded as being disabled by the Boston Police Department, when in fact he was not, he would be covered by the second prong of the test.²³⁷ If he was to claim that even if his mitigated hearing condition was not considered a disability, and the Police Department regarded him as being disabled and discriminated against him based on their mistaken belief, he would be covered under the third prong of the test.²³⁸ Either way, there appears to be no compelling policy reason that forced the SJC to go to the lengths it did to broaden the definition of handicapped when less drastic alternatives were available.²³⁹

C. The Decision in *Dahill* Will Create a Flood of Litigation

Another argument made to the SJC in *Dahill* was that if the court allowed handicaps to be considered in their unmitigated state, the result would be a flood of litigation.²⁴⁰ The court was correct in noting that the question of whether someone is considered a “handicapped person” is only a threshold inquiry.²⁴¹ After it is shown that the plaintiff is handicapped, there are several more elements that must be proven in order to succeed.²⁴²

236. See Burke & Abel, *supra* note 56, at 800-01; *Dahill*, 748 N.E.2d at 959, 964.

237. See *supra* notes 218-25 and accompanying text (discussing the “record of” prong of the definition).

238. See *supra* notes 206-17 and accompanying text (discussing the “regarded as” prong of the definition).

239. See *Dahill*, 748 N.E.2d at 961-62. The only public policy reasons that the court claimed were behind its decision requiring a broad reading of the definition of handicap were: (1) to protect handicapped people from prejudice; and (2) to encourage people to overcome their handicaps by mitigating them. See *id.* The next two prongs of the definition adequately fulfill the first policy desire. See *supra* notes 206-25 and accompanying text. It is hard to imagine how an employer could be prejudiced against someone who needs to wear contact lenses to a job interview to be able to see, without even knowing the person is wearing the contact lenses. See MCAD GUIDELINES, *supra* note 37, § IV. (employers during pre-employment screening may not ask whether the interviewee is disabled, or whether he has any limitations that would prevent him from performing the job for which he is applying). For the second policy consideration, the court notes that its decision is more fair because two people with the same condition will be treated the same under the law, regardless of whether they can afford mitigating measures. See *Dahill*, 748 N.E.2d at 962 n.11. However, the court again failed to notice that though the two people may have the same condition, they are in different situations if one mitigates the effects of the condition and the other does not.

240. See *Dahill*, 748 N.E.2d at 964.

241. See *id.*

242. In order to prove handicap discrimination under the Massachusetts anti-discrimination statute, the plaintiff has the burden of proving not only that he has a

The plaintiff faces an uphill battle to prove his case and remedy is by no means certain.²⁴³ However, the court did not adequately address the issue of the impact of its ruling on eliminating the possibility that the amount of litigation under the newly declared rule could increase significantly.²⁴⁴

The court claimed in its decision that it, in fact, did not change the law that has been applied since the statute was enacted.²⁴⁵ “Since 1983, when the Legislature made the relevant amendment to G.L. c. 151B, judges and litigants in Massachusetts have assumed that a person with a significant physical or mental impairment met the threshold definition of ‘handicap,’ whether the person used corrective devices or took other mitigating measures.”²⁴⁶ However, many of the cases cited, including *Labonte v. Hutchins & Wheeler*, include no discussion of mitigation at all.²⁴⁷ The Boston Police noted this fact in *Dahill* and argued that if the defendant in those cases did not dispute the fact that the plaintiff is covered under the statute, lack of discussion on the issue by the court should not be seen as the court making any kind of statement on the issue.²⁴⁸

Similarly, in *Handrahan v. Red Roof Inns*, the issue of whether the plaintiff was a qualified handicapped person was not argued until after the

handicap, but also that he is qualified and capable to fulfill the essential functions of the job, as well as proving that the reason he was denied the job, or fired from it, was based solely on his handicap. See *Talbert Trading Co. v. Mass. Comm’n Against Discrimination*, 636 N.E.2d 1351 (Mass. App. Ct. 1994). “Once the plaintiff has established a prima facie case, the burden shifts to the employer to articulate a legitimate reason for its actions.” *Handrahan v. Red Roof Inns, Inc.*, 680 N.E.2d 568, 571 (Mass. App. Ct. 1997) (citing *Tardanico v. Aetna Life & Cas. Co.*, 671 N.E.2d 510 (Mass. App. Ct. 1996)).

243. See *Dahill*, 748 N.E.2d at 964 (citing *Arnold v. United Parcel Serv., Inc.* 136 F.3d 854, 861 (1st Cir. 1998)). Though no numbers were available for Massachusetts cases, plaintiffs in ADA cases have a success rate of only between 2% and 7%. See *Kramer & Oakley, supra* note 177, at 28 (citing Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 109 (1999)). But see SCOTT C. MORIEARTY ET AL., REPRESENTING CLIENTS BEFORE THE MCAD IN EMPLOYMENT CASES, PART 2, § 9 (2001). “In the discrimination context, experience suggests that state courts may be more receptive to discrimination claims and less likely to grant summary judgment to employers.” *Id.*

244. See generally *Dahill*, 748 N.E.2d at 959-64.

245. See *id.* at 963.

246. *Id.* at 964. (citing as examples *Labonte v. Hutchins & Wheeler*, 678 N.E.2d 853 (Mass. 1997) (no discussion of mitigation); *Wooster v. Abdow Corp.*, 709 N.E.2d 71 (Mass. App. Ct. 1999) (controlled asthma); *Handrahan v. Red Roof Inns, Inc.*, 680 N.E.2d 568, 571-72 (Mass. App. Ct. 1997) (controlled epilepsy)).

247. See *Labonte v. Hutchins & Wheeler*, 678 N.E.2d 853, 859 n.12 (Mass. 1997). There was “no disagreement between the parties that the plaintiff suffers from multiple sclerosis and is therefore handicapped. Thus the first prong is fulfilled.” *Id.*

248. See Brief of Defendant-Appellee, *supra* note 150, at 14 n.5.

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decision in the case had been made.²⁴⁹ The issue was not properly preserved for appeal, and therefore was not a consideration in the determination of the outcome of the case.²⁵⁰

Additionally, the SJC in *Dahill* did not address the likelihood of a substantial increase in cases filed with the Massachusetts Commission Against Discrimination (MCAD), which could lead to a strain on administrative resources.²⁵¹ Under current Massachusetts law, in all cases of unlawful employment discrimination based on the Massachusetts antidiscrimination statute, a complaint must first be filed with the MCAD.²⁵² After the complaint is filed a formal investigation takes place.²⁵³ Upon a finding of probable cause the MCAD will seek to eliminate the problem through conciliation.²⁵⁴ If this process does not work, the next step initiated by the MCAD is a public hearing.²⁵⁵ Before the public hearing begins, the plaintiff must either agree to proceed with the public hearing or remove the case to the court system.²⁵⁶ It is obvious that this process consumes both time and resource. The greater the number of complaints filed, the greater the stress on the system.

Because persons suffering from a correctable hearing loss are protected by the Massachusetts statute, a court's pronouncement of this protection serves to enhance the public's awareness of this statute to not only hearing loss sufferers, but also, for example, persons with correctable vision. Additionally, if the numbers used by the Supreme Court in *Sutton* are correct,²⁵⁷ over one-half of the population of the United States could be considered as suffering from some form of disability if mitigation is not considered.²⁵⁸ If that number is correlated to Massachusetts figures, what

249. See *Handrahan v. Red Roof Inns, Inc.*, 680 N.E.2d 568, 572 n.7 (Mass. App. Ct. 1997).

250. See *id.*

251. See Mass. Comm'n Against Discrimination R. P. 804 CMR §§ 1.00-1.25 (2002) [hereinafter MCAD Rules]. It should be clear from the MCAD Rules of Procedure that the disposition of each complaint filed will entail significant allocation of administrative resources. See *id.*

252. See MASS. GEN. LAWS ch. 151B, § 5 (2001); MCAD Rules, *supra* note 251, § 1.10. See also *Carter v. Comm'r of Correction*, 681 N.E.2d 1255, 1256 (Mass. App. Ct. 1997).

253. See MCAD Rules, *supra* note 251, § 1.13.

254. See *id.* § 1.18.

255. See *id.* §§ 1.20-1.21.

256. See *id.* § 1.10.

257. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 484-87 (1999) (citing several studies suggesting the number of people with disabilities in the United States is anywhere from an "underinclusive" 37.3 million to an "overinclusive" 160 million).

258. This statistic is based on a United States population estimate of approximately 280 million people in 1999, as well as using the "overinclusive" estimate of 160 million people

the court did, in effect, was invite 3.6 million people²⁵⁹—many of whom surely did not consider themselves to be handicapped, nor eligible to make use of the antidiscrimination statute—to initiate complaints based on their new-found handicaps if they are denied employment.²⁶⁰ The ADA was enacted to provide protection to individuals with disabilities who were seen as a “discrete and insular minority” in society.²⁶¹ If the Massachusetts Legislature sought to protect handicapped people for the same reason, it is hard to justify the court’s defining half of the population of the state as a “discrete and insular minority.”²⁶²

The court in *Dahill* stated that its decision will not “open the floodgates of litigation.”²⁶³ But, what it failed to address was the potential for a flood of complaints being filed with the MCAD.²⁶⁴ While many of the claims will be dispensed with at the investigation stage, many more than before will make it through to the hearing stage or to trial.²⁶⁵ It appears quite possible that the SJC’s prophecy may not become a reality. A more accurate characterization of the effect of its decision would have been to say it will not open the floodgates of *successful* litigation.²⁶⁶ The court has declared that people with hearing loss, similar to Richard Dahill, are eligible to sue under the Massachusetts antidiscrimination statute.²⁶⁷ By

cited in *Sutton*. See *id.* See also U.S. CENSUS BUREAU, *Geographic Comparison Table: Population Estimates*, at <http://factfinder.census.gov> (last visited Jan. 20, 2003).

259. See U.S. CENSUS BUREAU, *supra* note 258.

260. This increase may or may not become a reality. It could be a few years before the increase in cases filed at the MCAD is significant enough to be notices. See J.M. Lawrence, *Jury Awards Ex-Cop Cadet \$1M for Ban Over Hearing*, BOSTON HERALD, Feb. 7, 2002, at 27; Thomas Cambanis, *Ex-Cadet Wins Lawsuit Over Hearing Problem*, BOSTON GLOBE, Feb. 7, 2002, at B10.

261. 42 U.S.C. § 12101(a)(7) (2000).

262. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 494 (1999) (Ginsberg, J. concurring).

263. *Dahill v. Police Dep’t of Boston*, 748 N.E.2d 956, 964 (Mass. 2001).

264. All cases must proceed through the MCAD before reaching the court system, if at all. This is sure to filter out many of the less-than-legitimate complaints, but the cost to the MCAD could be extraordinary. See *supra* notes 251-56 and accompanying text.

265. See *id.* This will be true if the number of cases filed actually does increase as predicted. See *supra* notes 246-51 and accompanying text.

266. “[T]he determination of whether an individual has a handicap is a threshold inquiry. He or she must still prove that he can perform his or her essential job functions with or without reasonable accommodation.” *Disability Defined*, *supra* note 147, at 582. In addition, the plaintiff must also prove that the employer discriminated against him because of his handicap. See MASS. GEN. LAWS ch. 151B, § 4(16) (2001). Also, the employer can defend against the charge by proving that the accommodation required is not reasonable, as defined in the statute. See § 4(16)(1)-(3).

267. See *Dahill v. Police Dep’t of Boston*, 748 N.E.2d 956, 963-64 (2001).

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doing so, the court has not eased the burden of those trying to prove a discrimination case based on a disability, but it has dramatically increased the number of people in Massachusetts who are expressly covered by the statute.²⁶⁸

Massachusetts has extended protection to more people under its antidiscrimination statute, and in doing so, has provided an example to other states that may have similarly worded statutes of how to avoid the plain language in their antidiscrimination statutes.²⁶⁹ However, this is not the only way to exclude consideration of mitigating measures.

D. The Outlook for Other States

Massachusetts has provided an example of how state antidiscrimination laws do not have to follow their federal counterparts, even when both contain identical language.²⁷⁰ The SJC used legislative history to explain away the inconsistencies between the language of the statute and the result that it wanted to impose.²⁷¹ The court also used public policy arguments to rationalize its decision to ignore the plain language of the statute in honoring what it thought was the legislature's intent.²⁷²

At least two other states, New York and Rhode Island, have reached the same decision as Massachusetts, albeit by employing different methods.²⁷³ Rhode Island used a statutory amendment to reach its decision,²⁷⁴ while New York was able to make use of language in its statute that was much more explicit than the language in the Massachusetts statute.²⁷⁵ By employing either of these two methods, both of which would have amounted to a legislative amendment in Massachusetts, the decision to not include mitigating measures in determining whether a person is handicapped would have stood on much firmer ground than the judicial interpretation resulting from *Dahill*.²⁷⁶

268. See *id.* See also *supra* notes 241-51 and accompanying text.

269. See *Dahill*, 748 N.E.2d at 963-64.

270. See Parlo, *supra* note 71, at 511.

271. See *Dahill*, 748 N.E.2d at 960-62.

272. See *id.* at 961-62.

273. See Parlo, *supra* note 71, at 511.

274. See R.I. GEN. LAWS § 11-24-2.1 (2000); Parlo, *supra* note 71, at 511.

275. See *Epstein v. Calvin-Miller Int'l, Inc.*, 100 F. Supp.2d 222, 229-31 (S.D.N.Y. 2000); Parlo, *supra* note 71, at 511.

276. See *Dahill*, 748 N.E.2d at 963. Whenever a subjective opinion as to legislative intent is involved there is a substantial risk of bias. See Parmet, *supra* note 56, at 69. "Legislative history is to be used sparingly, if at all, and reliance upon such lofty notions as 'statutory goals' is condemned as an illegitimate imposition of a judge's own values and policy preferences into the supposedly 'neutral' task of applying the law as written by the legislature." *Id.* (citations omitted).

A year before the Massachusetts Supreme Judicial Court made its decision in *Dahill*,²⁷⁷ the Rhode Island Legislature responded to the Supreme Court's decision in *Sutton*.²⁷⁸ In 2000, the legislature added language to both its antidiscrimination statute²⁷⁹ and to its Fair Housing Practices Act²⁸⁰ regarding the definition of a disabled person. The statutes state that, "whether a person has a disability shall be determined without regard to the availability or use of mitigating measures, such as reasonable accommodations, prosthetic devices, medications or auxiliary aids."²⁸¹

This action by the Rhode Island Legislature, while still retaining the public policy problems that are present in the Massachusetts standard,²⁸² at least settles all of the confusion and possible misunderstandings that led the SJC to its decision in *Dahill*.²⁸³ By clearly defining disability in the statute, there is no question regarding whom the legislature intended to include in its definition of disabled. The fact that the statute still states that the disability must "substantially limit" a major life activity, rather than "has the potential to substantially limit" or "could hypothetically limit" becomes irrelevant with regard to mitigating measures due to the fact that we know exactly what the legislature intended because they have spelled it out for us.²⁸⁴

If the Massachusetts Legislature thought that the SJC had misinterpreted its intent on mitigating measures, or if it was unhappy with the MCAD guidelines prior to the decision in *Dahill*,²⁸⁵ a statutory amendment, similar to that enacted by the Rhode Island Legislature in 2000, but with wording reflecting the current EEOC guidelines concerning the definition of disability regarding mitigating measures,²⁸⁶ would be the best way to resolve the issue.

The State of New York is the only other state that has addressed the issue since the Supreme Court's decision in *Sutton*, and they have done so only indirectly.²⁸⁷ In *Epstein v. Kalvin-Miller Int'l, Inc.*,²⁸⁸ the District

277. See *Dahill v. Police Dep't of Boston*, 748 N.E.2d 956 (Mass. 2001).

278. See Parlo, *supra* note 71, at 511.

279. See R.I. GEN. LAWS § 11-24-2.1 (2000).

280. See § 34-37-3(5)(ii).

281. §§ 11-24-2.1, 34-37-3(5)(ii).

282. See *supra* notes 140-43 and accompanying text.

283. See *supra* notes 157-270 and accompanying text.

284. R.I. GEN. LAWS §§ 11-24-2.1, 34-37-3(5)(ii) (2000). See also *supra* notes 129-32 and accompanying text.

285. See MCAD GUIDELINES, *supra* note 37.

286. See *supra* note 71.

287. See *Epstein v. Kalvin-Miller Int'l, Inc.*, 100 F. Supp. 2d 222, 229-31 (S.D.N.Y. 2000).

288. See *id.* at 222. In *Epstein*, the plaintiff suffered from type 2 diabetes and a heart

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Court for the Southern District of New York held that the New York Human Rights Law²⁸⁹ (NYHRL) is analytically different from the ADA and therefore the reasoning behind the *Sutton* decision, concerning mitigating measures among other things, should not be applied to a NYHRL.²⁹⁰ The court stated that the “New York Court of Appeals has made it extremely clear that the NYHRL definition of disability is to be construed more broadly than the federal definition.”²⁹¹

The result of this decision is to justify treating the ADA and the NYHRL as two separate and distinct pieces of legislation, each with its own separate history and intent.²⁹² This is the same effect that the *Dahill* decision had on the interpretation of the Massachusetts antidiscrimination statute in the shadow of the ADA.²⁹³ However, where the language of the Massachusetts antidiscrimination statute and the ADA are nearly identical, the language in the NYHRL is quite different from the language contained in the ADA.²⁹⁴

NYHRL section 292(21) states that the term disability is defined as, “a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques”²⁹⁵ Though the word “prevents” is written in the present indicative verb form, as is “substantially limits” in the ADA and the Massachusetts antidiscrimination

condition, however, both conditions were mitigated by medication resulting in no substantial limitation of any major life activity. *See id.* at 224. The court held that the plaintiff had no cause of action under the ADA, but ruled that the New York statute did not require a substantial limitation, only a medical diagnosis of the condition. *See id.* at 224, 229-30.

289. *See* N.Y. EXEC. LAW §§ 290-296 (McKinney 2001).

290. *See Epstein*, 100 F. Supp. 2d at 229.

291. *Id.* (citing *State Div. of Human Rights v. Xerox Corp.*, 480 N.E.2d 695 (N.Y. 1985)). The court ignored the express legislative purpose of the statute, which was “to enact a definition of disability coextensive with comparable federal statutes” and instead followed the broader reading of the statute as applied by the New York Court of Appeals. *Id.*

292. *See id.* at 230. *See also* Parlo, *supra* note 71, at 511.

293. *See Dahill v. Police Dep’t of Boston*, 748 N.E.2d 956, 963-64 (Mass. 2000); *Mass., U.S. High Courts Part Company on Definition of “Disabled Person”* 15 No. 16 ANDREWS EMP. LITIG. REP. 4 (June 12, 2001).

294. *Compare* MASS. GEN. LAWS ch. 151B, § 1(17) (2001), and 42 U.S.C. § 12102(2) (2000), with N.Y. EXEC. LAW § 292 (21) (McKinney 2001).

295. N.Y. EXEC. LAW § 292 (21). The statute also contains the familiar “record of such an impairment” and “regarded by others as such an impairment” prongs of the definition that both the ADA and the Massachusetts antidiscrimination statute borrowed from the Federal Rehabilitation Act. § 292 (21)(b)-(c); 42 U.S.C. § 12102(2)(b)-(c); MASS. GEN. LAWS ch. 151B, § 1(17)(b)-(c); 29 U.S.C. § 706(8) (2000).

statute, requiring actual present prevention,²⁹⁶ there is an escape hatch built into the statute.²⁹⁷ As long as the impairment can be shown in a laboratory or through testing, actual adverse effect on the claimant's life is irrelevant.²⁹⁸ Thus, under the New York statute mitigating measures would have to be considered irrelevant since it is the presence of the physical, mental or medical condition that is the basis of the determination of disability, not the effect that the condition has on the person.²⁹⁹

It is clear that out of these three states that have examined the issue post-*Sutton*, Massachusetts has reached its outcome by the method that is most open to criticism and second-guessing.³⁰⁰ While it can be said that the Rhode Island Legislature made unnecessary amendments to its statutes because the people who would be protected by the amended section were already protected by other sections of the statute,³⁰¹ the Legislature has the authority to amend the laws it has enacted, in the name of providing more protection to the people of the State than the federal government provides them.

Similarly, the New York courts have been giving broad meaning to the term disability in the NYHRL since 1985, well before the ADA decisions of the Supreme Court in 1999, including *Sutton*.³⁰² The court's interpretation of the NYHRL is based on wording that has clear meaning and obvious intent, unlike the language in the Massachusetts antidiscrimination statute and the ADA, which requires in depth textual analysis before a decision can be made as to the statute's true meaning.³⁰³

296. See 42 U.S.C. § 12102(2)(a); MASS. GEN. LAWS ch. 151B, § 1(17)(a); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482-83 (1999).

297. See *Kramer & Oakley*, *supra* note 177, at 31.

298. See N.Y. EXEC. LAW § 292(21). Just as in the ADA or the Massachusetts antidiscrimination statute, the person only needs to fall into one of the categories of "disabled" in the statute, due to the use of the word "or," in order to be able to claim protection under the statute. See § 292(21)(a)-(c).

299. See § 292(21).

300. Massachusetts was the only state of the three that engaged in any type of interpretation that could be open to criticism. See *Dahill v. Police Dep't of Boston*, 748 N.E.2d 956, 960-63 (Mass. 2000). New York applied the plain language of its statute as it was written, and Rhode Island simply added to the language of its statute. See R.I. GEN. LAWS §§ 11-24-2.1, 34-37-3(5)(ii) (2000); *Epstein v. Kalvin-Miller Int'l, Inc.*, 100 F. Supp. 2d 222, 229-30 (S.D.N.Y. 2000). Courts in these two states could not be criticized since it was not the courts that decided that mitigating measures should be ignored. See *id.*

301. See *supra* notes 216-40 and accompanying text.

302. See *Epstein*, 100 F. Supp. 2d at 229 (citing *State Div. of Human Rights v. Xerox Corp.*, 480 N.E.2d 695 (N.Y. 1985)); *Sutton v. United Air Lines, Inc.*, 537 U.S. 471 (1999).

303. See *Parinet*, *supra* note 56, at 71-81. By using the textualist approach, the Supreme Court reached a decision that is more objective than subjective. Giving the words in the text of the statute their true meanings leaves the decision resting on much firmer

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The SJC, in making its decision, has left itself open to criticism and claims of judicial activism.³⁰⁴ A statutory amendment would have been the least controversial way for Massachusetts to address the issue of mitigating measures post-*Sutton*.³⁰⁵ This action would have cleared up any misleading language in the statute regarding mitigating measures and immediately given a definitive answer to the question.³⁰⁶

Another way in which the problem could have been solved without getting the judiciary involved would have been for the MCAD to adopt guidelines similar to those adopted by the EEOC after the decision by the Supreme Court in *Sutton*.³⁰⁷ This would have had the same effect as a legislative amendment, except that the court must still determine whether the guidelines were a reasonable interpretation of the language of the statute.³⁰⁸

The SJC made its decision in *Dahill*, and unless the legislature now makes an amendment to the Massachusetts antidiscrimination statute it will have to be assumed that the court correctly interpreted the intent of the legislature.³⁰⁹ Whether the court was correct or not does not change the fact that the statute, as shown in this analysis, may be used broadly to cover people with impairments that do not actually limit a major life activity.³¹⁰ This result could have been avoided by simply limiting the plaintiff's

ground than if the Court used the intentionalist approach, which, being entirely subjective, would have left the decision open to far more interpretive criticism. *See id.* at 67-70.

304. *See supra* note 287.

305. *See id.*

306. *See, e.g.*, R.I. GEN. LAWS §§ 11-24-2.1, 34-37-3(5)(ii) (2000). Under these statutes there are no questions of whether mitigating measures are covered or what power the administrative agency had in order to issue the particular guidelines that it did, and thus no judicial interpretation is necessary. *See also* Parmet, *supra* note 56, at 88-90 (discussing the recent rise in textualist/plain language statutory interpretation in the courts).

307. *See* 29 C.F.R. § 1630 (1998) (stating that mitigating measures must be considered when determining whether someone is substantially limited in a major life activity under the first prong of the definition of disability in the ADA).

308. This is an easier question to answer. The analysis can be accomplished by looking no deeper than the plain language of the statute and the guideline. *See supra* notes 157-207 and accompanying text. If they are consistent, then they stand. *See id.* If not, then they could be disregarded and the plain meaning of the statute would govern. *See id.*

309. *See Knight-Ridder Broad., Inc. v. Greenberg*, 511 N.E.2d 1116, 1119 (N.Y. 1987) “[I]t is a recognized principle that where a statute has been interpreted by the courts, the continued use of the same language by the Legislature subsequent to the judicial interpretation is indicative that the legislative intent has been correctly ascertained.” *Id.* (citations omitted). *But see* Alfone v. Sarno, 432 A.2d 857, 862-63 (1981) (quoting C. DALLAS SANDS, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION, § 49.10 at 261 (4th ed. 1973). “Legislative silence [is] a ‘weak reed upon which to lean.’” *Id.*

310. *See supra* notes 152-270 and accompanying text.

options to suing under one of the other sections of the definition in the statute, under which most, if not all, would certainly be covered.³¹¹

V. CONCLUSION

The Supreme Judicial Court of Massachusetts decided in *Dahill* that it would protect a broader group of people under the Massachusetts antidiscrimination statute than the federal government protects under the Americans with Disabilities Act.³¹² This decision will result in increased strain on precious judicial and administrative resources.³¹³ The decision was unnecessary because the people protected by the new ruling are not actually substantially limited in any major life activity.³¹⁴ The United States Supreme Court decided the same issue in the opposite manner in *Sutton*.³¹⁵ Though that decision received substantial criticism, it is truer to the intent of the legislature and to the statutory language.³¹⁶ The SJC has missed an opportunity to follow suit, and it will now be up to the state legislature to set the record straight as to whether it intended to include people with mitigated disabilities in its definition of handicapped.

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311. See *supra* notes 208-40 and accompanying text.

312. See *Dahill v. Police Dep't of Boston*, 748 N.E.2d 956, 963-64 (Mass. 2000).

313. See *supra* notes 241-70 and accompanying text.

314. See *supra* notes 168-80 and accompanying text.

315. See *Sutton v. United Air Lines, Inc.*, 537 U.S. 471, 481-82 (1999).

316. See *supra* notes 157-240 and accompanying text.