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# INSULIN-DEPENDENT DIABETES AND ACCESS TO TREATMENT IN THE WORKPLACE:

# THE FAILURE OF THE AMERICANS WITH DISABILITIES ACT TO PROVIDE PROTECTION

MARGARET C. MCGRATH*

## I. INTRODUCTION

*I had decisions to make. I was scheduled to begin my new career with the Cubs; what was I going to tell them? Should I keep my secret and give myself a chance to let them judge me without prejudice? Or should I tell them up front, and risk having them look only at the disease instead of looking at the player? I just didn't know what to do.* Ron Santo[1]

Ron Santo, former Chicago Cubs star, chose not to tell his potential employers about his insulin-dependent diabetes in 1959, a choice still made by some individuals with insulin-dependent diabetes today.[2] Those who do choose to tell their employers about their disease can face an uphill battle to receive an accommodation that allows them to remain in control of their diabetes while at work.[3]

The passage of the Americans with Disabilities Act (ADA)[4] in

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* Joint J.D./LL.M. Candidate in The John Marshall Law School LL.M. in Employee Benefits, June 2004. The author would like to thank her family for their support and encouragement.

1. RON SANTO & RANDY MINKOFF, FOR LOVE OF IVY, THE AUTOBIOGRAPHY OF RON SANTO 15 (1993).

2. *See, e.g.*, Cupola v. Centr. Can Co., No. 97-C-3819, 1999 WL 199621 at *13 (N.D. Ill. Mar. 23, 1999) (holding that the plaintiff presented no evidence that the employer knew of his insulin-dependent diabetes).

3. *See* Erjavac v. Holy Family Health Plus, 13 F. Supp. 2d 737, 740-41 (N.D. Ill. 1998) (discussing an employer's increased restrictions on bathroom access once the employer knew the plaintiff required access due to insulin-dependent diabetes) and Landers v. Wal-Mart Stores, No. 99-CV-453, 2001 WL 1725300 at *2 (W.D.N.Y. Sept. 28, 2001) (noting an employer's denial of a medically necessary lunch break for an individual with insulin-dependent diabetes).

4. Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2000)

1990 offered individuals with diabetes the promise of protection from employment discrimination.[5] Congress specifically mentioned diabetes as a condition that it intended the ADA to cover.[6] However, courts have not always found diabetes a disability.[7]

This Comment examines the disparity in determining the disability status of individuals with insulin-dependent diabetes under the ADA. Part II of the Comment discusses the different types of diabetes, treatment protocols, and short-term complications. Part II also surveys the discrimination individuals with insulin-dependent diabetes have encountered in employment.[8] Part III analyzes the homogeneous nature of individuals with insulin-dependent diabetes and the difficulties encountered in establishing disability status under the ADA. Part III goes on to analyze the different responses courts give to the question of insulin-dependent diabetes as a disability, and addresses the reasons that courts diverge in their holdings.[9] Part IV analyzes judicial and legislative solutions that would allow individuals with insulin-dependent diabetes to effectively treat their condition in the workplace.

## II. TYPES OF DIABETES AND EMPLOYMENT DISCRIMINATION

### *A. Diabetes: Types, Treatments and Complications*

Diabetes is a general term that refers to several different conditions[10] affecting sixteen million Americans.[11] The two

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[hereinafter, ADA].

5. Denney v. Mosey Mfg. Co., No. IP 98-852-C H/G, 2000 WL 680417 at *8 (S.D. Ind. Mar. 20, 2000) (noting that the legislative history of the ADA clearly demonstrated Congress' intent to protect individuals with diabetes).

6. H.R. REP. NO. 101-485, pt. 2, at 51 (1990) and S. REP. NO. 101-116, at 22 (1989). Both reports specifically list diabetes as an impairment under the first prong of the ADA's definition of disability, which includes "any individual who has a 'physical or mental impairment.'" S. REP. NO. 101-116, at 22 (1989).

7. Orr v. Wal-Mart Stores, Inc., 297 F.3d 720, 724 (8th Cir. 2002) (finding that an individual with insulin-dependent diabetes was not disabled because he used insulin to mitigate his condition). The effect of the ruling allowed the employer to deny the plaintiff access to the very mitigating measures that rendered him not disabled. *Id.* *Cf.* Lawson v. CSX Transp., Inc., 918 F.3d 916 (7th Cir. 2001) (reversing summary judgment for the defendant). The court held that a jury could find an individual with insulin-dependent diabetes disabled because of the severe limitation on his ability to eat that exists when he uses insulin and the dire consequences that could result from not following strict dietary restrictions. *Id.* at 924-25.

8. AMERICAN DIABETES ASSOCIATION, AMERICAN DIABETES ASSOCIATION COMPLETE GUIDE TO DIABETES 413-21 (2d ed. 1999).

9. *See* cases cited *supra* note 7 (revealing courts' inconsistent holdings as to the disability status of a plaintiff with diabetes).

10. AMERICAN DIABETES ASSOCIATION, *supra* note 8, at 5.

primary types of diabetes are insulin-dependent,[12] affecting five to ten percent of all individuals with diabetes,[13] and non-insulin-dependent diabetes,[14] affecting ninety to ninety-five percent of all individuals with diabetes.[15] There are other, less common, types of diabetes that are not considered in this Comment.[16]

All individuals with diabetes have untreated blood glucose levels that are too high.[17] High blood glucose levels cause short-term symptoms such as extreme thirst, frequent urination, blurred vision, and exhaustion.[18] Long term complications include blindness, kidney failure, amputations, and heart disease.[19] The elevated blood glucose levels are due to the body's inability to remove glucose from the blood stream and deliver it to the cells of the body.[20] The cause of this inability depends on the type of diabetes,[21] but all of the causes are linked to the hormone insulin, which is produced by the pancreas.[22]

*1. Insulin-Dependent Diabetes*

The formal definition of insulin-dependent diabetes is "that form of diabetes which, in the absence of insulin treatment, causes

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11. *Id.* at 8.

12. Insulin-dependent diabetes results when the immune system of the body destroys the beta cells of the pancreas so it produces little or no insulin. CHRISTOPHER D. SAUDEK, M.D. ET AL., THE JOHNS HOPKINS GUIDE TO DIABETES 19 (1997).

13. DIABETES SOURCEBOOK 4 (Dawn Matthews ed., 2003).

14. Non-insulin-dependent diabetes results when the pancreas makes inadequate amounts of insulin. SAUDEK ET AL., *supra* note 12, at 25.

15. DIABETES SOURCEBOOK, *supra* note 13, at 5.

16. The most common form of diabetes not discussed is gestational diabetes, which occurs during the late stages of pregnancy and may be caused by either a shortage of insulin or the hormones of pregnancy. Frequently this form of diabetes disappears after the birth of the child. Developing gestational diabetes can indicate a higher likelihood of developing non-insulin-dependent diabetes later in life. NATIONAL DIABETES INFORMATION CLEARINGHOUSE, YOUR GUIDE TO DIABETES: TYPE 1 AND TYPE 2 (Sept. 7, 2002) *available at* http://www.niddk.nih.gov/health/diabetes/pubs/type1-2/what.htm (National Diabetes Information Clearinghouse is the public information arm of the National Institutes of Health's National Institute of Diabetes and Digestive and Kidney Disease).

17. MAYO CLINIC ON MANAGING DIABETES 7 (Maria Collazo-Clavell, M.D. ed., 2001).

18. *Id.* at 11-12.

19. AMERICAN DIABETES ASSOCIATION, *supra* note 8, at 301-23.

20. *Id.* at 5.

21. MAYO CLINIC ON MANAGING DIABETES, *supra* note 17, at 8-11.

22. Insulin causes blood glucose levels to go down by making it possible for glucose to enter cells and serve as fuel. SAUDEK ET AL., *supra* note 12, at 11. Insulin works by binding to a receptor on the cell surface. *Id.* After binding, glucose can pass through the outer membrane and into the cell where it provides energy. *Id.*

ketoacidosis and ultimately death."[23] Individuals with insulin-dependent diabetes do not produce any insulin and must inject insulin on a daily basis.[24] These injections treat, but do not cure diabetes.[25] The goal of injecting insulin is to mirror the functioning of the normal pancreas.[26] However, achieving this is difficult for all individuals with insulin-dependent diabetes.[27] Closely mimicking the function of the normal pancreas is desirable due to the decreased incidence of long-term complications due to diabetes.[28] Many factors complicate the process of emulating normal pancreas functions,[29] including the type and amount of food eaten,[30] the duration, intensity and time of exercise,[31] stress,[32] and illness or injury.[33] Failure to inject the correct amount of insulin will lead to short-term complications such as

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23. *Id.* at 19.

24. STANLEY MIRSKY & JOAN RATTNER HEILMAN, CONTROLLING DIABETES THE EASY WAY 105 (3rd ed. 1998).

25. Id. at 109. A cure for diabetes may be found at some time in the future. *Id.*

26. AMERICAN DIABETES ASSOCIATION, *supra* note 8, at 36.

27. SAUDEK ET AL., *supra* note 12, at 38-39. All individuals with insulin-dependent diabetes have widely fluctuating blood glucose levels in spite of their attempts at intensive treatment and the best levels of self-care. *Id.*

28. MAYO CLINIC ON MANAGING DIABETES, *supra* note 17, at 158-59. The ten-year-long Diabetes Control and Complications Trial, a study involving only individuals with insulin-dependent diabetes begun in 1983, demonstrated that maintaining blood glucose levels close to the normal levels for non-diabetics resulted in reduced risk for developing long-term complications. *Id.* The risk of developing diabetic retinopathy, responsible for blindness, was reduced seventy-six percent. The risk of developing nephropathy, responsible for kidney failure, was reduced fifty percent. The risk of developing neuropathy, nerve damage responsible for amputations, was reduced sixty percent. The risk of developing cardiovascular disease was reduced thirty-five percent. *Id.*

29. SAUDEK ET AL., *supra* note 12, at 20-21. The authors compared a normal pancreas to a furnace with a thermostat that adjusts to provide the exact amount of heat required at each time of the day and insulin injections to a woodstove that requires guessing how much fuel must be added in the morning for the entire day. *Id.* at 21.

30. SUE K. MILCHOVICH & BARBARA DUNN-LONG, DIABETES MELLITUS: A PRACTICAL HANDBOOK 8-9 (7th ed. 1999) (discussing the types of foods, carbohydrates, proteins, and fats, and their impact on blood glucose levels).

31. *Id.* at 153-54 (discussing the impact exercise has on the body in general and the interaction of exercise and blood glucose levels).

32. *Id.* at 175. Stress produces hormones that can force blood glucose levels up. *Id.* Stress contributes to unanticipated swings in blood glucose levels, the stress of driving in heavy traffic or being in an accident cannot be easily measured like carbohydrate grams, units of insulin, or exercise minutes. AMERICAN DIABETES ASSOCIATION, *supra* note 8, at 144.

33. *Id.* at 144-45. Illness also stresses the body and results in the release of hormones to fight the illness. *Id.* The hormones released as a result of the stress illness places on the body counteract the insulin injected and cause blood glucose levels to rise and sends them out of control. *Id.*

hypoglycemia[34] or diabetic ketoacidosis.[35]

Hypoglycemia occurs when more insulin is injected than the body needs.[36] Hypoglycemic reactions vary widely and are grouped into three categories:[37] mild, moderate, and severe.[38] The likelihood that an individual with insulin-dependent diabetes will experience a severe hypoglycemic reaction, including falling into a coma or having seizures, increases over time due to the development of hypoglycemia unawareness.[39]

Hypoglycemia unawareness forces individuals with insulin-dependent diabetes to monitor their blood glucose levels on a regular basis.[40] Self-monitoring yields an accurate blood glucose reading from a drop of blood within seconds.[41] After such testing, an individual can determine what kind of treatment, if any, is needed.[42]

Diabetic ketoacidosis (DKA), a life threatening complication,[43]

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34. SAUDEK ET AL., *supra* note 12, at 63-64.

35. *Id.* at 290-91.

36. AMERICAN DIABETES ASSOCIATION, *supra* note 8, at 160. "Hypoglycemia is usually caused by insulin doing its job too well. . . . The body's use of insulin is inconsistent. Even if you always give yourself the same dose of insulin, . . . you could end up with more than enough insulin to handle the glucose in your blood." *Id.*

37. SAUDEK ET AL., *supra* note 12, at 68.

38. The symptoms of mild hypoglycemic reactions include sweating, trembling, a feeling of not thinking clearly, and a sense or abnormal behavior. *Id.* Confusion and inappropriate actions characterize moderate hypoglycemic reactions. *Id.* In spite of the confusion, the individual will still have enough awareness of the situation to self-treat the problem. *Id.* Extreme confusion, seizures, and coma characterize severe hypoglycemic reactions. *Id.* The individual suffering from a severe reaction will require assistance to treat the problem, someone will have to administer glucose or other fast-acting sugars or will need to inject glucophage. *Id.*

39. *Id.* at 73. Individuals with insulin-dependent diabetes become hypoglycemia unaware over a period of fifteen to twenty years. *Id.* Hypoglycemia unawareness is the result of nerve damage, which blocks the normal physical responses to hypoglycemia. *Id.* As a result, there are no symptoms detectable by the individual until they are so confused and disoriented that they are unable to self-treat. *Id.*

40. *See, e.g.*, DIABETES SOURCEBOOK, *supra* note 13, at 163 (discussing how nerve damage can make it difficult to feel the symptoms of hypoglycemia). Hypoglycemia unawareness also develops in individual who have insulin-dependent diabetes for a long period of time. SAUDEK ET AL., *supra* note 12, at 73. Individuals who become hypoglycemic unaware test their blood glucose levels more often than those who are not. *Id.*

41. DIABETES SOURCEBOOK, *supra* note 13, at 123.

42. AMERICAN DIABETES ASSOCIATION, *supra* note 8, at 164-65. Individuals with insulin-dependent diabetes should test their blood sugar if they think they are experiencing a hypoglycemic reaction and then should treat any verified low blood glucose readings with fast-acting sugars. *Id.*

43. PAULA BRISCO, DIABETES: QUESTIONS YOU HAVE . . . ANSWERS YOU NEED 95 (1993). High blood glucose levels, if not detected and treated, result in symptoms such as fever, thirst, vomiting and nausea, frequent urination,

occurs when too little insulin in the body leads to very high blood glucose levels.[44] DKA can develop as the result of inadequate insulin injections or because of stress or illness,[45] but is avoidable with vigilant self-monitoring.[46]

*2. Non-Insulin-Dependent Diabetes*

The formal definition of non-insulin-dependent diabetes is "that form of diabetes which does not require insulin treatment to avoid ketoacidosis."[47] Non-insulin-dependent diabetes is "a fundamentally different disease"[48] from insulin-dependent diabetes because the pancreas does make insulin, but the amounts are inadequate due to resistance by the body's cells to insulin.[49] Non-insulin-dependent diabetes is more stable than insulin-dependent diabetes because of the production of insulin.[50] Blood glucose levels may still be too high, but DKA rarely occurs.[51]

Non-insulin-dependent diabetes is significantly different from insulin-dependent diabetes in that it can be managed by many methods.[52] The treatment methods will vary based on the level of insulin resistance[53] and can include a well-balanced diet and regular exercise,[54] oral medications,[55] or insulin injections.[56]

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dehydration, coma, and death. *Id.* DKA occurs because inadequate amounts of insulin cause cells to feel starved; in response the body breaks down fat cells for energy. *Id.* A byproduct of this breakdown is the formation of ketones, which the kidneys attempt to flush from the body by producing copious amounts of urine, causing dehydration. *Id.*

44. *Id.* at 94.

45. AMERICAN DIABETES ASSOCIATION, *supra* note 8, at 171.

46. *Id.* DKA does not occur without warning, and if individuals with insulin-dependent diabetes test frequently throughout the day, they will not miss the indicative high blood glucose levels. *Id. at 172.*

47. SAUDEK ET AL., *supra* note 12, at 25.

48. *Id.*

49. MAYO CLINIC ON MANAGING DIABETES, *supra* note 17, at 9.

50. SAUDEK ET AL., *supra* note 12, at 27.

51. *Id.*

52. MILCHOVICH & DUNN-LONG, *supra* note 30, at 5.

53. DIANA W. GUTHRIE & RICHARD A. GUTHRIE, THE DIABETES SOURCEBOOK: TODAY'S METHODS AND WAYS TO GIVE YOURSELF THE BEST CARE 30-31 (4th ed. 1999).

54. *Id.*

55. *Id.* Oral medications can include sulfonylurea drugs, which encourage the pancreas to produce more insulin, and biguanides, which decrease the amount of glucose in the body. AMERICAN DIABETES ASSOCIATION, *supra* note 8, at 44-45.

56. GUTHRIE & GUTHRIE, *supra* note 53, at 30-31. Injecting insulin does not transform a individual with non-insulin-dependent diabetes into an individual with insulin-dependent diabetes. SAUDEK ET AL., *supra* note 12, at 30.

### *B. Employment Discrimination Against Individuals with Insulin-Dependent Diabetes*

Historically, individuals with diabetes have faced discrimination in employment.[57] The discrimination has included "refusal to hire based on presumptions, stereotypes and myths about job performance, safety, insurance costs, absenteeism, and acceptance by coworkers."[58] Individuals with diabetes also suffer from refusals to accommodate their medical needs,[59] terminations,[60] and involuntary demotions or transfers.[61]

#### *1. Hiring Discrimination*

Hiring discrimination occurs when employers engage in the evaluation of an individual based upon "presumptions, stereotypes and myths"[62] and make hiring or retention decisions based on the existence of a disability rather than the ability of the person to perform a given job.[63] Hiring discrimination seems to fall into two main categories, irrational fears[64] and direct threat.[65]

Employers engage in discriminatory practices based on irrational fears when they fire or refuse to hire applicants because of their insulin-dependent diabetes.[66] Employers have refused to

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57. Employment application forms asked questions about applicants' physical conditions, and the responses were used to exclude those with hidden disabilities, including diabetes, from employment. S. REP. NO. 101-116, at 39 (1989).

58. *Id.* at 9.

59. *See, e.g.*, Nawrot v. CPC Int'l, 277 F.3d 896, 901 (7th Cir. 2002) (discussing an employer who refused to let an employee with insulin-dependent diabetes take breaks to check his blood glucose level and take any appropriate action to adjust it).

60. *See, e.g.*, Siefken v. Vill. of Arlington Heights, 65 F.3d 664, 665 (7th Cir. 1995) (dealing with an employer who discharged an employee with insulin-dependent diabetes who had a hypoglycemic reaction at work).

61. *See, e.g.*, Simms v. City of N.Y., 160 F. Supp. 2d 398, 401 (E.D.N.Y. 2001) (considering an employer who restricted the type of positions that an individual with insulin-dependent diabetes could hold, thereby reducing overtime income and other benefits).

62. S. REP. NO. 101-116, at 9 (1989).

63. *Id.* at 28-29.

64. *See* Norwood v. Litwin Eng'r & Constructors, Inc., 962 S.W.2d 220, 222 (Tex. App. 1998) (concerning an employer who fired an employee following a hypoglycemic reaction).

65. Hutton v. Elf Atochem N. Am., Inc., 273 F.3d 884, 892-93 (9th Cir. 2001).

66. *See* Sigurdson v. Carl Bolander & Sons, Co., 511 N.W.2d 482, 487 (Minn. Ct. App. 1994) (considering an employer who refused to hire an individual with insulin-dependent diabetes because "they didn't feel they wanted to hire a diabetic."); *Norwood*, 962 S.W.2d at 222 (dealing with an employer who fired an employee with insulin-dependent diabetes within fourteen days after the employee had his first hypoglycemic reaction at work in twenty-seven years); Price v. Dolphin Serv., Inc., No. Civ.A.99-3888, 2000 WL 1789962, at *2-3 (E.D. La. Dec. 5, 2000) (discussing an employer who fired

hire applicants based on a diagnosis of insulin-dependent diabetes[67] or because of predetermined blood glucose levels.[68]

Employers sometimes justify their discrimination by asserting the affirmative defense of a direct threat.[69] Under this defense, an employer is not required to hire or retain an individual if that person would pose a significant risk of injury to themselves or others.[70] The U.S. Supreme Court set out a test for determining if an employee presents a direct threat in *School Board of Nassau County v. Arline*.[71] This test has been adapted to require an evaluation regarding the extent of the risk, the potential for injury, and the possibility of mitigating the risk.[72]

Using the direct threat defense, employers have sought to

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an employee with insulin-dependent diabetes who had two hypoglycemic reactions at work within a six month period); Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 628-29 (7th Cir. 1998) (describing an employer who failed to offer a driver who had developed insulin-dependent diabetes another position before he lost his seniority, instead offering to transfer him to a lower paying job after a one year medical leave).

67. *See* Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 857 (1st Cir. 1998) (considering an employer who refused to hire an individual with insulin-dependent diabetes for a mechanic position); EEOC v. Murray, Inc., 175 F. Supp. 2d 1053, 1055-56 (M.D. Tenn. 2001) (dealing with an employer who fired an individual with insulin-dependent diabetes upon discovering his condition, believing that he was no longer able to safely operate the forklift which he had operated for over twenty-five years); Kapche v. City of San Antonio, 176 F.3d 840, 841-42, 846-47 (5th Cir. 1999) (reconsidering prior court rulings that employers could exclude individuals with insulin-dependent diabetes from positions requiring driving when the city excluded an individual with insulin-dependent diabetes from police cadet training).

68. EEOC v. Chrysler Corp., 917 F. Supp. 1164, 1166 (E.D. Mich. 1996) (discussing an employer's refusal to hire an individual with insulin-dependent diabetes because of a blanket exclusion based on blood glucose levels).

69. 42 U.S.C. § 12113(b) (2000). An employer may impose a qualification standard requiring "that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." *Id.* The statute defines a "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Id.* at § 12111(3).

70. Doe v. N.Y. Univ., 666 F.2d 761, 777 (2d Cir. 1981).

71. Sch. Bd. of Nassau County v. Arline, 480 U.S. 273 (1987). The test required a fact specific inquiry:

> The basic factors to be considered in conducting this inquiry are well established. In the context of the employment of a person handicapped with a contagious disease, we agree with *amicus* American Medical Association that this inquiry should include "[findings of] facts based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm." Brief for American Medical Association as *Amicus Curiae* 19.

*Id.* at 287-88.

72. Bombrys v. City of Toledo, 849 F. Supp. 1210, 1219 (N.D. Ohio 1993).

exclude employees from positions that require driving.[73] Many employers based their arguments on the Department of Transportation (DOT) ban on employing individuals with insulin-dependent diabetes as commercial drivers.[74] Others have rationalized their restrictions based on specific incidents.[75] Employers have used the direct threat defense in other situations, including positions involving dangerous chemicals.[76]

*2. Workplace Discrimination*

Individuals with insulin-dependent diabetes are also subject to discrimination on the job, facing denial of access to medically necessary physical accommodations[77] and treatment,[78] and

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73. *See, e.g.*, *Arnold*, 136 F.3d at 862 (refusing to hire an individual with insulin-dependent diabetes). The employer refused to hire the plaintiff because of his inability to acquire a commercial driver's license even though the position he applied for was truck mechanic. *Id.*

74. *See* 49 C.F.R. § 391.41 (2003) (prohibiting employers who engage in interstate commerce from employing individuals with insulin-dependent diabetes as commercial truck drivers). DOT regulations are absolute with no allowance for discretion based upon medical examination. Thoms v. ABF Freight Sys., Inc., 31 F. Supp. 2d 1119, 1122 (E.D. Wis. 1998). Based on the DOT's blanket exclusion, an individual with insulin-dependent diabetes was not qualified to drive a city vehicle and could therefore be excluded from any employment requiring him to drive. Chandler v. City of Dallas, 2 F.2d 1385, 1395 (5th Cir. 1993). An individual with insulin-dependent diabetes had to prove that the driving position he sought only involved intrastate commerce so as not to be subject to the DOT exclusion. Tinjum v. Atl. Richfield Co., 34 P.3d 855, 859 (Wash. Ct. App. 2001).

75. *See, e.g.*, Zenaty-Paulson v. McLane/Sunsweet Inc., 2000 WL 33300666, at *7 (D. Ariz. Mar. 20, 2000) (discussing an employer who regarded an employee with insulin-dependent diabetes as substantially limited in her ability to work). The plaintiff experienced hypoglycemic reactions including seizures, and so her employer believed that the plaintiff's driver's license had been revoked, and that therefore she was substantially limited in her ability to work. *Id.*

76. *See, e.g.*, *Hutton*, 273 F.3d at 886-91 (describing an employer who fired a chlorine finishing operator after he had hypoglycemic reactions at work because he presented a direct threat to others). The court based its analysis of direct threat on the potential for a catastrophic event and the severity and scale of potential harm to others due to the dangerous nature of chlorine. *Id.* at 894.

77. *See, e.g.*, Heimback v. Lehigh Valley Plastics, Inc., 2000 WL 14871, at *1 (E.D. Pa. Jan. 7, 2000) (dealing with an employer who denied an individual with insulin-dependent diabetes a requested accommodation). The employee, a fabrication technician who also had cirrhosis of the liver and kidney dysfunction, was denied the requested accommodation of working in a sitting position or taking occasional breaks to relieve the swelling in her extremities caused by standing. *Id.*

78. *See, e.g.*, *Nawrot*, 277 F.3d at 901 (refusing requested breaks). The employer refused to let an employee with insulin-dependent diabetes take breaks to check his blood glucose levels and take any appropriate action. *Id.*

involuntarily demotions or transfers.[79]

The refusal of medically necessary physical accommodations, such as adequate access to a restroom, typically arises in more structured work settings such as factories,[80] but can occur anywhere.[81] Denial of access to medically needed treatment occurs in all types of employment, from accounting[82] to retail sales[83] and manufacturing.[84] Employers have denied or significantly restricted access to food,[85] blood glucose testing,[86] and insulin[87] for individuals with insulin-dependent diabetes.

There are also examples of discriminatory actions involving demotions and involuntary transfers.[88] Employees have seen their salaries slashed or their chances for promotion, overtime, and other benefits eliminated solely because of their insulin-dependent

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79. *See, e.g., Simms*, 160 F. Supp. 2d at 406 (restricting types of positions for an firefighter with insulin-dependent diabetes). City policy restricted the positions that an insulin-dependent firefighter could hold, diminishing responsibilities and potential for promotion. *Id.*

80. *Heimback*, 2000 WL 14871, at *1.

81. *See, e.g., Erjavac*, 13 F. Supp. 2d at 740 (discussing denial of adequate bathroom access). The employer imposed additional restrictions on bathroom access once the employer was informed the employee needed access because she had insulin-dependent diabetes. *Id.*

82. Arena v. AGIP USA, Inc., 2000 WL 264312, at *1 (S.D.N.Y. Mar. 8, 2000) (claiming that the employer prevented plaintiff from administering insulin).

83. *Landers*, 2001 WL 1725300, at *2 (denying an employee with insulin-dependent diabetes a lunch break).

84. *Nawrot*, 277 F.3d at 901-02 (denying employee short breaks away from the production floor to monitor blood sugar levels).

85. *See* Fraser v. U.S. Bancorp, 168 F. Supp. 2d 1188, 1189-90 (D. Or. 2001) (considering an employer who barred an employee with insulin-dependent diabetes from eating at her desk and subsequently fired her after she became unconscious at work due to low blood sugars); *Denney*, 2000 WL 680417, at *3 (discussing a supervisor who told an employee with insulin-dependent diabetes that he could not go to the break room during working hours to get a snack because the machines he was operating were more important than employees' blood glucose level); *Landers*, 2001 WL 1725300, at *2 (concerning an employers' refusal to allow an employee with insulin-dependent diabetes to take a scheduled lunch break).

86. *See Denney*, 2000 WL 680417, at *4 (considering a supervisor who slapped an employee with insulin-dependent diabetes on the arm while he was testing blood glucose levels and told him get back to work and test on his own time); *Nawrot*, 277 F.3d at 901 (discussing an employer's refusal of repeated requests by an employee with insulin-dependent diabetes to take breaks to monitor his blood glucose levels).

87. *See, e.g.*, Deschene v. Pinole Point Steel Co., 76 Cal. App. 4th 33, 44 (Cal. Ct. App. 1999) (concerning employer's denial of access to a clean location in which to inject insulin, and to medically necessary access to food).

88. *See, e.g., Simms*, 160 F. Supp. 2d at 401 (denying overtime and career advancement). The city policy precluded an individual with insulin-dependent diabetes from serving as a full duty firefighter, which prevented the plaintiff from receiving overtime and from being considered for promotion. *Id.*

diabetes.[89]

## III. INSULIN-DEPENDENT DIABETES AS A DISABILITY

### *A. Individuals with Insulin-Dependent Diabetes Are a Homogeneous Population That Do Not Require an Individualized Assessment to Ascertain Disability Status*

#### *1. Individuals with Insulin-Dependent Diabetes All Have Exactly the Same Condition*

Individuals with insulin-dependent diabetes all have exactly the same disease, which only occurs when the pancreas does not produce the hormone insulin.[90] Once this happens, the only treatment option is ongoing insulin injections if they are to stay alive.[91] Insulin injections require careful consideration of all the factors affecting the insulin needs of the body and close monitoring of blood glucose levels to avoid short-term complications such as hypoglycemia-induced seizures and coma.[92]

In short, insulin-dependent diabetes is an incurable disease requiring every afflicted individual to constantly monitor their condition in order to avoid the life-threatening short-term complications caused by the only treatment available to keep them alive.[93] No individual with insulin-dependent diabetes can avoid the treatment, monitoring, or short-term complications.[94] Given the consistency of cause, treatment, and complications, individuals with insulin-dependent diabetes appear to be a homogeneous population with no significant medical differences among members of the group. It must next be determined if individuals with insulin-dependent diabetes as a group are disabled for purposes of the ADA.

#### *2. Insulin-Dependent Diabetes as a Disability Under The ADA as Interpreted by the U.S. Supreme Court*

The ADA defines a disability as "a physical or mental impairment that substantially limits one or more of the major life

89. *See, e.g.*, *Arena*, 2000 WL 264312, at *2 (discussing threats of dismissal). The employer threatened the plaintiff, an individual with insulin-dependent diabetes on medical leave from her position as Chief Accountant, with termination if she did not return to work within two weeks. *Id.* The employer also told the plaintiff that they were demoting her to an entry-level position if she did return to work. *Id.*

90. GUTHRIE, *supra* note 53, at 16.

91. BRISCO, *supra* note 43, at 61.

92. SAUDEK ET AL., *supra* note 12, at 68-72.

93. *Id.* at 18-24.

94. BRISCO, *supra* note 43, at 61.

activities of [an] individual."[95] The definition has three components: an impairment, a major life activity, and substantial limitation.[96] Over the past several years, the U.S. Supreme Court has addressed the interpretation of each of these components.[97]

a. Establishing an Impairment

The ADA defines the first component, a physical or mental impairment, as a disorder or condition affecting one or more of the body's systems.[98] The definition is very broad and the Supreme Court has indicated that it includes such conditions as correctable nearsightedness.[99] Individuals with insulin-dependent diabetes have no difficulty meeting the burden of establishing this component of disability,[100] and frequently the employer does not question that there is an impairment.[101] However, diagnosis of an impairment is merely the first step in the analysis and by itself does not prove a disability.[102]

b. Finding an Effect on a Major Life Activity

Once an impairment is established, the next step involves identification of the major life activities that are affected by the

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95. 42 U.S.C. § 12102(2)(A) (2000).

96. Bragdon v. Abbott, 524 U.S. 624, 632-42 (1998). *Bragdon* sets forth the three-part analysis for determining substantial limitation of a major life activity: (1) whether the condition alleged constitutes a physical or mental impairment, (2) whether the impairment affects a major life activity, and (3) whether the impairment of the major life activity is substantial. *Id.*

97. *See* Sutton v. United Airlines, Inc., 527 U.S. 471, 481-82 (1999) (addressing the definition of impairment); Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 196-99 (2002) (defining major life activities and substantial limitation).

98. 29 C.F.R. § 1630.2(h) (2003). The regulation states:

> (h) Physical or mental impairment means:
>
> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
>
> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

*Id.*

99. *Sutton*, 527 U.S. at 490.

100. *See, e.g., Lawson*, 245 F.3d at 923-25 (finding the plaintiff's insulin-dependent diabetes was an impairment). The court found diabetes was an impairment because it affected the plaintiff's eyes, joints, metabolic system, vascular system, urinary system, and reproductive system. *Id.* at 923.

101. *See, e.g., Nawrot*, 277 F.3d at 904 n.3 (noting that the employer did not dispute that diabetes was an impairment for purposes of the ADA).

102. *Toyota*, 534 U.S. at 198. To find a disability it was insufficient "to merely submit evidence of a medical diagnosis of an impairment." *Id.*

impairment.[103] The ADA regulations limit their discussion of major life activity to an illustrative list and do not define the phrase,[104] but the Supreme Court has determined that the word "major" means "important."[105] The Court also held that the term major life activity "need[s] to be interpreted strictly to create a demanding standard for qualifying as disabled," so that the interpretation of the ADA reflects the legislative findings that forty-three million Americans had some type of physical or mental disability.[106]

Despite the Supreme Court's admonition to use a demanding standard, lower courts have identified nearly forty different major life activities.[107] Courts have concluded that insulin-dependent diabetes affects such major life activities as thinking,[108] caring for oneself,[109] eating,[110] walking,[111] standing,[112] working,[113] and waste

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103. *Bragdon*, 524 U.S. at 637.

104. The regulations list major life activities "such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i) (2003).

105. *Toyota*, 534 U.S. at 197.

106. *Id.*

107. Brian East, *Definition of Disability After Sutton: A Step-By-Step Approach to Avoiding the Effects of* Sutton v. United Air Lines, 6-10, *available at* http://www.diabetes.org/uedocuments/BrianEast1213.pdf (last visited Feb. 6, 2004). The article noted:

> There is authority holding that the following are major life activities: caring for oneself, bathing, dressing, toileting, controlling bowels, waste elimination, sleeping, getting into or out of bed, getting around outside, getting around inside, keeping house, living independently, eating, drinking, cooking, using stairs, sitting, standing, reaching, throwing, squatting, bending, lifting, carrying, performing manual tasks that are central to daily life, walking, running, seeing, hearing, speaking, breathing, reading, writing, thinking, learning, concentrating, cognitive functions, reproducing or bearing children, sexual activities, working, attending school, traveling, driving, interacting with others, interpersonal relations and socializing.

*Id.*

108. *Nawrot*, 277 F.3d at 905. The court noted that the plaintiff's unpredictable hypoglycemic episodes substantially limited his ability to think coherently since they caused him to make nonsensical statements, lose consciousness, and fall. *Id.*

109. *Id.* The court linked plaintiff's ability to think coherently to his ability to care for himself. *Id.*

110. *Lawson*, 245 F.3d at 924-26. The court held the plaintiff was substantially limited in the major life activity of eating, rejecting the trial court's interpretation of substantial limitation as being the equivalent of complete inability. *Id.* The court concluded the demanding regime for managing blood glucose levels and the severe consequences of failing to do so created a substantial limitation on the major life activity of eating. *Id. See also EEOC and Landers*, 2001 WL 1725300, at *5-6. The court found that the plaintiff had raised questions of material fact about a substantial limit on the major life activity of eating, noting that passing out from hypoglycemic episodes significantly impairs the major life activities of walking, seeing,

elimination.[114]

Since *Sutton v. United Airlines, Inc.*[115] and its companion cases, commonly known as the *Sutton* trilogy,[116] were decided in 1999, a limitation on a major life activity must be considered in light of any mitigating measures the individual has undertaken.[117] The effects of the mitigating measures and any adverse results of mitigation are part of the determination of disability.[118] The Supreme Court found that it was the actual limitations faced after mitigation that determine disability status.[119] Courts consider only the actual mitigation used and have rejected arguments that plaintiffs could benefit from additional or different mitigation.[120] The ability to refrain from mitigation, which is available to many individuals with an impairment, is not available to individuals with insulin-dependent diabetes since they face certain death within days for failure to use insulin.[121]

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hearing, breathing, and working. *Id.*

111. Lutz v. Glendale Union High Sch., 8 Fed. Appx. 720, 721 (9th Cir. 2001), No. 99-17410, 2001 WL 408989 (9th Cir. Apr. 20, 2001). The court held that an individual with insulin-dependent diabetes whose blood glucose level was so adversely affected by walking that she was unable to go grocery shopping was substantially limited in the major life activity of walking. *Id.*

112. *Heimback*, 2000 WL 14871, at *2. The court denied the defendant's motion to dismiss a claim where the plaintiff alleged she was substantially limited in the life activity of standing. *Id.*

113. Rebhan v. Atoll Holdings, Inc., No. B140612, 2001 WL 1190434, at *3-4 (Cal. App. 2 Dist. Oct. 2, 2001). The court found that an individual with insulin-dependent diabetes who experienced a number of hypoglycemic episodes at work and lost consciousness several times was significantly impaired in the life activity of working. *Id.* Losing consciousness limited the plaintiff from working at any position where she would be unsupervised. *Id.*

114. *Erjavac*, 13 F. Supp. 2d at 746-47. The court noted that even with insulin injections the plaintiff experienced high blood glucose levels, which induced a need to urinate frequently and caused dehydration. *Id.*

115. 527 U.S. 471 (1999).

116. Sutton v. United Airlines, Inc., 527 U.S. 471 (1999); Albertsons, Inc. v. Kirkingburg, 527 U.S. 555 (1999); Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999).

117. *Sutton*, 527 U.S. at 487. The Court concluded that if Congress had wanted to cover all persons with corrected physical limitations, Congress would have noted a significantly larger number of disabled persons in the legislative record. *Id.*

118. *Id.* at 488.

119. *Id.*

120. *See* Finical v. Collections Unlimited Inc., 65 F. Supp. 2d 1032, 1037-38 (D. Ariz. 1999) (rejecting an employers argument that the plaintiff could benefit from using a hearing aid and stating that failure to use mitigating measures would not defeat the claim); *Nawrot*, 277 F.3d at 904 (stating the mitigation standard developed in *Sutton* was not a license for courts to wander into discussions of the types of mitigation a plaintiff could or should use). Courts should only consider the actual measures taken and any adverse affects that resulted. *Id.*

121. SAUDEK ET AL., *supra* note 12, at 19.

Even considering use of insulin as a mitigating measure, the courts have found that individuals with insulin-dependent diabetes are limited in major life activities.[122] For instance in *Nawrot v. CPC International*,[123] the court noted that the plaintiff was limited in the major life activities of thinking and caring for himself even after mitigation.[124] Despite diligent efforts involving insulin injections and blood glucose monitoring, the plaintiff was unable to completely control his insulin-dependent diabetes and still suffered from hypoglycemic episodes that posed a real danger of death.[125] Similarly, in *Lawson v. CSX Transportation, Inc.*,[126] the court noted that the plaintiff was limited in his ability to eat after using insulin, discussing his need to continually "concern himself with the availability of food, the timing of when he eats, and the type and quantity of food he eats."[127] The court differentiated the constraints placed on the plaintiff from lesser dietary restrictions potentially imposed on individuals with non-insulin-dependent diabetes.[128]

c. Determining if a Limitation on a Major Life Activity is Substantial

The final requirement for establishing disability status under the ADA is finding that major life activities are substantially limited.[129] The ADA and EEOC regulations do not define substantial, but the Supreme Court has looked to the language of the statute and to standard dictionary definitions to conclude that "substantial" means "considerable or to a large degree,"[130] but does not mean "complete inability."[131] The court has gone on to describe the requirement as excluding impairments that interfere in minor ways or are not permanent or long lasting.[132]

When this definition has been applied to individuals with insulin-dependent diabetes the courts have found substantial limitations on major life activities.[133] In *Lawson*, the appeals court

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122. *See, e.g.*, *Nawrot*, 277 F.3d at 905 and *Lawson*, 245 F.3d at 924.
123. 277 F.3d 896 (7th Cir. 2002).
124. *Id.* at 905.
125. *Id.*
126. *Lawson*, 245 F.3d 916 (7th Cir. 2001).
127. *Id.* at 924.
128. *Id.* at 924-25. *Cf.* Ingles v. Neiman Marcus Group, 974 F. Supp. 996, 1001-02 (S.D. Tex. 1997) (finding no limitation on the major life activity of eating). The court noted that a individual with non-insulin-dependent diabetes who ate a normal diet with meals at regular intervals was not limited in the major life activity of eating. *Id.*
129. *Bragdon*, 524 U.S. at 639.
130. *Toyota*, 534 U.S. at 196.
131. *Bragdon*, 524 U.S. at 641.
132. *Toyota*, 534 U.S. at 196-97.
133. *See, e.g.*, *Lawson*, 245 F.3d at 924.

disagreed with the lower court finding that the plaintiff was not substantially limited in his ability to eat because he could ingest food.[134] The court based its finding on the extent of the restrictions, the severity of the consequences for failing to follow the restrictions, and testimony by the plaintiff's physician that managing diabetes was "'a perpetual, multi-faceted and demanding treatment regime' requiring 'continued vigilance.'"[135] The court went on to distinguish the plaintiff's condition from the myopia suffered by the plaintiffs in *Sutton*, noting that those plaintiffs faced none of the coordination of treatment or constant vigilance that an individual with insulin-dependent diabetes faces.[136]

### *3. Homogeneous Populations Require Less Individualized Assessment for Disability Determination Under the ADA*

The language of the ADA and the Supreme Court's interpretations of the statute both require an individualized determination of disability in all cases.[137] However, this requirement is not strictly enforced, and some disabilities are so obvious that the courts never address the question of disability,[138] or the parties agree that the individual is disabled.[139] Instead of debating disability status, these cases revolve around questions that arise once there is an established disability. Such questions include whether the individual is otherwise qualified for the position[140] and the reasonableness of the accommodation requested.[141]

The major factor differentiating cases where disability status

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134. *Id.*

135. *Id.*

136. *Id.* at 925.

137. 42 U.S.C. § 12102(2) (2000) (defining disability with respect to an individual). 29 C.F.R. § 1630.2(g) (2003) (stating that the determination of disability must be made on a case-by-case basis). *See also Sutton*, 527 U.S. at 483 (holding that disability under the ADA was determined by individualized inquiry).

138. *See, e.g.*, Sieberns v. Wal-Mart, Inc., 125 F.3d 1019, 1022 (7th Cir. 1997) (failing to discuss the disability status of a blind plaintiff). The court did not analyze the existence of an impairment but, instead began the analysis with the otherwise qualified individual inquiry. *Id.*

139. *See, e.g.*, Winfrey v. City of Chicago, 259 F.3d 610, 614 (7th Cir. 2001) (noting that the defendant did not dispute that the blind plaintiff was disabled).

140. An individual is otherwise qualified for a position if "with or without reasonable accommodation, [they] can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8) (2000).

141. A reasonable accommodation imposes an obligation on the employer to accommodate known physical or mental disabilities to the extent they do not impose an undue burden on the employer. 42 U.S.C. § 12111(9)-(10) (2000).

is litigated from those where it never arises is the uniformity of the disabling condition. For example, individuals who are blind in both eyes are always considered disabled,[142] as are those who are deaf[143] or confined to a wheelchair.[144] However, those with lesser impairments frequently are found to be not disabled.[145]

Like those with unquestioned disability status, individuals with insulin-dependent diabetes are a uniform group for disability assessment.[146] Unlike sufferers of conditions with widely varied symptoms such as hypertension,[147] carpal tunnel syndrome[148] or bad backs,[149] individuals with insulin-dependent diabetes all have exactly the same condition with exactly the same symptoms.[150] They suffer from the complete destruction of an essential part of the endocrine system rather than a partial loss.[151] The Supreme

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142. *See, e.g.*, *Sieberns*, 125 F.3d at 1022 (omitting any discussion of disability). The court did not discuss impairment of a blind plaintiff but implied its existence by discussing the otherwise qualified portion of the ADA test for disability. *Id.*

143. *See, e.g.*, Downing v. United Parcel Serv., Inc., 215 F. Supp. 2d 1303, 1309 (M.D. Fla. 2002) (noting that there was no contention by the defendant that a deaf plaintiff was not disabled).

144. *See, e.g.*, Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 543-44 (7th Cir. 1995) (finding that a plaintiff paralyzed from the waist down was disabled without discussion). The court went on to hold that the pressure sores she got as a result of the paralysis added to the disability. *Id.*

145. *See, e.g.*, *Finical*, 65 F. Supp. 2d at 1040-43 (discussing extensively whether a plaintiff with mild to moderate hearing loss in the low to mid frequency range was disabled); Still v. Freeport-McMoran, Inc., 120 F.3d 50, 52 (5th Cir. 1997) (holding that a plaintiff who was blind in one eye was not disabled). The court found the complete loss of vision in one eye was not a disability, even though it greatly impaired plaintiff's peripheral vision, because his remaining eye functioned normally. *Id.*

146. *See supra* Part II.A.1 (discussing the medical aspects of insulin-dependent diabetes).

147. *Compare* Garvey v. Jefferson Smurfit Corp., 2000 U.S. Dist. LEXIS 15468, at *10 (E.D. Penn. Oct. 24, 2000) (finding high blood pressure an impairment) *with Murphy*, 527 U.S. at 520 (finding high blood pressure was not an impairment). In *Garvey*, the court held that a plaintiff who could not be involved in any stressful social situations because it would cause his blood pressure to rise to dangerous levels was substantially limited in the major life activity of interpersonal relations and socializing. *Garvey*, 2000 U.S. Dist. LEXIS 15468, at *10. However, the court in *Murphy* held that a mechanic who was discharged for failing to meet Department of Transportation guidelines for blood pressure was not disabled because he functioned normally for everyday activities when he took his medication. *Murphy*, 527 U.S. at 520.

148. *Toyota*, 534 U.S. at 199. The varied levels of impairment created by carpal tunnel syndrome could range from muscle atrophy and extreme loss of feeling to merely occasionally numbness and tingling. *Id.*

149. *See, e.g.*, Mays v. Principi, 301 F.3d 866, 869-70 (7th Cir. 2002) (stating that back problems rendered the plaintiff disabled in this case). The court noted that this was an unusual case and back problems, which restrict lifting, though numerous, are usually not disabilities. *Id.*

150. SAUDEK ET AL., *supra* note 12, at 18-24.

151. *Id.* at 19. Insulin-dependent diabetes is the result of destruction of the

Court noted in *Toyota* that an individualized assessment was especially needed when the symptoms of an impairment varied widely.[152] This statement seems to imply that less varied symptoms do not need as extensive an assessment, and those symptoms that do not vary at all may not need any assessment.

Additionally, all individuals with insulin-dependent diabetes must use the same mitigation.[153] Unlike those afflicted with other disabilities, those with insulin-dependent diabetes have no choice about their treatment.[154] They must use insulin injections since it is the only treatment available and without it, they will die.[155] The mandated use of insulin means that all individuals with insulin-dependent diabetes are subject to the same mitigation-related adverse effects of hypoglycemic reactions.[156] Injecting insulin causes unpredictable hypoglycemic reactions resulting in seizures, coma, or even death.[157] These adverse effects of mitigation are the most severe types imaginable.[158]

Because individuals with insulin-dependent diabetes are a homogeneous group meeting the definition of disabled under the ADA, it would be logically inconsistent for courts to find some members of the group disabled and others not. However, that is exactly what courts are doing.[159] Courts across the country are evaluating disability claims from individuals with insulin-dependent diabetes and reaching different results.[160]

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insulin producing beta cells in the pancreas by the immune system. *Id.*

152. *Toyota*, 534 U.S. at 199.

153. BRISCO, *supra* note 43, at 61.

154. *Id.*

155. *Id.* at 14.

156. AMERICAN DIABETES ASSOCIATION, *supra* note 8, at 159-60.

157. BRISCO, *supra* note 43, at 89.

158. *Lawson*, 245 F.3d at 924-26. The court noted that an individual with insulin-dependent diabetes must deal with potentially life-threatening complications from mitigation. *Id.* They stated that the severity of the complications distinguished the plaintiff from situations like *Sutton* where the effects of noncompliance were minimal. *Id.*

159. *See, e.g.*, *Orr*, 297 F.3d at 724-26 (finding the plaintiff was not disabled), *cf. Lawson*, 245 F.3d at 929 (finding the plaintiff was disabled).

160. In a sample of eighteen cases applying the mitigation requirement of *Sutton*, individuals with insulin-dependent diabetes have established disability so as to survive a motion for summary judgment or a motion to dismiss in eight cases. These cases are *Kapche v. City of San Antonio*, 304 F.3d 493 (5th Cir. 2002), *Petrosky v. N.Y. State Dep't of Motor Vehicles*, 72 F. Supp. 2d 39 (N.D.N.Y 1999), *Lawson*, 245 F.3d 916, *Lutz*, 2001 WL 408989, *Landers*, 2001 WL 1725300, *Fraser v. Goodale*, 342 F.3d 1032 (9th Cir. 2003), *Nawrot*, 277 F.3d 896, and *Rebhan*, 2001 WL 1190434. In the ten remaining cases, individuals with insulin-dependent diabetes did not establish a disability and were unable to survive a motion for summary judgment or a motion to dismiss. These cases are *Orr*, 297 F.3d 720, *Harris v. Challenger Motor Freight, Inc.*, 1999 WL 1489819 (N.D. Ohio Dec. 10, 1999), *Williamson v. International Paper Co.*, 85 F. Supp. 2d 1184 (S.D. Ala. 2000), *Denney*, 2000 WL 680417, *Whitney v. Sweetwater Sound, Inc.*, 2000 WL 33309383 (S.D. Ind.

### *B. Courts Are Mistakenly Ruling That Individuals with Insulin-Dependent Diabetes Are Not Disabled*

A large portion of the cases involving individuals with insulin-dependent diabetes are decided on motions to dismiss or summary judgment.[161] Plaintiffs lost in fifty-seven percent of the reported cases involving the question of whether diabetes is a disability since *Sutton* was decided.[162] In many of these instances, courts rule against individuals with insulin-dependent diabetes without fully considering all of the medical ramifications.

#### *1. Courts Do Not Understand the Disease or the Mitigation.*

A recent Eighth Circuit decision, *Orr v. Wal-Mart*,[163] is representative of cases where courts fail to understand the medical implications of insulin-dependent diabetes. In rejecting the plaintiff's disability claim, the *Orr* Court refused to consider the potential impact of the plaintiff's failure to treat his insulin-dependent diabetes.[164] The Court focused on the plaintiff's words in his brief, finding the fact that "he '*could* experience' adverse symptoms"[165] for failure to adequately monitor his diabetes as inconsistent with the requirement in *Sutton* that an impairment, in fact, substantially limit a major life activity.[166] This is a narrow reading of *Sutton* and implies that an individual must be substantially limited at all times in order to gain protection from the ADA, an interpretation that is not found in other case law.[167]

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Apr. 6, 2002), *Mack v. Strauss*, 134 F. Supp. 2d 103 (D.D.C. 2001), *Rivera v. Apple Indus. Corp.*, 148 F. Supp. 2d 202 (E.D.N.Y. 2001), *Kinzer v. Fabyanske, Westra & Hart*, P.A., 2001 WL 1110371 (D. Minn. 2001), *Murray, Inc.*, 175 F. Supp. 2d 1053, and *Grant v. May Dep't Stores*, 786 A.2d 580 (D.D.C. 2001).

161. BACKGROUND MATERIALS ON DIABETES AND FUNCTIONAL LIMITATIONS FOR LAWYERS HANDLING DIABETES DISCRIMINATION CASES, American Diabetes Association *available at* http://www.diabetes.org/advocacy-and-legalresources/discrimination/for_lawyers/background_material.jsp (last visited Feb. 8, 2004) [hereinafter BACKGROUND MATERIALS].

162. *Id.* The statistics are based on all types of diabetes, not just insulin-dependent diabetes. *Id.*

163. 297 F.3d 720.

164. *Id.* at 724. The court refused to consider anything but the plaintiff's present condition and actual consequences even though the plaintiff had suffered several hypoglycemic reactions at work due to the defendant's refusal to allow him an uninterrupted lunch break. *Id.* at 723-24.

165. *Id.* at 724.

166. *Id.*

167. The interpretation is inconsistent with case law finding disabilities because of impairments that do not substantially limit the plaintiffs at all time. *See, e.g.*, *Bragdon*, 524 U.S. at 641 (holding that HIV substantially limited the major life activity of reproduction even though the risk of perinatal transmission was only twenty-five percent and could be reduced to eight percent with medication); PGA Tour, Inc. v. Martin, 532 U.S. 661, 670 (2001) (noting no contention that a degenerative circulatory disorder which prevented

In *Fraser v. U.S. Bancorp*,[168] the District Court of Oregon held that an individual with insulin-dependent diabetes was not disabled despite medical evidence that her blood glucose levels tended to change rapidly, thus causing hypoglycemic reactions at work.[169] This court, like the court in *Orr*, focused on the exact words used to describe the plaintiff's limitations, quoting from her physician's deposition, "*So if she can't take a break to eat, can't take a break to get her shot, can't take a break to test herself, that's a potential problem.*"[170] The court went on to hold that there was no actual substantial limitation, only a potential one,[171] and ignored evidence of the plaintiff's prior hypoglycemic reactions[172] and hospitalization due to a diabetic coma.[173]

*2. Diabetes Is an Invisible Impairment Whose Victims Are Unable to Convey Its Impact*

Undoubtedly much of the confusion that courts encounter when evaluating insulin-dependent diabetes comes from the invisible nature of the disease.[174] The situation appears further complicated by the difficulty plaintiffs seem to have in conveying the extent to which the disease substantially limits them.[175]

Plaintiffs have stated that insulin-dependent diabetes "was just a matter of normal upkeep"[176] and that in spite of their condition they felt "pretty good."[177] These plaintiffs ignored the established medical problems inherent in treating insulin-dependent diabetes.[178] The lack of specificity in pleading may be due to several factors including the age that the plaintiff developed insulin-dependent diabetes,[179] the "can-do" attitude adopted in

the plaintiff from walking five miles during a golf tournament was a disability); and Otting v. J.C. Penney Co., 223 F.3d 704, 711 (8th Cir. 2000) (finding an epileptic plaintiff was substantially limited in the life activities of speaking, walking, and seeing when she suffered a seizure).

168. 168 F. Supp. 2d 1188.

169. *Id.* at 1194.

170. *Id.* at 1192.

171. *Id.* at 1194.

172. *Id.* at 1190.

173. *Id.* at 1191.

174. SAUDEK ET AL., *supra* note 12, at 4. Half of all people in the U.S. who have diabetes are unaware of their condition. *Id.*

175. *See, e.g.*, *Whitney*, 2000 WL 33309383, at *6 (noting the plaintiff did not plead any substantial limitation on the major life activity of working) and *Grant*, 786 A.2d at 584-85 (noting that the plaintiff failed to demonstrate any problems with major life activities).

176. *Whitney*, 2000 WL 33309383, at *6.

177. *Grant*, 786 A.2d at 585.

178. The plaintiff in *Grant* did not discuss any potential problems caused by using insulin. *Id.* at 584-85. The plaintiff in *Whitney* merely mentioned the need to go home for medication before attending after hours business dinners. *Whitney*, 2000 WL 33309383, at *6.

179. SAUDEK ET AL., *supra* note 12, at 19. Most individuals with insulin-

treating insulin-dependent diabetes,[180] and the variance with which short-term complications occur.[181]

The diagnosis of insulin-dependent diabetes in childhood creates problems when trying to identify how major life activities are substantially affected.[182] Individuals with insulin-dependent diabetes must speculate about how activities are affected since they may have no memory of life before diabetes and therefore no point of reference for comparison.[183] The "can-do" attitude creates problems identifying affects on major life activities because an individuals with insulin-dependent diabetes turns their focus from the problems created by diabetes to minimizing its *impact* on daily life.[184] The variance with which short-term complications occur leads plaintiffs to assert that problems *could* occur, since there is no way to determine in advance exactly what *will* occur in any given situation.[185]

The three factors combine to produce plaintiff pleadings that do not adequately state a disability for ADA purposes.[186] The result is that courts, reviewing these pleadings and lacking

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dependent diabetes are diagnosed in childhood. *Id.*

180. BACKGROUND MATERIALS, *supra* note 161.

181. AMERICAN DIABETES ASSOCIATION, *supra* note 8, at 160. The body does not always use insulin consistently. *Id.* The inconsistent use of insulin by the body can lead to hypoglycemic reactions on one day but not on another day even all of the factors such as food consumption and insulin dosage are the same. *Id.*

182. "I don't know what life feels like except as a diabetic." Interview with James P. Radermacher, insulin-dependent diabetic and diabetes activist, in Chicago, IL (Sept. 4, 2002). Mr. Radermacher was diagnosed with insulin-dependent diabetes in 1968 at age five. He is currently the Volunteer Illinois Advocate Leader for the American Diabetes Association and was a named plaintiff in a recently settled ADA Title III public accommodation claim brought by the Department of Justice against SFX Entertainment.

183. "I can't remember what it feels like not to think about my diabetes on a constant basis. I'm even a diabetic when I dream." Interview with James P. Radermacher, *supra* note 182.

184. BACKGROUND MATERIALS, *supra* note 161. A pitfall in litigation many individuals with diabetes encounter comes from this attitude, which while useful in treating diabetes is devastating for establishing disability status. *Id.* A plaintiff's overly optimistic self-assessment need not be fatal to finding a disability as determined by *Gillen v. Fallon Ambulance Service, Inc.*, 283 F.3d 11, 22 (1st Cir. 2002). The court held that the fact the plaintiff was missing one arm below the elbow but took a position that she was not limited did not foreclose a finding of disability because the assessment was based more on the plaintiff's determination that on her actual abilities. *Id.*

185. AMERICAN DIABETES ASSOCIATION, *supra* note 8, at 159-60. The body's use of insulin is inconsistent so even doing exactly the same thing on different days will yield different results. *Id.* at 160.

186. *See, e.g.*, *Rivera*, 148 F. Supp. 2d at 213 (finding a plaintiff with insulin-dependent diabetes was not disabled). The court held the plaintiff failed to establish a disability because he could control his diabetes with proper diet and insulin injections. *Id.*

knowledge about insulin-dependent diabetes, find that the plaintiffs are not disabled.[187]

Once the court finds the plaintiff is not disabled an absurd situation can unfold. The plaintiff who has mitigated his condition falls prey to a paradox; he or she ends up outside the protection of the ADA and can be denied access to the very mitigation that was used to deny his or her disability status.[188]

## IV. PROPOSAL

### A. *Judicial Action and Interpretation*

The ADA must be broadly interpreted by the courts to fulfill the mandate given by Congress, "[t]he purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life."[189] Use of the mitigated individual standard of *Sutton*[190] has contributed to some courts failure to find individuals with insulin-dependent diabetes to be disabled,[191] thereby allowing their employers to deny them access to blood glucose testing, insulin, and medically necessary food.[192]

Before *Sutton*, courts could look at a medical diagnosis for guidance in determining impairment.[193] Courts could engage in a one-step process to determine if an individual had an impairment.[194] Since *Sutton*, courts have had to look beyond the medical diagnosis to the treatment of an impairment.[195] Not only

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187. *See, e.g., Williamson*, 85 F. Supp. 2d at 1190-95 (finding a plaintiff with insulin-dependent diabetes was not disabled). The court held the plaintiff was not disabled despite his extensive list of problems caused by insulin and diabetes complications he experienced. *Id.*

188. *See, e.g., Orr*, 297 F.3d 720 (finding that an individual with insulin-dependent diabetes was not disabled because he used insulin to mitigate his condition). Some courts have rejected the notion that an employer could prevent an employee from using corrective measures at work and then claiming the actions were beyond the reach of the ADA because the employee was not disabled. *Denney*, 2000 WL 680417, at *10.

189. H.R. REP. 101-485, pt. 2, at 23 (1990).

190. *Sutton*, 527 U.S. at 482.

191. *Orr*, 297 F.3d 720.

192. *See supra* notes 85-87 and accompanying text (discussing cases involving employers who denied individuals with insulin-dependent diabetes opportunities to control their diabetes during work hours).

193. *See, e.g.*, Sarsycki v. United Parcel Serv., 862 F. Supp. 336, 340 (W.D. Okla. 1994) (noting that the plaintiff was disabled based on a medical diagnosis of insulin-dependent diabetes).

194. *Id.* The court looked at the medical diagnosis and determined that the plaintiff was impaired because he would suffer debilitating symptoms and eventually death without insulin. *Id.*

195. *See, e.g., Grant*, 786 A.2d at 586 (holding that a plaintiff was not

must courts determine what the impairment is, but they must also determine if there is an impairment after the plaintiff is treated.[196] Courts must delve into the realm of medicine and decide what effect, good or bad, the treatment has had on the impairment.[197] Courts frequently ignore the adverse effects of treatment, looking only at the positive ones.[198]

*Orr v. Wal-Mart Stores, Inc.*[199] clearly demonstrates an example of the paradox created by *Sutton*. The plaintiff, an individual with insulin-dependent diabetes, had an impairment without mitigation,[200] but was judged after mitigation.[201] The court found that he no longer had an impairment,[202] and that he could not look to the ADA for protection from employer discrimination.[203] The employer was then free to deny a request for accommodation.[204] This denial prevented the plaintiff from using the mitigation that forced him outside the protection of the ADA in the first place.[205] The employer had in effect rendered the plaintiff disabled at work but unable to invoke protection from the ADA.[206]

The courts can close this loophole for employers in several ways. First, the courts could find that insulin-dependent diabetes is a per se disability.[207] Unfortunately, this is at odds with the Supreme Court's persistent determination that impairment and

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disabled because insulin mitigated her condition).

196. *Id.* The plaintiff, through "diligent monitoring, diet, and insulin use," was able to control her blood sugar levels. *Id.* at 581. Due to her mitigation, she felt "pretty good" and the court found she was not substantially limited in any major life activities. *Id.* at 585.

197. *See, e.g.*, *Nawrot*, 277 F.3d at 904-05 (discussing the problems created by insulin injections). The court found the plaintiff was so adversely affected by insulin injections that he was disabled within the meaning of the ADA as interpreted in *Sutton*. *Id.*

198. *See, e.g.*, *Fraser*, 168 F. Supp. 2d at 1194 (holding that the adverse affects of insulin did not substantially limit the plaintiff). The court reiterated the plaintiff's problems caused by insulin including a hypoglycemic episode at work that caused her to lapse into a coma. *Id.* Notwithstanding the events it discussed, the court held she was not substantially limited in any major life activity. *Id.*

199. *Orr*, 297 F.3d 720.

200. *Id.* at 724.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 722-23. The plaintiff had requested an uninterrupted lunch break so he could eat immediately after injecting insulin. *Id.*

205. *Orr*, 297 F.3d at 724.

206. *Id.*

207. This action finds support in the legislative history of the ADA, which states "persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability [actual disability], even if the effects of the impairment are controlled by medication." H.R. REP. 101-485, pt. 2, at 52.

disability must be established on an individualized basis.[208]

The courts could also solve this problem by interpreting the ADA as preventing employers from disallowing the use of mitigation. This solution falls outside of the scope of the ADA, which provides no mechanism requiring employer action in the absence of a finding of disability.[209] Furthermore, if adopted, this solution could add another layer to the already complicated question of disability determination. Courts could find themselves locked in a circular analysis, with plaintiffs considered at first as having an impairment, and then later as not having one based on their own actions, those of their employer, or subsequent changes by either.

### *B. Legislative Solutions*

Neither judicial solution is workable. A per se disability pronouncement defies the plain language of the statute and all judicial interpretation to date.[210] Preventing employers from interfering with mitigation falls outside the scope of the ADA and creates never-ending questions of impairment.[211] Since judicial solutions do not seem viable, legislative solutions are more appropriate.

#### *1. Medical Criteria Test*

The first possibility for a legislative solution is amending the ADA to provide that certain medical conditions are per se disabilities. Mark Rothstein, Serge Martinez and Paul McKinney, professors at University of Louisville School of Medicine, suggested this approach in a recent article.[212] In the article, they suggest amending the ADA to authorize the EEOC to "publish medical standards for determining disability for the most common physical and mental impairments."[213] The article proposes medical standards for twelve different physical impairments

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208. *Toyota*, 534 U.S. at 691-92. This case, decided in 2002, held that Congress "intended the existence of a disability to be determined in such a case-by-case manner." *Id.* at 692.

209. Title I of the ADA mandates that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112 (2000).

210. *Toyota*, 534 U.S. at 691-92.

211. 42 U.S.C. § 12112 (2000). The language of the ADA provides for action only when an employer discriminates against a disabled individual. *Id.*

212. Mark A. Rothstein, et al., *Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act*, 80 WASH. U. L.Q. 243, 269-82 (2002).

213. *Id.* at 270.

including diabetes.[214]

Such a solution has appeal. It would provide clarity to both employers and employees about who the law would consider disabled.[215] Such clarity could result in less litigation and would fit within the current disability framework for ease of implementation.[216]

However, there are several problems with this solution. Congress seems very reluctant to amend the ADA, and since the Act's inception has passed only four minor amendments.[217] None of these amendments affected the basic manner in which the ADA operates.[218] Additionally, basing disability on established medical criteria could open the process up to constant amendment as future medical advances allow more people with impairments to obtain mitigating treatments that allow them to enter the workforce. Finally, the establishment of the criteria could be subject to significant pressures from special interest groups, leading to criteria that were less reflective of actual medical diagnosis and more reflective of special interest group clout.

*2. Access to Self-Administered Medical Treatment*

This Comment proposes an additional solution: new legislation that would forbid employers, schools, places of public accommodation, and other entities from interfering with the self-administration of medically prescribed treatment. The new legislation would close the loophole in the ADA and would facilitate the access to "the economic and social mainstream of

214. The article proposes disability standards for arthritis, asthma, bipolar I mood disorder, chronic obstructive pulmonary disease, congestive heart failure, diabetes mellitus, epilepsy, hearing impairments, malignancy, multiple sclerosis, renal failure, and vision impairments. *Id.* at 282-96. The proposed standard for diabetes would include as disabled all individuals who are insulin-dependent as well as those who were non-insulin-dependent but had experienced diabetes related eye, nerve, or kidney problems. *Id.* at 289.

215. *Id.* at 270.

216. *Id.*

217. Over 800 bills referencing the ADA have been introduced in Congress since the ADA was enacted. http://thomas.loc.gov (http://thomas.loc.gov, the official site for legislative materials maintained by the Library of Congress, was searched for any reference to the ADA in legislation introduced between the enactment of the ADA and November 2002.) Only four bills have been enacted which amend the ADA: Pub. L. No. 102-166, Pub. L. No. 104-1, Pub. L. No. 104-59, and Pub. L. No. 104-287.

218. Pub. L. No. 102-166, § 109 amended the ADA to extend its protection to U.S. citizens working in foreign countries. Pub. L. No. 104-1, §§ 201(c)(3) and 210(g) extended the protections of the ADA to employees of the legislative branch of the federal government. Pub. L. No. 104-59, § 341 modified the effective dates for accessibility on over-the-road buses. Pub. L. No. 104-287, § 6(k) changed terminology from "commuter service" to "commuter rail passenger transportation." No changes were made to the way the ADA was originally designed to function.

American life"[219] mandated by Congress when the ADA was enacted.

The proposed legislation would benefit individuals who do not meet the strict requirements of disability under the ADA but still find themselves subject to discrimination in treating their medical condition.[220] Such legislation could be of particular benefit to those who do not seek an accommodation in the traditional sense of barrier removal or adaptive technology,[221] but only seek to be able to treat or mitigate their impairment as medically needed and prescribed.[222]

Narrowly crafted legislation would address the specific problem encountered by individuals with insulin-dependent diabetes when treating themselves. It would also apply to other medical treatments available now or in the future. It could avoid problems arising from amending the ADA, such as either drastically expanding the scope of the ADA to include non-disabled persons or limiting protection to those who fall within the ADA in their unmitigated state.

The proposed legislation allows for changes in medical treatment and technology without the constant need for new rules and legislation. Like the ADA, the scope of the legislation could constantly adjust to the changing scope of self-administered medical treatments available, and it would cover individuals whose new treatment pushed them outside the protection of the ADA.

## V. CONCLUSION

The ADA cannot always provide the protection Congress intended when the mitigation standard for disability is applied. Applying the *Sutton* standard allows employers to deny employees the reasonable accommodation of using mitigating treatment by

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219. H.R. REP. 101-485, pt. 2, at 22.

220. *See, e.g.*, *Orr*, 297 F.3d at 723-25 and *Lawson*, 245 F.3d at 924-26 (arriving at different conclusions as to whether plaintiffs' diabetes substantially impaired a major life activity).

221. The ADA states that:

> "reasonable accommodation" may include- (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9) (2000).

222. *Nawrot*, 277 F.3d at 901-02. The plaintiff requested an accommodation of leaving the factory floor to test his blood sugars and treat his diabetes as needed on several occasions. *Id.* The employer refused the request every time. *Id.*

arguing that their medical conditions are not substantially disabling when mitigated.[223] This paradox punishes those who treat their impairment and is particularly damaging to individuals who have no choice in the mitigation they use. Congress and the courts should act to ensure that no one can deny an individual access to prescribed, self-administered medical treatment. By doing so, they will help close the loophole created by *Sutton* and will extend protection to individuals who seek to treat their medical conditions without interference.

223. *Orr*, 297 F.3d at 724.