

Does Albinism Fit Within the Legal Definition of Disability in the Employment Context? A Comparative Analysis of the Judicial Interpretation of Disability under the SA and the US Non-Discrimination Laws

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Abstract

South Africans with albinism are among the most marginalised and vulnerable citizens yet very little attention is paid to protecting them from human rights violations. There have been several calls by people with albinism in South Africa to be classified as disabled. The question of whether albinism is classified as a disability or not is a controversial legal one, which does not always have a straightforward answer. A literature search indicates that in South Africa no comprehensive and analytical study has been carried out on the subject of albinism and disability, whereas this has already been addressed in court cases in the United States of America. This paper anticipates addressing this gap within a legal perspective. The objective of such an analysis is to understand the construction of disability under the *Employment Equity Act* in order to shed light on whether people with albinism qualify for the protection, which is afforded to people with disabilities in the work place. Foreign case law and international human rights law could shed new light on this longstanding grey area or stimulate the development of novel legal analytical strategies. This paper reviews the nature of disability claims in the workplace on grounds of albinism in the United States context, including factors contributing to disability claims; assessing the degree of impairment and the guidelines in assessing albinism related disability. Prior to this discussion, the paper explores the current working definition of disability in South Africa, which stems from the *IMATU* case, which relied significantly on a foreign precedent; the *Sutton v United Airlines* case as there was no indigenous precedent in South Africa to fall back on. It will be argued that the *Sutton v United Airlines* decision, referred to in the *IMATU* case is based on an insufficiently inclusive definition of disability. Specific cases that relied on the *Sutton v United Airlines* decision as a persuasive authority in determining whether albinism is a disability or not, will also be examined. While the United States of America has struck down the decision in the *Sutton v United Airlines* and amended its legislation to include a broader and less restrictive definition of disability, which includes present as well as past conditions and a subjective component of perceived disability, the South African definition of disability still remains narrow and less inclusive. The United States of America's amended legislation does not contain an exhaustive definition of disability; rather, an equality-based framework was chosen which considers changing biomedical, social and technological developments. This new definition highlights the fact that the emphasis must be on whether discrimination occurred rather than adherence to a strict definition of disability. Such a framework of disability includes a socio-political aspect, which places emphasis on human dignity, respect and the right to equality. Against this background, the comparative analysis raises specific issues that deserve attention, in particular that the unique disadvantages and negative stereotyping suffered by people with albinism should be recognised as unlawful conduct against people with disabilities as defined by legislation. Put differently, the discussion calls for a broader approach to viewing disability, which includes both a social and a human rights perspective. In taking the position that albinism related discrimination is socially constructed, the article also explores the mandate of the *Convention on the Rights of Persons with Disabilities* in as far as it relates to the social construction of disability. The paper argues that the *Convention on the Rights of Persons with Disabilities* affords a direction for an analysis of the discrimination faced by persons with albinism.

Keywords

Albinism; disability; employment; the right to equality; Employment Equity Act, Americans with Disability Amendment Act; Convention on the Rights of Persons with Disabilities.

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1 Contextual background and significance of the paper

South Africans with albinism are among the most marginalised and vulnerable citizens yet very little attention is paid to protecting them from human rights violations. There have been several calls by people with albinism in South Africa to be classified as disabled.¹ The question of whether albinism is classified as a disability or not is a controversial legal one which does not always have a straightforward answer. A literature search indicates that in South Africa no comprehensive and analytical study has been carried out on the subject of albinism and disability. This paper anticipates addressing this gap within a legal perspective. The objective of such an analysis is to understand the construction of disability under the *Employment Equity Act* in order to shed light on whether people with albinism qualify for the protection, which is afforded to people with disabilities in the work place.

Following an inquiry into the status of people with albinism in South Africa by the United Nations High Commissioner for Human Rights in Geneva, the South African Human Rights Commission responded as follows:²

In South Africa, persons with albinism are considered as persons with disabilities. In many communities within South Africa, disability is still generally seen as an illness, shame or curse despite the fact that both section 9 of the Constitution, Act No. 108 of 1996 and the Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000, prohibit unfair discrimination on the basis of disability.

No reasons have been brought forward to explain the South African Human Rights Commission's classification of albinism as a disability, and this classification has resulted in uncertainty regarding the status of persons with albinism in South Africa.³

Early in 2015, the Acting Assistant Labour Commissioner of Swaziland, Stukie Motsa, who herself has albinism, came down hard on the countries classification of people with albinism under the disability category and

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¹ Ekurhuleni *Declaration on the Rights of Persons with Albinism* s 23; Hlongwane 2011 <http://www.iol.co.za/news/south-africa/kwazulu-natal/fear-as-albino-boy-vanishes-1.1092451#.VYkfCvmqqko>.

² SAHRC 2015 <http://www.ohchr.org/Documents/HRBodies/HRCouncil/AdvisoryCom/Albinism/SouthAfricanHumanRightsCommission.doc>.

³ Ntiwane 2015 <http://www.observer.org.sz/news/69308-albinism-classification-is-discriminatory.html>.

commented that the classification was unwarranted because persons with albinism are not disabled.⁴ In her own words:

I personally think it is wrong for people with Albinism to be classified as People with disabilities because they are not. They are just normal people and should be treated this way. They are just ill-placed in this category.⁵

A pocket guide on disability equity in South Africa states that although albinism does not amount to a disability *per se*, persons living with albinism associate themselves with disabled people for the reason that they face the same discrimination.⁶ This view is also found in the Ekurhuleni Metropolitan Municipality's Policy Guidelines for People with Disabilities.⁷

It is apparent that there is evidence of ambiguity around the disability status of people with albinism in South Africa; in particular, whether they should be classified as disabled or not, whereas this has already been addressed in court cases in the United States of America. Foreign case law and international human rights law could shed new light on this longstanding grey area or stimulate the development of novel legal analytical strategies. In this regard, this paper reviews the nature of disability claims in the workplace on grounds of albinism in the United States context, including factors contributing to disability claims; assessing the degree of impairment and the guidelines in assessing albinism related disability. Prior to this discussion, the paper explores the current working definition of disability in South Africa, which stems from the *IMATU*⁸ case, which relied significantly on a foreign precedent; the *Sutton v United Airlines*⁹ case as there was no indigenous precedent in South Africa to fall back on.¹⁰ It will be argued that the *Sutton v United Airlines* decision, referred to in the *IMATU* case¹¹ is based on an insufficiently inclusive definition of disability. Specific cases that relied on the *Sutton v United Airlines* decision as a persuasive authority in determining whether albinism is a disability or not, will also be examined. While the United States of America has struck down the decision in the *Sutton v United Airlines* and amended its legislation to include a broader and less restrictive definition of disability, which includes present as well as

⁴ Ntiwane 2015 <http://www.observer.org.sz/news/69308-albinism-classification-is-discriminatory.html>.

⁵ Ntiwane 2015 <http://www.observer.org.sz/news/69308-albinism-classification-is-discriminatory.html>.

⁶ DPSA *Pocket Guide* 1-36. The guide on disability equity further states that persons with albinism routinely develop visual disabilities that affect their participation in life activities.

⁷ Ekurhuleni *Policy Guidelines for People with Disabilities* s 9(7).

⁸ *IMATU v City of Cape Town* 2005 11 BLLR 1084 (LC) 1091 (hereafter the *IMATU* case).

⁹ *Sutton v United Airlines Inc* 527 US 471 (1999) (hereafter the *Sutton* case).

¹⁰ Ngwena and Pretorius 2007 *ILJ* 754.

¹¹ *IMATU* case para 98.

past conditions and a subjective component of perceived disability,¹² the South African definition of disability still remains narrow and less inclusive. The United States of America's amended legislation does not contain an exhaustive definition of disability; rather, an equality-based framework was chosen which considers changing biomedical, social and technological developments.¹³ This new definition highlights the fact that the emphasis must be on whether discrimination occurred rather than adherence to a strict definition of disability. Such a framework of disability includes a socio-political aspect, which places emphasis on human dignity, respect and the right to equality.¹⁴ As a result, a physical limitation, a condition, a perceived disability or a combination of these, can be defined as a disability. Against this background, the comparative analysis raises specific issues that deserve attention, in particular that the unique disadvantages and negative stereotyping suffered by people with albinism should be recognised as unlawful conduct against people with disabilities as defined by legislation. Put differently, the discussion calls for a broader approach to viewing disability, which includes both a social and a human rights perspective.

The article also explores the mandate of the *Convention on the Rights of Persons with Disabilities* in as far as it relates to the social construction of disability. In taking the position that albinism related discrimination is socially constructed, this paper argues that the *Convention on the Rights of Persons with Disabilities* affords a direction for an analysis of the discrimination faced by persons with albinism. Although public perceptions of disability are not regulated under the *Employment Equity Act*, in November 2007 South Africa ratified the *United Nations Convention on the Rights of Persons with Disabilities* (CRPWD).¹⁵

2 The legislative framework regulating disability in South Africa

South Africa does not have centralised disability legislation prescribing the basis on which a person can claim to be disabled. Rather, there are diverse policies and legislation regulating disability matters.¹⁶

Since the dawn of democracy in South Africa, the situation with regard to disabled people has changed very little apart from a few modifications to

¹² Lawrence and Gostin 2015 *JAMA* 2232.

¹³ Bryan *Socio-Political Aspects of Disabilities* 5-17.

¹⁴ Bryan *Socio-Political Aspects of Disabilities* 5-17, 215-252.

¹⁵ The *United Nations Convention on the Rights of Persons with Disabilities* (2007).

¹⁶ These are, for example, the *Social Assistance Act* 13 of 2004; the *Employment Equity Act* 55 of 1998; and the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000, which specifies disability as a prohibited ground of unfair discrimination but does not define what disability means.

legislation.¹⁷ Disabled persons are protected in the *Constitution* against unfair discrimination. The *Constitution* provides the framework for non-discrimination against people with disabilities.¹⁸ Legislation such as the *Promotion of Equality and Prevention of Unfair Discrimination Act*, the *Employment Equity Act*¹⁹ and the *Labour Relations Act*,²⁰ give effect to section 9 of the *Constitution* which provides for the enactment of national legislation to prevent unfair discrimination and promote the achievement of equality among all people, including those with disabilities. Such legislation exists to enable progress towards a democratic society that is integrated in its diversity and manifested in relationships that express care and concern for disabled people.²¹ These statutes are guided by the constitutional principles of equality, fairness, equity, social progress, justice, human dignity and freedom.²²

The way in which we think about equal opportunities in the context of disability is inextricably linked to how disabled people are categorised as a protected class.²³ Defining who qualifies as a disabled person is a challenge, since disability in itself is a contested concept, comprising "very fluid or porous boundaries".²⁴ There is no agreed upon general standard for establishing who qualifies under the protected class of disability for the purposes of non-discrimination.²⁵ Cases of racial, sex or gender discrimination are easily identifiable in the sense of determining whether a petitioner falls in the protected class.²⁶ The distinctive attributes of race, such as phenotype, or sex or gender which distinguish between the biologically defined male and female, are generally regarded as readily ascertainable and determinative.²⁷ Disability, in contrast, is not, and has been treated in different ways by the legislature.²⁸

¹⁷ Department of Provincial and Local Government *Disability Framework* 16.

¹⁸ Section 9 of the *Constitution of the Republic of South Africa*, 1996.

¹⁹ *Employment Equity Act* 55 of 1998.

²⁰ *Labour Relations Act* 66 of 1995.

²¹ Department of Provincial and Local Government *Disability Framework* 13.

²² Degener "Disability as a Subject of International Human Rights Law" 152.

²³ Dupper and Garbers *Equality in the Workplace* 189.

²⁴ Dupper and Garbers *Equality in the Workplace* 189.

²⁵ Dupper and Garbers *Equality in the Workplace* 189.

²⁶ Dupper and Garbers *Equality in the Workplace* 189.

²⁷ Dupper and Garbers *Equality in the Workplace* 189.

²⁸ Dupper and Garbers *Equality in the Workplace* 189. The *Social Assistance Act* 13 of 2004 under s 9(b) recognises a person with a disability as a person who, owing to a physical or mental disability, is unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance. In the *Employment Equity Act* 55 of 1998 under s 1, disability is defined in terms of the capability of the disabled person to be usefully employed. The South African Revenue Services (SARS) has shed additional light on the legal definition of disability. S 18(3) of the *Income Tax Act* 58 of 1962 defines the term disability at length as a moderate to severe limitation of a person's ability to function or perform

There is no common legal definition of what "disability" is.²⁹ When investigating unfair discrimination based on disability, the outcome of each case will depend on the context within which it occurs.³⁰ Section 9 of the *Constitution*, affords persons with disability constitutional protection against unfair discrimination. However, the South African *Constitution* provides no framework for the definition of disability.³¹ It merely lists disability as a ground for protection from unfair discrimination.³² In the *Hoffmann* case, there was a challenge to engage the Constitutional Court on the definition of disability as a listed ground.³³ The courts refused to provide a definition since it was able to decide the case on an analogous ground. The present working definition of disability in South Africa derives from the interpretation of the *Employment Equity Act*.³⁴

2.1 Disability as an insufficiently inclusive concept under the Employment Equity Act 55 of 1998

The *Employment Equity Act* is designed for the implementation of constitutional equality in the workplace and to regulate disability in two major ways. Firstly, similarly to the *Constitution*, the *Employment Equity Act* lists disability as one of the grounds for protection in section 6(1).³⁵ Secondly, chapter 3 of the Act stipulates that disabled persons are part of the target groups for affirmative action. Persons with disabilities, as well as black persons and women, are advanced by affirmative action.³⁶

daily activities as a result of physical, sensory, communication, intellectual or mental impairment, if the limitation – (a) has lasted or has a prognosis of lasting more than a year; and (b) is diagnosed by a duly registered medical practitioner in accordance with criteria prescribed by the Commissioner. The Commissioner for SARS set out a prescribed form (ITR-DD Confirmation of Diagnosis of Disability for the purposes of the *Income Tax Act*) which explores vision, hearing, communication or speech, physical, intellectual and mental disability. This form also indicates what is considered to be disability in each of the previously stipulated areas. See also Bick 2011

<http://www.mondaq.com/x/147254/Arbitration+Dispute+Resolution/Definitions+Of+Disability+And+The+2011+Census>.

²⁹ Renteln *Cross-cultural Perceptions on Disability* 62.

³⁰ *IMATU* case para 22.

³¹ Gutto *Equality and Non-discrimination in South Africa* 151.

³² Dupper and Garbers *Equality in the Workplace* 189. Also see *Hoffmann v South African Airways* 2001 1 SA 1 (CC) (hereafter the *Hoffmann* case).

³³ *Hoffmann* case para 40.

³⁴ *Hoffmann* case para 40.

³⁵ Section 6(1) of the *Employment Equity Act* 55 of 1998.

³⁶ Dupper and Garbers *Equality in the Workplace* 189.

The *Employment Equity Act*³⁷ defines disabled persons as:

... people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment.

It is clear that this definition of disability is centered on the actual existence of impairment and on the degree of impairment.³⁸ To qualify under the protected class, such impairment ought to cause significant restriction in the competence required to carry out the inherent purpose of the job.³⁹ The definition is based on the consequences of the impairment, in that it has to limit the complainant's admission into, or progression in, employment.⁴⁰

2.1.1 *IMATU v City of Cape Town*

In the groundbreaking case of *IMATU*,⁴¹ the meaning of disability as contained in section 6 of the *Employment Equity Act* was construed very narrowly. This case concerns a complex but significant question relating to whether the City of Cape Town's imposition of a blanket ban on the employment of diabetics as fire-fighters amounted to unfair employment discrimination.⁴² In this case, a law enforcement officer working for the Cape Town City Council applied to be transferred to the firefighting unit.⁴³ He was turned down because it was believed that his diabetes (an illness that can result in a coma) could be dangerous to himself and others.⁴⁴

The Plaintiff claimed that in his thirteen years as a voluntary firefighter, his diabetes had never endangered anyone's life.⁴⁵ He further argued that he was no more of a risk than other employees who could, suffer from unexpected strokes, embolisms or fits.⁴⁶ Statistics show that diabetics are employed in emergency services around the world.⁴⁷

The court held that the onus was on the employer to prove that its policy of a blanket ban on insulin-dependent diabetics was not discriminatory.⁴⁸ In the court's view, the employer was unable to supply this proof.⁴⁹ The court

³⁷ Chapter 1 of the *Employment Equity Act* 55 of 1998.

³⁸ Dupper and Garbers *Equality in the Workplace* 189.

³⁹ Section 1 of the *Employment Equity Act* 55 of 1998. Also see Dupper and Garbers *Equality in the Workplace* 189; and GN 1345 in GG 23702 of 19 August 2002.

⁴⁰ *IMATU* case paras 89-90.

⁴¹ *IMATU* case paras 89-91.

⁴² *IMATU* case para 1.

⁴³ *IMATU* case para 8.

⁴⁴ *IMATU* case paras 8-11.

⁴⁵ *IMATU* case para 20.

⁴⁶ *IMATU* case para 65.

⁴⁷ *IMATU* case para 52.

⁴⁸ *IMATU* case para 81.

⁴⁹ *IMATU* case para 112.

further held that the employee's condition did not constitute a disability in terms of the *Employment Equity Act*⁵⁰ but the employee's dignity had nonetheless been negatively affected which meant there was unfair discrimination.⁵¹ The employer was also unable to persuade the court that its policy on diabetes sufferers was based on the inherent requirements of the job.⁵² The court concluded that the employer's policy generalised unnecessarily and unfairly and that diabetes sufferers should be tested individually to establish whether they are fit for certain jobs.⁵³

As an expert witness in this case, Professor Bonnici testified that Type 1 diabetes is a long-term physical impairment.⁵⁴ There is no cure for it and it is a lifetime disease. People who suffer from Type 1 diabetes are dependent on insulin that has to be self-administered or administered by others for the rest of their lives.⁵⁵ They cannot function without it, and will in fact die if they do not receive insulin.⁵⁶ There is therefore no doubt that Type 1 diabetes is a long-term physical impairment. The Respondent's expert witness, Dr Carstens, confirmed this.⁵⁷

However, in the court's opinion the matter did not end there. Item 5.1⁵⁸ requires that before being classified as a person with disabilities, an applicant must satisfy all the criteria in the definition. Hence, in addition to showing a long-term physical impairment, applicants need to show that such impairment substantially limits their prospect of entry into or advancement in employment. In terms of item 5.1.3(i), an impairment is substantially limiting if, in its nature, duration or effects, it substantially limits the person's ability to perform the essential functions of the job for which they are being considered. Cognisance was taken of subsection (ii) of item 5.1.3 as some impairments are easily controlled, corrected or lessened to the point that they have no limiting effects. For example, a person who wears spectacles or contact lenses does not have a disability, unless the person's vision is substantially impaired even with spectacles or contact lenses. Consideration must be given to the medical treatment or devices which could control or correct the impairment so that its adverse effects are prevented or removed.

50 *IMATU* case paras 91-92.

51 *IMATU* case paras 92-93.

52 *IMATU* case para 119.

53 *IMATU* case para 98.

54 *IMATU* case para 107.

55 *IMATU* case para 107.

56 *IMATU* case para 107.

57 *IMATU* case para 107.

58 GN 1345 in GG 23702 of 19 August 2002.

The court was of the view, particularly in the light of the medical evidence, that fast-acting, analogue insulin controls or corrects the long-term physical impairment, diabetes mellitus, so that its adverse effects in the working environment are significantly reduced or disappear entirely. Indeed, that was the applicant's case. It follows that although diabetes mellitus can be accurately described as a long-term impairment, a person who suffers from this ailment is not regarded as a person with a disability under the *Employment Equity Act*. According to the court, the plaintiff lived a normal life apart from his medication regime, and there was no substantial limitation of his ability to carry out tasks.⁵⁹ The applicant therefore did not fall within the definition of "people with disabilities" in the Code of Good Practice.

Defining disability in the employment context shifts the consideration from the diagnosis of the disability to the consequences of the disability for both the employee's capability to work as well as their ability to find work.⁶⁰ Ngwena and Pretorius robustly argue that the definition of disability in terms of section 6(1) of the *Employment Equity Act* is evidently not for the purposes of determining eligibility into social security benefits which requires functional incapacity but is about a right to non-discrimination.⁶¹ This definition is excessively restrictive for non-discrimination purposes as it misses the rationale for addressing disability-related discrimination.⁶² The central limitation of such a definition is that it does not take cognisance of the fact that many disabled people are not severely impaired or that they manage these impairments to the extent that they no longer require protection from unfair discrimination.⁶³ In support of this argument, Ngwena, for example says

The decisive factor in the definitional content of disability must necessarily be context rather than an incontestable a priori notion of disability. If our objective is to eliminate discrimination, then, to be efficacious, our definition of disability must necessarily seek to maximally challenge stigma, aversive attitudes, stereotyping and indifferent social and physical arrangements.⁶⁴

In the context of nondiscrimination, the enquiry is whether the definition adopted by the court in *IMATU*, namely: (1) "a long-term or recurring physical or mental impairment"; and (2) "substantial limitation in prospects of entry into or advancement in employment" are mutually proper and necessary.⁶⁵ If the context is eradicating unfair discrimination, it is not only

⁵⁹ *IMATU* case para 91.

⁶⁰ *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* 2008 4 BLLR 356 (LC) (hereafter the *Standard Bank* case) para 58.

⁶¹ Ngwena and Pretorius 2007 *ILJ* 758.

⁶² Ngwena and Pretorius 2007 *ILJ* 758.

⁶³ Dupper and Garbers *Equality in the Workplace* 195. Also see Ngwena '*Disabled People*' and the *Search for Equality* 62.

⁶⁴ Ngwena 2006 *SAJHR* 644. Also see Ngwena and Pretorius 2007 *ILJ* 759.

⁶⁵ Ngwena and Pretorius 2007 *ILJ* 758.

proper, but also indispensable, to require the first element since the notion of physical or mental impairment is essential for differentiating disability from other categories of associational features.⁶⁶ Devoid of impairment, it would be problematic for instance to differentiate disability from other features such as race or sex.⁶⁷ Necessitating the impairment to be 'long-term' or 'recurring' is crucial so as to make a distinction between disability from momentary impairments such as impairments arising from short-term illness.⁶⁸ In order for the right not to be discriminated against on grounds of a disability to be effective and to be on parity with other forbidden grounds, then the effective measure should not be the severity of the impairment or the severity of the effects associated with the impairment as required by the second element of the definition adopted in the *IMATU* case.⁶⁹ Rather, what is essential is determining if a complainant's dignity has been impaired based on differentiation that is linked to the fact of physical or mental impairment.⁷⁰

Ngwena and Pretorius argue that the second element of the definition, is not only unnecessary, but juridically inappropriate.⁷¹ Within the context of the workplace, people with disabilities have traditionally faced stigmatisation and have been excluded from employment not necessarily on grounds of the severity of their impairments, but simply on the basis that the long-term or recurring impairments that they have, or are perceived to have, are associated with incompetence to perform the innate requirements of the job or are merely preserved as undesirable personal characteristics to have in the workplace.⁷²

In the *IMATU* case, the court took a foreign precedent; *Sutton v United Airlines*, as credible and persuasive authority.⁷³ The court noted as follows:

My finding in this regard, I would venture, accords with the view taken by diabetics of themselves. Many surely would prefer not to be stigmatised by the brand "disabled". A similar conclusion was reached by the US Supreme Court in *Sutton v United Airlines Inc* 527 US 471 (1999) which held that the determination of whether an individual is disabled under the ADA Disability Standard requires consideration of the individual's impairment in its mitigated, or medicated state.⁷⁴

⁶⁶ Ngwena and Pretorius 2007 *ILJ* 758.

⁶⁷ Ngwena and Pretorius 2007 *ILJ* 758.

⁶⁸ Ngwena and Pretorius 2007 *ILJ* 758.

⁶⁹ Ngwena 2006 *SAJHR* 645. Also see Ngwena and Pretorius 2007 *ILJ* 758.

⁷⁰ Ngwena 2006 *SAJHR* 645.

⁷¹ Ngwena and Pretorius 2007 *ILJ* 758.

⁷² Ngwena and Pretorius 2007 *ILJ* 759.

⁷³ *IMATU* case para 98.

⁷⁴ *IMATU* case para 91.

The *Sutton v United Airlines* case was decided by the United States of America Supreme Court under the *Americans with Disabilities Act* of 1990. The definitional construct of disability under the *Americans with Disabilities Act* of 1990 will be explored next in order to provide a meaningful understanding of disability in the American context as well as a better understanding of the American courts' normative responses to disability discrimination claims.

3 The legal interpretation of disability under the Americans with Disabilities Act of 1990: A case study

3.1 Sutton v United Airlines

The *Americans with Disabilities Act* of 1990 contains a three-pronged approach to the definition of disability, which has been retained in the *Americans with Disabilities Amendment Act*:

The term disability means, with respect to an individual:

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment (as described in para(3)).⁷⁵

The first component of this definition of disability refers to a physical or mental impairment that substantially limits one or more major life activities of an individual, while the second component refers to a record of such impairment. In addition, the definition provides for the protection against discrimination of individuals who are regarded as having an impairment. An individual can therefore be covered by the definition of disability in three ways.⁷⁶

In the case of *Sutton v United Airlines*, the court considered the application of the third component of this definition of disability. The United States Supreme Court⁷⁷ found that the determination of "disability" under the *Americans with Disabilities Act* of 1990 requires an inquiry into any mitigating or corrective measures.⁷⁸ The case focused on the question of whether the determination of disability under the *Americans with Disabilities Act* should be made with consideration of any corrective measures for the impairment. The key question was whether the appellants, the twin Sutton sisters who suffered from severe myopia, had been unfairly discriminated against in being refused positions as global airline pilots for a major

⁷⁵ Section 4 of the *Americans with Disabilities Amendment Act* of 2008.

⁷⁶ Lawrence and Gostin 2015 *JAMA* 2232.

⁷⁷ *Sutton* case para 68.

⁷⁸ *Sutton* case para 1.

commercial carrier.⁷⁹ The sisters met the stipulated employment criteria such as age, education, experience and FAA certification.⁸⁰

Subsequent to the submission of their applications, United Airlines invited the sisters to attend interviews and to take the relevant flight simulator tests,⁸¹ but when they arrived they were told that there had been a mistake because they did not meet the airline's minimum vision requirement. The minimum requirement specified by the employer and accepted as an inherent requirement for the job was 20/100 uncorrected visual acuity or better.⁸² The sisters failed to meet this requirement for the reason that they both had visual acuity of 20/200 or less in the right eye and 20/400 or less in the left eye, although their corrected visual acuity was 20/20 or better.⁸³

The discrimination claim brought by the sisters was dismissed because it failed to state a claim upon which relief could be granted.⁸⁴ The court noted that the plaintiffs were not actually and substantially limited in any major life activity since their vision impairments could be fully corrected.⁸⁵ The court further noted that their claim did not specify that they were disabled in the meaning of the *Americans with Disabilities Act* and that there was insufficient allegation that the airline regarded the sisters as having an impairment that substantially limits a major life activity. Their claim only alleged that the airline regarded them as incapable of meeting the specific job requirements.⁸⁶

The judge noted that that the *Americans with Disabilities Act* did not define what is meant by "substantially limits", and that this could be achieved through consulting dictionaries as well as turning to the interpretive guidance of the Equal Employment Opportunity Commission (EEOC).⁸⁷

The dictionaries suggest that "substantially" means something that is "considerable", "specified to a large degree", "ample" or of "considerable amount, quantity or dimensions".⁸⁸

⁷⁹ *Sutton* case paras 1-6.

⁸⁰ *Sutton* case para 4.

⁸¹ *Sutton* case para 4.

⁸² *Sutton* case para 4.

⁸³ *Sutton* case para 4.

⁸⁴ *Sutton* case para 6.

⁸⁵ *Sutton* case para 6.

⁸⁶ *Sutton* case para 4.

⁸⁷ *Sutton* case para 35.

⁸⁸ *Sutton* case para 35.

The judge also referred to the Equal Employment Opportunity Commission's⁸⁹ explanation of "substantially limits" in the following terms:

Significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.⁹⁰

On appeal, the Court of Appeals for the Tenth Circuit affirmed the District Court's decision. Whilst the appellants were prohibited from being international pilots, there were a number of other jobs from which they were not excluded as they could still be employed as regional pilots or pilot instructors.⁹¹ It is apparent from this case that where a corrective measure allows a person to participate in the major life activity of working, it cannot be said that the person is substantially limited, notwithstanding the fact that the person could not perform a particular job without the corrective measure.

The discussion now turns to court cases in the United States of America that have specifically dealt with the question of whether albinism is a disability or not. The judges in these cases have treated the *Sutton v United Airlines* case as a persuasive authority in coming to their respective judgements.

3.2 *Manz v Gaffney*⁹²

In the *Manz v Gaffney* case, the plaintiff had ocular albinism and his disability claim was based upon this visual condition. The plaintiff was hired to work for the County in 1995.⁹³ In 1997, he was tested for promotion to the position of "caseworker trainee"⁹⁴ and scored 95 out of a possible 100 points in the promotion examination.⁹⁵ Manz's complaint stated that he was interviewed for the caseworker trainee position on several occasions between November 1997 and March 1999⁹⁶ but was never offered the promotion. He also asserted that during the period in which he was interviewed for the job, the County hired fifty caseworker trainees.⁹⁷ He

⁸⁹ The EEOC is responsible for interpreting and enforcing most but not all federal laws that prohibit employment discrimination, including the *Americans with Disabilities Act*. Guerin 2018 <https://www.nolo.com/legal-encyclopedia/what-is-the-eeoc.html>.

⁹⁰ *Sutton* case para 35.

⁹¹ *Sutton* case para 37.

⁹² *Manz v Gaffney* 200 F Supp 2d 207 (EDNY 2002) (hereafter the *Manz* case).

⁹³ *Manz* case para 211.

⁹⁴ *Manz* case para 211.

⁹⁵ *Manz* case para 211.

⁹⁶ *Manz* case para 211.

⁹⁷ *Manz* case para 211.

claimed that the failure to promote him was based upon his disability, namely ocular albinism.⁹⁸

The plaintiff filed a Notice of Claim against the County in May 1998.⁹⁹ In June 1998 he asked his supervisor for leave so that he could attend a meeting with a County attorney to discuss his disability discrimination claim.¹⁰⁰ The plaintiff alleged that after the June 1998 meeting, he received a poor performance evaluation.¹⁰¹ According to the plaintiff, this evaluation as well as the failure to promote him that followed his filing of the Notice of Claim and the June 1998 meeting were acts taken in retaliation for his disability discrimination claim.¹⁰²

Manz had had a driver's licence since 1994 and he stated that he was able to drive using an adaptive aid provided by his physician.¹⁰³ The use of this corrective aid, together with his doctor's certification that he was able to see well enough to drive, allowed Manz to bypass the eye test which is required for all driver's license applicants.¹⁰⁴ Manz attested that he could not see signs from afar and stated that if this turned out to be an on-the-job dispute, he would perhaps have to use binoculars.¹⁰⁵ Manz also asserted that he was capable of reading although slowly.¹⁰⁶ While observing that he had to be close to things than others might easily see from further away, Manz did not experience any other visual limitation.¹⁰⁷ He also submitted an affidavit detailing his limitations in the activities of hunting, watching television and reading.¹⁰⁸ He emphasised that when hunting, he "sits in a deer stand and waits for the animal to approach him".¹⁰⁹ When watching television, he attested that he could only see "appropriate detail" if he sat no more than eight feet away from a four foot screen, that he could read only a section of a newspaper at a time due to eye fatigue, and that he required a magnifying device to read small print.¹¹⁰

Dr Marc Epstein, an ophthalmologist for the Plaintiff since 1992, pointed out that the plaintiff's corrected visual acuity was 20/60 but submitted that with the help of "telescopic magnification," he was able to see 20/20.¹¹¹ Dr

⁹⁸ *Manz case para 211.*

⁹⁹ *Manz case para 211.*

¹⁰⁰ *Manz case para 211.*

¹⁰¹ *Manz case para 211.*

¹⁰² *Manz case para 211.*

¹⁰³ *Manz case para 215.*

¹⁰⁴ *Manz case para 215.*

¹⁰⁵ *Manz case para 216.*

¹⁰⁶ *Manz case para 216.*

¹⁰⁷ *Manz case para 216.*

¹⁰⁸ *Manz case para 216.*

¹⁰⁹ *Manz case para 216.*

¹¹⁰ *Manz case para 216.*

¹¹¹ *Manz case para 216.*

Epstein further stated that Menz had very little trouble driving with the exception of driving in environments with "extraordinarily bright lights", but could compensate for his problem by wearing sunglasses.¹¹²

Manz alleged that his vision constituted an impairment that limits the major life activities of seeing, reading, and driving.¹¹³

The defendant, the County, contended that the plaintiff was not disabled within the meaning of the *Americans with Disabilities Act*.¹¹⁴ This contention was backed up by the argument:

1. that Plaintiff did not suffer from a physical impairment and
2. that Plaintiff suffered no substantial limitation in the performance of any major life activity. In this regard it was argued that driving has been rejected as constituting a "major life activity" within the meaning of the ADA.¹¹⁵

The court found that the prerequisite that a plaintiff proves that a "major" life activity was affected by his impairment confirms that only important impairments are protected.¹¹⁶ The court further stated that major life activities are functions such as caring for oneself, performing manual tasks, seeing, hearing, speaking and breathing, while activities such as playing golf, shopping and executing household chores do not amount to major life activities.¹¹⁷

In answering the question of whether the plaintiff's ocular albinism constituted a disability within the meaning of the *Americans with Disabilities Act*, the court noted that the plaintiff suffered from a "physical impairment" and that such impairment limited his ability to see, which is clearly a major life activity under the *Americans with Disabilities Act*.¹¹⁸

The inquiry did not end there. A further question critical to the investigation of whether the plaintiff's condition was a disability under the *Americans with Disabilities Act*, was whether the plaintiff was in fact "substantially" limited in the major life activity of seeing.¹¹⁹ Persons who are substantially limited in major life activities are either incapable of performing such actions or significantly restricted as to the way in which or the length of time for which an activity can be performed.¹²⁰

¹¹² *Manz case paras 216-217.*

¹¹³ *Manz case para 212.*

¹¹⁴ *Manz case para 212.*

¹¹⁵ *Manz case para 212.*

¹¹⁶ *Manz case para 212.*

¹¹⁷ *Manz case para 212.*

¹¹⁸ *Manz case para 216.*

¹¹⁹ *Manz case para 217.*

¹²⁰ *Manz case para 212.*

In considering whether there is a substantial limitation, the court considered:

- a) the nature and severity of the impairment,
- b) the duration or expected duration of the impairment, and
- c) the permanent or long term impact of the impairment.¹²¹

The individual analysis that is central to the substantial limitation inquiry also necessitates that the court consider the effect of corrective measures on the plaintiff's condition.¹²² This includes the use of devices such as eyeglasses, contact lenses and medication.¹²³ The body's specific coping systems need to be considered when determining the extent of any limitation.¹²⁴ The degree of improvement afforded by the use of such aids may lead to the conclusion that the impairment does not qualify as a substantial limitation of the major life activity as claimed.¹²⁵ The substantial limitation question has to be deliberated on a case by case basis.¹²⁶ Such individual inquiry bars a court from concluding that all people with a certain condition automatically suffer from a disability under the *Americans with Disabilities Act*.¹²⁷ The court in this case noted that it is "insufficient" to come to a conclusion that several people with ocular albinism are substantially limited in their ability to see.¹²⁸ Reasonably, the determination should be whether a specific plaintiff suffers from a considerable limitation in the ability to see.¹²⁹

The court in the *Manz* case referred to the *Albertsons* case where the Supreme Court noted that the visual impairment suffered by the plaintiff is suffered by a number of individuals in varying degrees.¹³⁰ The court held that the plaintiff's own testimony, as well as his doctor's report were evidence that the plaintiff used a number of ameliorative devices to allow him to function.¹³¹ Spectacles and other visual aids made it possible for him to drive a car, read and perform his duties at work.¹³² The court held that the reasoning of the plaintiff's doctor that the plaintiff's vision was correctable to 20/20 and that such corrective measures were "artificial" 20/20, was meaningless, stating that

¹²¹ *Manz* case para 212.

¹²² *Manz* case para 214.

¹²³ *Manz* case para 214.

¹²⁴ *Albertsons, Inc v Kirkingburg* 527 US 555, 566, 119 S Ct 2162, 144 L Ed 2d 518 (1999) (hereafter the *Albertsons* case).

¹²⁵ *Manz* case para 214.

¹²⁶ *Manz* case para 217; and *Albertsons* case paras 11-12.

¹²⁷ *Manz* case para 217; and *Albertsons* case paras 11-12.

¹²⁸ *Manz* case para 217.

¹²⁹ *Manz* case para 217.

¹³⁰ *Manz* case para 217; and *Albertsons* case para 11.

¹³¹ *Manz* case para 217.

¹³² *Manz* case para 217.

[e]very near-sighted person who wears eyeglasses has their vision "artificially" corrected to 20/20 while they remain myopic. Every person whose high blood pressure is "corrected" by the use of medication still suffers from hypertension. Similarly, Plaintiff has his vision artificially improved to 20/20 while still suffering from ocular albinism. Any distinction between a "real" and "artificial" correction is simply semantic.¹³³

In light of the above, the court came to the conclusion that the plaintiff does not suffer from a disability within the meaning of the *Americans with Disabilities Act* and as a result dismissed the claim that he was discriminated against on the basis of a disability.¹³⁴

3.3 *Barta v Sears*

In the case of *Barta v Sears*,¹³⁵ the plaintiff Nancy Barta, a person with albinism, brought an application to the court for determination whether she is a "disabled person" under the *Americans with Disabilities Act*.¹³⁶

On 7 October 1999, the plaintiff found a casual job as a replenisher at Sears, Roebuck and Co through the Virginia Department for the Blind and Visually Handicapped.¹³⁷ She worked in the stockroom, unloading and packing commodities on the sales floor.¹³⁸ On 21 March 2001, the defendant unilaterally changed the Plaintiff's job position from replenisher to sales associate.¹³⁹ She worked in the ladies department of one of the defendant's stores from April 2001 until she resigned on 28 January 2002. On 1 July 2001, the defendant allegedly registered the plaintiff as disabled in the Accommodation and Leave Log.¹⁴⁰

In the spring of 2001, the plaintiff completed a standard assistant's availability form wherein she specified her availability as 16 hours per week.¹⁴¹ Her available hours were allegedly limited by access to transportation.¹⁴² Part-time associates at the company were not guaranteed a minimum number of working hours per week, hence the scheduling of working hours was the obligation of the department or unit manager.¹⁴³

¹³³ *Manz* case para 217.

¹³⁴ *Manz* case para 218.

¹³⁵ *Barta v Sears, Roebuck and Co* 307 F Supp 2d 773 (ED Va 2004) (hereafter the *Barta* case) para 778.

¹³⁶ *Barta* case para 778.

¹³⁷ *Barta* case para 776.

¹³⁸ *Barta* case para 777.

¹³⁹ *Barta* case para 777.

¹⁴⁰ *Barta* case para 777.

¹⁴¹ *Barta* case para 777.

¹⁴² *Barta* case para 777.

¹⁴³ *Barta* case para 777.

A sales associate's duties include working with customers, helping them in product selection and concluding sales transactions, as well as restocking merchandise.¹⁴⁴ Since the plaintiff reported herself as having a visual limitation, she was at no time obligated to use the cash register as part of her job as a sales assistant.¹⁴⁵ The plaintiff contended that she informed a number of managers that she could not read the computer monitors and that the Department for the Blind and Visually Handicapped could be approached to provide the defendant with whatever might be required for her to perform her job, such as a talking register, a bigger monitor or Zoom text loaded onto the computer.¹⁴⁶ The plaintiff contended that the defendant turned down her proposal regarding free tools for the visually impaired,¹⁴⁷ and she was not allowed to make use of the cash register as part of her job.¹⁴⁸ She was also not offered store training on the use of the register.¹⁴⁹

The plaintiff's hours remained consistent until January 2002.¹⁵⁰ The decrease in her working hours after that date, as well as the rationale behind the decrease were central to the plaintiff's discrimination claim under the *Americans with Disabilities Act*.¹⁵¹ The defendant claimed that the plaintiff and all other casual sales associates had their working hours decreased in January 2002.¹⁵² The plaintiff allegedly worked 45.5 hours in December 2001, but did not work at all for the first two weeks in January 2002 and was only scheduled for one day from 9:00 am to 12:30 pm in the entire month of January.¹⁵³ Following an objection by Ms Jill Dewey, one of her managers, the plaintiff was allegedly allowed to work two further non-scheduled days during January.¹⁵⁴

The plaintiff asserted that Ms Dewey demanded that she undergo training on the computers and start using the sales registers. She again tried to explain her visual impairment to Ms Dewey, and the fact that supplementary aids were accessible through the Department for the Blind and Visually Handicapped.¹⁵⁵ Ms Dewey refused to consider accommodating the plaintiff's condition and declared that the plaintiff would not be scheduled for work again until she took the computer training and learned to work the

¹⁴⁴ *Barta* case para 777.

¹⁴⁵ *Barta* case para 777.

¹⁴⁶ *Barta* case para 777.

¹⁴⁷ *Barta* case para 777.

¹⁴⁸ *Barta* case para 777.

¹⁴⁹ *Barta* case para 777.

¹⁵⁰ *Barta* case para 777.

¹⁵¹ *Barta* case para 777.

¹⁵² *Barta* case para 777.

¹⁵³ *Barta* case para 777.

¹⁵⁴ *Barta* case para 777.

¹⁵⁵ *Barta* case para 777.

register.¹⁵⁶ The plaintiff alleged that her direct manager tried to give her other unscheduled working hours, which Ms Dewey challenged.¹⁵⁷

The plaintiff also alleged that at this stage she asked Ms Dewey to complete a rental calculation form for her landlord and Ms Dewey refused. The plaintiff resided in Section VIII housing partly funded by the Housing and Urban Development (HUD), and her monthly rent varied based on her monthly earnings.¹⁵⁸ She had previously routinely had the form completed by supervisors at Sears, Roebuck and Co, and without the updated information for January 2002, her rent would be calculated based on the 45.5 hours she worked in December.¹⁵⁹ The plaintiff alleged that she tried to explain her rental arrangements to Ms Dewey and again requested that she complete the form. Ms Dewey again declined.¹⁶⁰

On 28 January 2002, the plaintiff submitted a handwritten notice of resignation from her position with Sears, Roebuck and Co with immediate effect. She asserted that she resigned because she felt it was the only way to have her rent decreased by reporting her income.¹⁶¹ A charge of discrimination under the *Americans with Disabilities Act* was brought before the court and the court requested to determine whether the Plaintiff was a "disabled person" under the *Americans with Disabilities Act*.¹⁶²

The plaintiff contended that her eyesight is a physical impairment *per se*, automatically making her a disabled person under the *Americans with Disability Act*.¹⁶³ She also specified that she falls under the category of "statutory blindness" as per the Social Security Administration's definition. Under the Social Security Regulations, one is categorised as statutorily blind if one has "central visual acuity of 20/200 or less in the better eye with the aid of a correcting lens".¹⁶⁴ The plaintiff furthermore claimed that the medical records from her medical practitioner, Dr Jacey reflected that she has a visual acuity of below 20/200 which can only be adjusted to 20/200 with corrective lenses.¹⁶⁵ The plaintiff in addition contended that her physical condition is permanent and that it is evident that she cannot see certain things without the assistance of improving aids.¹⁶⁶ The plaintiff depended

¹⁵⁶ *Barta* case para 777.

¹⁵⁷ *Barta* case paras 777-778.

¹⁵⁸ *Barta* case para 778.

¹⁵⁹ *Barta* case para 778.

¹⁶⁰ *Barta* case para 778.

¹⁶¹ *Barta* case para 778.

¹⁶² *Barta* case para 778.

¹⁶³ *Barta* case para 778.

¹⁶⁴ *Barta* case para 779.

¹⁶⁵ *Barta* case para 779.

¹⁶⁶ *Barta* case para 779.

on the affidavit of Dr Jacey and a letter from Ms Jennings¹⁶⁷ of the Department for the Blind and Vision Impaired corroborate her submission that she had undergone a personal assessment of the effect of her condition on her life. Dr Jacey's affidavit stated that:

Ms Barta's daily life activities, which have been affected by her visual disability, are driving, sewing, and unable to read small print without the aid of a magnifying glass or visual aid readers.

The defendant referred to the Eleventh Circuit case of *Chenoweth v Hillsborough County*,¹⁶⁸ which found that driving is usually not viewed as a major life activity.¹⁶⁹ The defendant also referred to the Second Circuit case of *Colwell v Suffolk County Police Department*,¹⁷⁰ which held that getting to and from work does not amount to a distinct major life activity. The defendant further argued that if driving is not seen as a major life activity then sewing should not be seen as a major life activity.¹⁷¹

An applicant need meet only one of the three listed factors to substantiate that he or she is within the protected class under the *Americans with Disabilities Act*.¹⁷² The determination whether a person qualifies as a disabled person as defined by the Act necessitates an individual evaluation of the effect of the condition on the person's major life activities.¹⁷³

Despite the fact that the term "substantially limits" is not defined in the law, regulations state that a comparison must be drawn between what a person is able to do or not as a result of their impairment and what a normal non-impaired person is capable of doing.¹⁷⁴ In the case of *Toyota Motor Manufacturing Kentucky v William*,¹⁷⁵ the Supreme Court explained that to be "substantially limiting", an impairment has to be permanent or long-term and the impairment must impede or severely restrict the individual from

¹⁶⁷ "Ms. Jennings' letter does not explain the actual impact Plaintiff's impairment has had on her life activities but simply states that Plaintiff has been classified as statutorily blind by the Social Security Administration." See *Barta* case para 779.

¹⁶⁸ *Chenoweth v Hillsborough County* 250 F 3d 1328 (11th Cir 2001) (hereafter the *Chenoweth* case).

¹⁶⁹ *Chenoweth* case para 7.

¹⁷⁰ *Colwell v Suffolk County Police Dept* 158 F 3d 635 (2d Cir1998) (hereafter the *Colwell* case) para 643.

¹⁷¹ *Barta* case para 779.

¹⁷² *Barta* case para 778.

¹⁷³ *Barta* case para 778. Also see *Toyota Motor Manufacturing Kentucky v Williams* 534 US 184, 198-99, 122 S Ct 681, 151 L Ed 2d 615 (2002) (hereafter the *Toyota Motor Manufacturing Kentucky* case).

¹⁷⁴ EEOC *Technical Assistance Manual* 4-5. Also see *Barta* case para 779.

¹⁷⁵ *Toyota Motor Manufacturing Kentucky* case para 681.

performing activities that are important in the day-to-day lives of many people.¹⁷⁶

In circumstances where the plaintiff has been diagnosed with severe visual complications but is not always disabled, an individual investigation of their capability to compensate for the impairment is necessary.¹⁷⁷ Nevertheless, the court explained that the burden of proof for individuals with severe visual impairments is not unduly heavy as they "ordinarily will meet the Act's definition of disability".¹⁷⁸

In the *Barta* case, the court held the defendant to be correct in arguing that the activities documented in Dr Jacey's report do not qualify as major life activities.¹⁷⁹ The Equal Employment Opportunity Commission lists major life activities as including:

... caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.¹⁸⁰

The court came to the conclusion that the plaintiff merely outlined her impairment without illustrating how the impairment affected her life.¹⁸¹ Therefore no sufficient evidence was brought to support a finding that the plaintiff was disabled as a matter of law.¹⁸²

4 The Americans with Disabilities Amendment Act of 2008 and the overturn of the decision in the *Sutton* case

In the United States of America the medical model¹⁸³ has been the prevailing disability paradigm,¹⁸⁴ even though the passing of the *Americans with Disabilities Act* of 1990 was largely understood as a conceptual departure from the medical model of disability. Rather than approaching physical impairments as individual problems, the *Americans with Disabilities Act* highlighted the social construction of disability¹⁸⁵ by affording statutory

¹⁷⁶ *Toyota Motor Manufacturing Kentucky* case para 681.

¹⁷⁷ *Albertsons* case para 11.

¹⁷⁸ *Albertsons* case para 12.

¹⁷⁹ *Barta* case para 780.

¹⁸⁰ EEOC *Technical Assistance Manual* 8.

¹⁸¹ *Barta* case para 780.

¹⁸² *Barta* case para 778.

¹⁸³ The medical approach to disability stipulates that the "inability to carry out activities is caused by impairment or impairments; for example, you are not mobile because you have a spinal injury. This understanding of disability is said to be a medical model of disability because the causes of disability are attributed only to medical conditions." Western Cape Government 2014 <https://www.westerncape.gov.za/general-publication/disability-definitions-models-and-terminology>.

¹⁸⁴ Areheart 2008 *Ind LJ* 181-232; Lawrence and Gostin 2015 *JAMA* 2231-2232.

¹⁸⁵ The social model takes the wider view that the ability to carry out activities is reliant on social intervention. This approach demonstrates that the limitation in participation

recourse in the event of acts of employment discrimination.¹⁸⁶ Despite the expectation that the *Americans with Disabilities Act* would bring about a transition to a social construction of disability, ongoing public examples of disability and the handling thereof by the federal courts have stood in the way of achieving this goal.¹⁸⁷

Court cases that require the application of the *Americans with Disabilities Act* are opportunities to advance awareness of social issues related to disability, such as access and discrimination.¹⁸⁸ Through a series of court cases, the United States Supreme Court narrowed the protection afforded by the *Americans with Disabilities Act* with the result that people whom the Act was initially intended to protect have been excluded, namely people with epilepsy, diabetes and muscular dystrophy.¹⁸⁹ The explanations of the Act given by the courts have for the most part functioned to place more and more restrictions on eligibility for protection under disability laws.¹⁹⁰ For example, the cases discussed above in the context of albinism indicate that under the *Americans with Disabilities Act* an action against discrimination should provide proof of a disability that substantially limits one or more major life activities. Such proof involves a detailed medical diagnosis. It must also be shown that all possible corrective measures have been utilised, and lastly, that discrimination has in fact occurred. The preoccupation with the medical definition of disability diverts attention from the real societal problems that the *Americans with Disabilities Act* had intended to address.¹⁹¹ It is sometimes easier for defendants to make an assertion that a claimant does not in fact have a disability or that the claimant failed to take sufficient corrective measures, than to argue that discrimination did not take place.¹⁹²

The *Americans with Disabilities Amendment Act* of 2008 overturned the controversial key ruling in the *Sutton* case which involved a stringent construal of "substantially limits".¹⁹³ The redefinition of disability has

in activities is not caused by impairments but is a result of social organisation, thus the phrase "social model". Western Cape Government 2014 <https://www.westerncape.gov.za/general-publication/disability-definitions-models-and-terminology>.

¹⁸⁶ Areheart 2008 *Ind LJ* 191.

¹⁸⁷ Areheart 2008 *Ind LJ* 184.

¹⁸⁸ Kaplan date unknown <http://www.accessiblesociety.org/topics/demographics-identity/dkaplanpaper.htm>.

¹⁸⁹ Benfer *ADA Amendments Act* 1.

¹⁹⁰ Kaplan date unknown <http://www.accessiblesociety.org/topics/demographics-identity/dkaplanpaper.htm>.

¹⁹¹ Kaplan date unknown <http://www.accessiblesociety.org/topics/demographics-identity/dkaplanpaper.htm>.

¹⁹² Kaplan date unknown <http://www.accessiblesociety.org/topics/demographics-identity/dkaplanpaper.htm>.

¹⁹³ Charles and Scott 2010 *JAAPL* 95; Lawrence and Gostin 2015 *JAMA* 2232.

broadened the number and types of persons who are protected under the *Americans with Disabilities Act*.¹⁹⁴ The amendments highlight the fact that the emphasis must be on whether discrimination occurred rather than adherence to a strict definition of disability.¹⁹⁵

The *Americans with Disabilities Amendment Act* of 2008 introduced a new resolution whereby the interpretation of "substantially limits" and "major life activities" was totally expunged and replaced with additional components that result in a more inclusive standard.¹⁹⁶ The question of whether a person has a disability was seen as a basic threshold concern, but the legislative history of the *Americans with Disabilities Amendment Act* reveals a considerably lower threshold for ascertaining whether a person has a disability.¹⁹⁷

The holding that a substantial limitation of a major life activity should relate to activities of central significance to daily life was determined by the National Council of Disabilities to be in conflict with the purpose of the *Americans with Disabilities Act*.¹⁹⁸ The definition of "major life activities" has since been well-defined and extended to include "major bodily functions".¹⁹⁹ The *Americans with Disabilities Amendment Act* instructs the courts to provide protection "to the maximum extent permitted"²⁰⁰ and offers a non-exhaustive list of "major life activities", including caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.²⁰¹

The *Americans with Disabilities Amendment Act* notes that an impairment that substantially limits one major life activity does not have to limit other major life activities in order to be accepted as a disability.²⁰²

¹⁹⁴ Lawrence and Gostin 2015 *JAMA* 2232.

¹⁹⁵ Elliott 2012 *Gonz L Rev* 395-420.

¹⁹⁶ Benfer *ADA Amendments Act* 4.

¹⁹⁷ Walter *Legal Interpretation of Disability* 17.

¹⁹⁸ Feldblum et al 2008 *TJCLCR* 193-194.

¹⁹⁹ Section 4(2)(1) of the *Americans with Disabilities Amendment Act* of 2008 reads as follows: "Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working".

²⁰⁰ Section 4(4)(A) of the *Americans with Disabilities Amendment Act* of 2008 reads as follows: "The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act".

²⁰¹ Section 4(2)(1) of the *Americans with Disabilities Amendment Act* of 2008.

²⁰² Section 4(4)(C) of the *Americans with Disabilities Amendment Act* of 2008.

The *Americans with Disabilities Amendment Act* requires courts to decide if a person is disabled without reference to the ameliorative effects of mitigating measures (with the exclusion of ordinary eyeglasses or contact lenses).²⁰³ These modifications to the original Act of 1990 must make it easier for individuals to qualify as disabled for purposes of the law and for deliberations to focus on whether or not discrimination occurred.²⁰⁴

Under the *Americans with Disabilities Amendment Act* persons with diabetes and other chronic illnesses; which the original *Americans with Disabilities Act* was evidently intended to cover, now fall under the Act's umbrella of protection.²⁰⁵ By following the *Sutton* case, South African courts have adopted a restrictive approach, which has now become questionable in light of the fact that the decision in the *Sutton* case was overturned.

5 Albinism and disability in the context of the South African Employment Equity Act 55 of 1998

The question of whether a person living with albinism can succeed with a discrimination claim based on disability under the *Employment Equity Act* is considered next.

Albinism is associated with various life-long physical impairments due to its effect on the skin and vision. Persons with albinism routinely develop visual disabilities that have a profound impact on their participation in life activities. The symptoms of albinism in early childhood comprise poor vision, sensitivity to bright light, nystagmus and strabismus.²⁰⁶ Vision may vary from normal in persons with albinism who are moderately affected, to complete blindness in people with the more severe types of albinism.²⁰⁷ Usually, those with the least pigmentation have the poorest vision.²⁰⁸ Where albinism affects the hair, eyes and skin, it results in pale, white to chalky coloured skin, sandy to yellow hair and light brown or blue eyes.²⁰⁹ Because their skin is extremely fair, people with this form of albinism suffer from photo-ageing cancer and greater prevalence of all types of skin cancer.²¹⁰

Some writers are of the view that there should be a differentiation between a genetic trait and a genetic disease, submitting that the term genetic

²⁰³ Section 4(4)(E) of the *Americans with Disabilities Amendment Act* of 2008.

²⁰⁴ Elliott 2012 *Gonz L Rev* 395-420.

²⁰⁵ Lawrence and Gostin 2015 *JAMA* 2232.

²⁰⁶ Dominguez *et al Building Blocks* 14.

²⁰⁷ Dominguez *et al Building Blocks* 14.

²⁰⁸ Dominguez *et al Building Blocks* 14.

²⁰⁹ Lund 2001 *Health Educ Res* 1.

²¹⁰ Marks *et al Clinical Signs and Procedures* 17.

disease may be used if a trait results in medical problems.²¹¹ Effects of albinism which are cosmetic only may perhaps be called generic traits,²¹² in which case colouration in albinism would be seen as a cosmetic trait.²¹³ With this in mind, it is submitted that in cases where albinism results in medical visual and skin problems, it may be associated with life-long impairment. Considering that most of the medical problems associated with albinism appear at birth and others during childhood, one could regard them as life-long, particularly in light of the fact that many of the said visual problems and skin cancers cannot be corrected. To date, there is no "cure" for albinism.

Persons living with albinism are dependent on sunscreen with a high sun protection factor (SPF),²¹⁴ and have to protect their bodies by means of protective clothing²¹⁵ and sunglasses with a high UV protection screen to relieve light sensitivity.²¹⁶ They also have to wear glasses prescribed for the treatment of infertile nystagmus to correct eyesight problems, such as eye position.²¹⁷ Persons living with albinism cannot function without taking these precautions. If they do not use sunscreen, they are prone to skin cancer while some cannot see unless they wear spectacles.

As held by the court in the *IMATU* case, the matter does not end with an inquiry as to whether there is a physical impairment. The applicants must show that such impairment substantially limits the prospects of entry into or advancement in employment of a person with albinism. It is only where albinism limits a person's ability to perform the essential functions of the job for which they are being considered (for example, legal blindness) and where the medical condition cannot be easily controlled, corrected or lessened, that an employer may dismiss a person with albinism on the ground of disability. Where a person living with albinism can easily control, correct or lessen the severity of their medical condition to the extent that it has no limiting effects, as in the *Standard Bank* case²¹⁸, it may be concluded

²¹¹ Richards and Hawley *Human Genome* 35.

²¹² Richards and Hawley *Human Genome* 35.

²¹³ Richards and Hawley *Human Genome* 35.

²¹⁴ Horobin *Diseases and Disorders* 29.

²¹⁵ McGarry and Tong *5-Minute Consult* 224.

²¹⁶ Horobin *Diseases and Disorders* 29.

²¹⁷ Brodsky *Paediatric Ophthalmology* 405.

²¹⁸ In the *Standard Bank* case, Deirdre Ferreira, who had worked for Standard Bank for 17 years, sustained injuries in a motor accident whilst on duty. She developed back pain and was later diagnosed with fibromyalgia. The court had to determine on review whether Standard Bank rightfully dismissed Ferreira and whether the compensation awarded to Ferreira was reasonable. The *Standard Bank* case emphasises that the Constitution protects employees with disabilities as a vulnerable group, as they are a minority with attributes that are different from mainstream society. It was also held in the same case that the primary inquiry in an incapacity examination is whether a person's disability is a long-term recurring physical or

that the medical condition does not limit a person's ability to perform. For instance, should an albino correct her vision by wearing glasses, an employer cannot limit advancement in employment or entry into employment unless the person's vision is still substantially impaired even with the use of spectacles or contact lenses.

As mentioned before, the main shortcoming of the definition under discussion is that it excludes many disabled people from protection on the grounds that their impairment is not severe enough or that they are coping satisfactorily with the impairment to the point that they no longer require protection from discrimination. It is apparent that persons living with albinism who do not suffer from a severe impairment as a result of their condition are therefore not protected against unfair discrimination on the basis of disability.

The court in the *Standard Bank* case remarked that if disability is construed restrictively instead of purposively, the very intention of preventing unfair discrimination may be thwarted.²¹⁹ The court explained that protection against discrimination would be lost to many disabled people in instances such as where:²²⁰

- a severely myopic job candidate is refused a position as a pilot as a result of being regarded as not being disabled because she wears spectacles to correct her sight; or
- a diabetic is not regarded as a person with a disability because he controls his condition with medication.

This narrow approach does not take into account instances where persons are discriminated against as a result of social constructions with regard to disability. The appearance of albinism in the paleness of the skin colour of persons living with oculocutaneous albinism²²¹ makes it a condition that is loaded with symbolism and has led to a number of negative social constructions around this group of people, such as the association of fair tanned skin colour with harmful myths, false notions and curses.²²² The stigma and discrimination attached to persons living with albinism are

mental impairment that significantly restricts the person's prospects of admission into, or progress, in employment. Defining disability in the employment context shifts the consideration from the diagnosis of the disability to the consequences of the disability for both the employee's capability to work as well as their ability to find work.

²¹⁹ *Standard Bank* case para 59.

²²⁰ *Standard Bank* case para 59.

²²¹ Oculocutaneous albinism is the result of mutation in at least one of four genes. Such mutations have results and symptoms allied to vision (ocular) as well as symptoms allied to skin (cutaneous), hair and iris colour. Mswela *Selection of Legal Issues* 47.

²²² Mswela *Selection of Legal Issues* 5-9.

matters of concern. Of all the persons living with albinism, the position of the African albino is the worst.²²³ African albinos suffer overt discrimination that results from a fundamental and recurrent misunderstanding and general ignorance of the condition.²²⁴ There is growing evidence of social discrimination and stigmatisation directed towards this segment of the population.²²⁵ Their appearance, lack of knowledge about the condition itself and how it is viewed in communities serve to perpetuate the stigma associated with albinism.²²⁶ For example, the etiological beliefs about albinism are influenced by culture and superstition rather than by genetics.²²⁷ Although public perceptions of disability are not regulated under the *Employment Equity Act*, in November 2007 South Africa ratified the *United Nations Convention on the Rights of Persons with Disabilities* (CRPWD).²²⁸ The *Convention on the Rights of Persons with Disabilities* is the most recent significant international human rights instrument relating to disability. The *Convention on the Rights of Persons with Disabilities* came into force on 3 May 2008 with the purpose of protecting the fundamental rights and integrity of persons living with disabilities (PLWD).

The *United Nations Convention on the Rights of Persons with Disabilities* marked the beginning of a new era in disability rights and was the culmination of a 30 year struggle by people in the disability rights movement and advocates of human rights to gain acknowledgment that everyone, regardless of impairment, must enjoy all human rights and fundamental freedoms.²²⁹ It altered the playing field for people universally by giving official acknowledgment that disability is a rights issue²³⁰ on the one hand and a social development issue on the other.²³¹ At the level of the *Employment Equity Act* there seems to be a noticeable inconsistency between the South African framework on disability and the framework of the Convention.

The *United Nations Convention on Persons with Disabilities* advances an alternative way in which persons with albinism may be protected from discrimination. The Convention's definition is ideal for the South African disability sector.²³² It may not be practicable to find an entirely acceptable

²²³ Mswela *Selection of Legal Issues* 5.

²²⁴ Mswela *Selection of Legal Issues* 5.

²²⁵ Braathen *Albinism in Malawi* 11-14.

²²⁶ Cruz-Inigo *et al* 2011 *Dermatologic Clinics* 79-87.

²²⁷ Mswela *Selection of Legal Issues* 15-23.

²²⁸ *United Nations Convention on the Rights of Persons with Disabilities* (2007).

²²⁹ Rioux 2011 *Sport in Society* 1094.

²³⁰ Rioux 2011 *Sport in Society* 1094.

²³¹ Rioux 2011 *Sport in Society* 1094.

²³² Part (e) of the preamble of the *Convention on the Rights of Persons with Disabilities* (2007) defines disability in the following way: "Disability is an evolving concept, and that disability results from the interaction between persons with impairments and

common description of disability, but the four essentials stipulated in the *Convention on the Rights of Persons with Disabilities* offer a basis upon which everyone can evaluate and take action on disability.

The Preamble and article one of the Convention affirm the social construction of disability by stating that the definition of disability ought to be advanced from the social perspectives which generate attitudinal and physical barriers preventing persons with disabilities from effectively contributing to society, and not from the viewpoint of the supposed medical condition of such individuals.²³³ The Convention looks beyond the question of "access to the physical environment" and tackles concerns of equality and the elimination of legal, social and attitudinal obstructions to the involvement of people with disabilities.²³⁴ The same view is shared by Ngwena who views disability from a social model perspective and argues that impairment does not play a tangible role in the understanding disability.²³⁵

Social exclusion and inclusion consist of the multidimensional social relations between those at the centre and those on the periphery.²³⁶ By generating barriers, society creates disablement.²³⁷ According to Ngwena, the perpetrator is the society because of its discriminatory conduct.²³⁸ The debate on the "social inclusion" and "social exclusion" of disability seldom revolves around the rights or needs of persons with disabilities.²³⁹

The advantages of social approaches to disability are that they shift the focus from individuals and their physical or mental deficits to the manner in which society embraces or rejects them.²⁴⁰ Instead of disability being seen as unavoidable, it is viewed as a product of social arrangements that can be reduced or perhaps even eliminated.²⁴¹ The purpose of the social model is therefore to move society away from treating persons with incapacities as

attitudinal and environment barriers that hinders their full and effective participation in society on an equal basis with others". Also see Bick 2011 <http://www.mondaq.com/x/147254/Arbitration+Dispute+Resolution/Definitions+Of+Disability+And+The+2011+Census>. Tanzania has signed and ratified the *Convention on the Rights of Persons with Disabilities* and is therefore bound to the provisions of this Convention in as far as they relate to the rights of persons with albinism. Since Tanzania has ratified the CRPWD as well as the Optional Protocol, persons living with albinism in Tanzania can bring any complaints to the Committee.

²³³ Scott 1999 *JGRJ* 514.

²³⁴ Scott 1999 *JGRJ* 514.

²³⁵ Ngwena 2006 *SAJHR* 630; Ngwena 2007 *SAJHR* 150.

²³⁶ Rioux *et al Critical Perspectives* 65.

²³⁷ Hurlpur 2012 *Disability and Society* 5.

²³⁸ Ngwena 2007 *SAJHR* 150.

²³⁹ Rioux *et al Critical Perspectives* 64.

²⁴⁰ Shakespear *Disability Rights and Wrongs Revisited* 12.

²⁴¹ Shakespear *Disability Rights and Wrongs Revisited* 12.

"defective" and to render it more inclusive.²⁴² The Convention on the Rights of Persons with Disabilities embraces the social model idea that society causes the disablement of persons with impairments.²⁴³

6 Conclusion and recommendations

Following from the principles laid down in the *IMATU* case, paragraph 5 above has taken us on a step-by-step enquiry into whether persons with albinism qualify for the protection, which is afforded to people with disabilities in the workplace. To determine such eligibility, an enquiry into whether albinism is a disability or not was indispensable. Disability according to the *IMATU* case means a long-term or recurring physical or mental impairment, which substantially limits a major life activity; in this case work. The key question is how profoundly you are affected by albinism.

From the analysis in paragraph 5 above, it became apparent that all persons with albinism cannot be classified as having a disability as it is necessary to do a careful, case-by-case analysis to determine whether their impairment substantially limits their prospects of entry into, or advancement in employment. Such an analysis provided clarity on whether or not a person complies with the definition of a person with a disability in terms of the *Employment Equity Act*. It therefore follows that protection in the workplace is afforded only in cases where albinism limits a person's ability to perform the essential functions of the job for which they are being considered and where the medical condition cannot be easily controlled, corrected or lessened. Where a person living with albinism can easily control, correct or lessen the severity of their medical condition to the extent that it has no limiting effects, they are not protected under the disability category, as they are not considered as having a disability.

South Africa's narrow approach to disability, as pointed out, excludes several persons with albinism people from protection on the grounds that their impairment is not severe enough in itself, or that they are coping so satisfactorily with the impairment that they no longer require protection from discrimination. This position stands irrespective of the merits of the victim's discriminatory claim, and the victim is deprived of the opportunity to attest to unfair treatment in a court of law. This has had the adverse effect that persons who can mitigate their disabilities and are evidently capable of working are unable to rely on the *Employment Equity Act*²⁴⁴ for protection against disability discrimination.

²⁴² Hurpur 2012 *Disability and Society* 3.

²⁴³ Hurpur 2012 *Disability and Society* 4.

²⁴⁴ The *Employment Equity Act* 55 of 1998.

The South African case of *IMATU* adopted a restrictive approach to disability, which can be disputed in light of the fact that the decision in the *Sutton* case, which was followed, has since been overturned. The *Americans with Disabilities Amendment Act* of 2008 overturned the controversial key ruling in the *Sutton* case which involved a strict construal of "substantially limits". This redefinition of disability has broadened the number and types of persons who are protected under the *Americans with Disabilities Act* and highlights the fact that the emphasis must be on whether discrimination has occurred rather than a strict definition of disability. In light of the unwillingness of our courts to interpret the definition of disability in an inclusive manner, a reformulation of the *Employment Equity Act's* definition of disability and the establishment of civil rights protection for South Africans who experience disability-based discrimination is long overdue. The recommendations emanating from this article are directly related to the amendments to the *Americans with Disability Act*, particularly the striking down of the restrictive interpretation of disability in the *Sutton* case which has been so regularly applied by our courts.

The explanations given by the court of what constitutes disability in terms of the *Employment Equity Act* have had the distressing effect of imposing restrictions on eligibility for protection.²⁴⁵ As a matter of legislative reform, this article proposes a new statutory definition of disability for the *Employment Equity Act*, which does not require proof of substantial limitations in major life activities. The *Convention on the Rights of Persons with Disabilities* appears to take a middle road between the individual impairment model and the social model,²⁴⁶ and it reflects a flexible and inclusive definition of disability.²⁴⁷ The definition recognises that whilst there might be a myriad interpretation of disability, a juridical definition of disability for equality and non-discrimination purposes must at least imply impairment as a point of departure.²⁴⁸ At the same time, the definition must be responsive to socio-economic barriers as constituent elements of disability.²⁴⁹ The Convention accepts that impairment and the environment interact to produce the experience of disability when people with impairments cannot participate in society on an equal basis.

This directs attention away from the preoccupation with and adherence to a strictly medical definition of disability and focus attention on whether discrimination has occurred. In this regard it is recommended that the existence of a physical or mental impairment or health condition, or the

²⁴⁵ Du Plessis *Access to Work for Disabled Persons* 136.

²⁴⁶ Dupper and Garbers *Equality in the Workplace* 94.

²⁴⁷ Dupper and Garbers *Equality in the Workplace* 94.

²⁴⁸ Dupper and Garbers *Equality in the Workplace* 195.

²⁴⁹ Dupper and Garbers *Equality in the Workplace* 94.

perception of a physical or mental impairment or health condition be determined without factoring in any mitigating measures such as medication or auxiliary aids, since protection against discrimination has been lost to many disabled people in instances such as where they are coping satisfactorily as a result of using auxiliary aids.²⁵⁰ Such a definition will allow persons who demonstrate an impairment or health condition, or the perception of one, to raise the real issue of whether they have been treated unfairly or discriminated against on the grounds of the impairment or health condition.

The goal is to extend civil rights protection to the countless employees who experience discrimination due to the myths and stereotypes which society continues to associate with certain impairments, diagnoses or characteristics. In other words, sanctions against perceived disability discrimination, if taken seriously, can prevent subjective employer behaviour, which is demonstrably the main purpose for discrimination legislation. This proposal, as shown earlier on, is well grounded in the international approach to disability, the social construction of disability as enshrined in the *United Nations Convention on the Rights of Persons with Disabilities*. Under the *Americans with Disabilities Amendment Act*, this subcategory of the definition of disability protects those who are "perceived" as having a disability from employment decisions grounded on stereotypes or mistaken beliefs about disability.

If implemented, such modifications to the definition of disability will assist in addressing its current restrictiveness. An employee with albinism would therefore be protected from discrimination emanating from misconceptions, myths and stereotypes about their condition.

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²⁵⁰ See the *Manz* case above and the *Barta* case.

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List of Abbreviations

CRPWD	United Nations Convention on the Rights of Persons with Disabilities
DPSA	Disabled People South Africa
EEOC	Equal Employment Opportunity Commission
Gonz L Rev	Gonzaga Law Review
Health Educ Res	Health Education Research
Ind LJ	Indiana Law Journal
ILJ	Industrial Law Journal
JAMA	Journal of the American Medical Association
JAAPL	Journal of the American Academy of Psychiatry and the Law
JGRJ	Journal of Gender, Race and Justice
PLWD	Persons Living with Disabilities
SAHRC	South African Human Rights Commission
SAJHR	South African Journal of Human Rights
SARS	South African Revenue Services
SPF	sun protection factor
TJCLCR	Texas Journal for Civil Liberties and Civil Rights
UV	Ultraviolet