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Legal Issues in Accommodating the Americans with Disabilities Act to the Diabetic Worker

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INTRODUCTION

Shifting population demographics and a dramatic rise in obesity are fueling an epidemic of Type II diabetes in the United States. In 2002, it was estimated that diabetes cost approximately $132 billion in the United States, with $92 billion in direct costs and $40 billion in indirect costs, such as lost workdays and permanent disability.[1] These costs will increase with time, as the prevalence of diabetes increases. The number of individuals with diagnosed diabetes in the United States has more than doubled in the last 15 years, reaching 14.6 million in 2005, with an estimated 6.2 million additional undiagnosed cases.[2] Beyond the financial impact of diabetes on the health care system, diabetes leads to suffering, disability, and premature death.

Diabetes is a lifelong, chronic illness that requires significant behavior modification for proper management. These behavioral changes, which include the regularization of diet, routine exercise, control of stress, and pharmacological treatment, must be followed 24 hours per day. Such behavioral

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[1] American Diabetes Association, Direct and Indirect Costs of Diabetes in the United States, *available at* http://www.diabetes.org/diabetes-statistics/cost-of-diabetes-in-us.jsp (last visited Aug. 21, 2007).

[2] Centers for Disease Control and Prevention (CDC), Diabetes: Disabling Disease to Double by 2050 (2007), *available at* http://www.cdc.gov/nccdphp/publications/aag/pdf/diabetes.pdf (last visited Aug. 21, 2007).

changes can significantly ameliorate the effects of the disease and can slow or arrest its progression.

This article focuses on the management of diabetes in the workplace. Most Americans spend a significant part of their day at work, and for many these days are long enough to account for most of the individual's waking time. Diabetes management must be part of workplace life if affected individuals are to successfully control the disease.

The Americans with Disabilities Act of 1990 (ADA) provides a general legal framework for access of individuals with disabilities to public places and for accommodating employees with disabilities in the workplace.[3] Although the ADA contains very specific guidance for physical accommodations, such as wheelchair access, it provides little guidance relevant to workers with diabetes. Many of the judicial rulings on diabetes under the ADA are based on simplistic or outdated understandings of the disease and do not provide useful precedent for workplace diabetes policies.

This article reviews the problems in ADA jurisprudence as it relates to diabetes. Some of these problems are common to other chronic diseases under the ADA. The article concludes that courts would reach more consistent and effective rulings if they used a more sophisticated view of diabetes.

Unfortunately, it is difficult to achieve consistent scientific fact-finding when each case depends on the preparation and resources of the attorneys representing individuals before the court and on the scientific sophistication of the particular judges and jurors. We propose that the Equal Employment Opportunity Commission (EEOC),[4] the federal agency charged with enforcing the ADA, use its rulemaking power to clarify the conditions under which diabetes is a protected disability and to provide guidance on applying these standards in individual cases. Depending on how broadly the courts construe the EEOC's mandate in this area, it may also be necessary for Congress to amend the ADA to better fit the growing burden of chronic diseases in the workplace, with particular attention to diabetes.

I. MANAGING DIABETES IN THE WORKPLACE

The core of diabetes management in the workplace is support for healthy eating and working habits that could benefit all workers, with specific assistance to workers with diabetes. The first category, as outlined by the American Diabetes Association, includes strategies such as establishing a workplace walking program and keeping any workplace food sources, such as cafeterias

[3] Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12300 (2000).
[4] U.S. Equal Employment Opportunity Commission, http://www.eeoc.gov (last visited Aug. 21, 2007).

and vending machines, stocked with healthy items.[5] The second category, listed in an EEOC guidance document on diabetes and the ADA, lists examples of accommodations that diabetic employees may need in the workplace. These include: a private place where employees with diabetes may test their blood sugar or inject insulin; a resting place for employees with diabetes whose blood sugar levels are fluctuating; breaks for diabetic employees to eat, drink, test their blood sugar levels, or take medication; leave for dealing with diabetes or attending a training session on managing it; shift change or modified work schedule; and providing a stool for someone with a nerve disorder resulting from diabetes (diabetic neuropathy).[6]

It is predicted that the percentage of workers with diabetes will increase and the age of onset of diabetes will decrease. Therefore, all employers can expect enough employees to be affected to justify specific programs for workers with diabetes.

II. FRAMEWORK AND STRUCTURE OF THE ADA

Congress first addressed discrimination against the disabled in the Rehabilitation Act of 1973. The Rehabilitation Act is limited to federally funded programs, and only provides some of the protections of the ADA.[7] The ADA was passed in 1990 to broaden the reach and protections of the Rehabilitation Act. The ADA is intended to both protect individuals with disabilities and reduce the expenses of the Social Security Disability Insurance Program by helping disabled individuals find and hold jobs. Most states and some large cities have their own disability laws that mirror or extend the ADA.

The ADA focuses on two areas: eliminating discrimination in employment and reducing physical barriers to persons with disabilities participating in the workplace and having access to public spaces. This article focuses on employment discrimination. The employment provisions of the ADA do not apply to employers with fewer than 15 employees. Neither the employment nor the facilities provisions apply to United States government employees (but federal employees are covered by the Rehabilitation Act), Indian tribes, and bona fide membership clubs that are tax exempt under section 501(c) of the Internal Revenue Act of 1986.

The ADA bans discrimination against a "qualified individual with a disability," defined as "an individual with a disability who, with or without

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[5] AMERICAN DIABETES ASSOCIATION, DIABETES IN THE WORKPLACE, *available at* http://www.diabetes.org/communityprograms-and-localevents/diabetes-in-the-workplace.jsp (last visited Aug. 21, 2007).

[6] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, QUESTIONS AND ANSWERS ABOUT DIABETES IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT (2003), *available at* http://www.eeoc.gov/facts/diabetes.html (last visited July 14, 2007).

[7] Rehabilitation Act of 1973, 29 U.S.C. § 791 (2006).

reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[8] The ADA also prohibits discrimination based on perceived disability, that is, when the employer wrongly assumes an employee cannot do a job because of a disability, such as assuming a diabetic cannot be a police officer.

A. Limits on ADA Protections

The ADA is prospective. It is intended to ensure that the employee gets any necessary help, called an "accommodation," to do the job correctly. The ADA cannot be raised as a defense after a disabled employee is disciplined or fired for poor performance or for violating work rules. In *Siefken v. Village of Arlington Heights,*[9] a probationary police officer had a diabetic attack resulting in disorientation and memory loss. He drove erratically through a neighborhood and was stopped by other police officers. In *Burroughs v. City of Springfield*, the plaintiff police officer, while on duty, suffered two hypoglycemic diabetic episodes that caused him to become disoriented and dysfunctional.[10] He chose to resign after being given a choice between resignation and demotion, then initiated a lawsuit.

The courts determined these were not valid ADA claims, because the employees were fired for legitimate work-related reasons, not because they were disabled. Neither plaintiff had sought an accommodation to avoid the problems prior to their respective incidents. These rulings highlight the employee's responsibility to seek any necessary accommodations before job performance is affected.

B. Covered Disabilities

The ADA defines disability as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[11] The disability must also last at least six months, and not be a natural, self-limited condition such as pregnancy.

The ADA does not protect those who engage in illegal use of drugs or the use of alcohol in the workplace, and employees with substance abuse problems may be held to the same standards of behavior as other employees. However, those who have successfully completed a rehabilitation program for drugs or who are currently enrolled in a program and not currently using, or who are incorrectly regarded as drug users, are protected. Courts have differed on the issue of whether alcoholism itself is a disability, as the 8th

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[8] 42 U.S.C. § 12111(8).
[9] 65 F.3d 664, 665 (7th Cir. 1995).
[10] Burroughs v. City of Springfield, 163 F.3d 505, 506 (8th Cir. 1998).
[11] 42 U.S.C. § 12102(2).

Circuit found it a disability[12] while the 11th Circuit found plaintiff's evidence that his alcoholism was a disability to be insufficient.[13]

C. Perceived Disability and Direct Threat

Prior to the ADA, employees often were excluded from the workplace because the employer believed they were disabled, even without any evidence the employee could not do the job. For example, persons with abnormal back x-rays commonly were excluded from jobs involving lifting, without regard to whether they could do the job. This practice protected the employer from potential workers' compensation claims.

Today, however, the ADA requires that the employer make an individual assessment of the employee's ability to do the job and prevents most blanket exclusions. For example, in *Bombrys v. City of Toledo*, the plaintiff wanted to become a police officer but was excluded by the city's blanket exclusion of insulin-dependent persons with diabetes from the police force.[14] The court held that, without specific evidence to support the exclusion, the city had violated the ADA.

This protection against perceived disability was tempered by the United States Supreme Court in *Chevron U.S.A., Inc. v. Echazabal*.[15] The petitioner in that case challenged the exclusion of workers with possible liver disease from working around petrochemicals that could exacerbate the liver disease. The exclusion was based on Occupational Safety and Health Administration (OSHA) policy and regulations. The employer argued EEOC regulations allow an employer to exclude an employee from the workplace if the employer believed the job posed a risk to the employee. The EEOC regulations went beyond the language of the ADA, which only allows an exclusion for employees whose disability poses a threat to others. The employee argued prior cases allowed the employee to choose to do the job, even at a personal risk, as long as others were not endangered.[16]

The court rejected the worker's interpretation and allowed employers to exclude employees from the workplace for their own protection. This holding may be limited to the specific circumstances where another federal agency has made a legal determination that a class of employees is disqualified from a given job category, because later courts have continued to reject employer fears of future injury to the employee as grounds for not hiring.[17]

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[12] Miners v. Cargill Communications, 113 F.3d 820 (8th Cir. 1997).
[13] Roberts v. Rayonier, Inc., 135 Fed. Appx. 351 (11th Cir. 2005).
[14] Bombrys v. City of Toledo, 849 F. Supp. 1210, 1215 (N.D. Ohio 1993).
[15] 536 U.S. 73 (2002), *on remand to* 336 F.3d 1023 (9th Cir. 2003).
[16] *Id.* at 86.
[17] Rodriguez v. ConAgra Grocery Prods. Co., 436 F.3d 468, 484 (5th Cir. 2006); Hammel v. Eau Galle Cheese Factory, 2003 WL 21067091 (W.D. Wis. 2003), *overturned on other grounds*, Hammel v. Eau Galle Cheese Factory, 407 F.3d 852 (7th Cir. 2005).

D. Pre-Employment Evaluation and Employee Privacy

The ADA bans pre-employment physicals and medical questionnaires, which were once used to exclude potentially disabled workers before they were offered a job. The employer may not ask whether or to what extent an individual has a disability, only whether the employee can do the job. If the employee cannot do the job without an accommodation, then the employee must inform the employer of the disability and any necessary accommodation. Employers may require the potential employee to show that he or she can perform basic job functions.

Once an employer has offered an individual a job, the employer may require a medical examination if it is required of all employees for purposes such as health benefits. Medical information concerning disabilities cannot be kept in the employee's personnel file and must be treated confidentially. Information about the employee's disability may be shared with supervisors only when it is necessary to implement an accommodation or the disability might require emergency treatment, such as medical response to a hypoglycemic episode.

E. Reasonable Accommodation

The ADA requires the employer to provide a reasonable accommodation for employees who have a disability but are otherwise qualified to do the job. Reasonableness is defined in terms of the overall assets of the employer, not the value of the job at the specific jobsite. This represents a policy choice that employers should bear any additional financial cost of disabled workers, as long as the worker can do the job. Examples of reasonable accommodations in the statute include making facilities used by employees with disabilities accessible and usable and "acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, [and] the provision of qualified readers or interpreters."[18]

Requiring the employee to request accommodations before failing at the job assures that there is no disruption in the workplace, but it penalizes the disabled employee who wants to try to do the job without an accommodation. The employer must evaluate the requested accommodation in terms of the specific needs of the individual employee, rather than determining what accommodations are reasonable for classes of disabled workers. Individualized assessment is very important because of the broad spectrum of morbidity secondary to diabetes.

Under the definitions in the employment section of the ADA, a "reasonable accommodation" also can include: "job restructuring, part-time or modified work schedules, [or] reassignment to a vacant position."[19] Despite

[18] 42 U.S.C. § 12111(9)(B).
[19] *Id.*

this language, the courts have been reluctant to require job restructuring or reassignment. Most courts find the employee must be able to do the job as it is offered, with an accommodation, unless the job is designed in ways that violate other federal laws such as OSHA limitations on lifting heavy loads.

In *Rehrs v. Iams Co.*, the court found it was an essential job function of the plaintiff with diabetes that he work rotating shifts.[20] The court accepted the employer's argument that working rotating shifts as part of a team is an essential function of the job, saying the plaintiff's request that he not be subject to this requirement is "unreasonable per se." The court looked to other cases in saying that "[j]ob restructuring is a possible accommodation, but an employer is not required to reallocate essential functions of the employee's job."[21] The reluctance to order job restructuring may stem from confusing the structure of the job with the function of the job, as this case demonstrates.

The courts have been divided over whether an employer must offer an employee an available alternative job as an accommodation, and whether the employee must accept such an offer or can insist on an accommodation in the existing job. The ADA does not override collective bargaining agreements: thus, employers are not required to accommodate workers with different job assignments if doing so would violate a union contract awarding jobs based on seniority.[22] This provision further limits the options for workers with diabetes in unionized workplaces.

III. THE ADA AND DIABETES

A. When Is Diabetes a Disability?

The spectrum of diabetes ranges from an unexpressed genetic predisposition to acutely life-threatening and completely disabling. When diabetes leads to disabilities such as blindness and amputations, ADA coverage should not be an issue. Difficult legal and policy issues arise from a need to determine whether diabetes is covered by the ADA before it reaches such endpoints and, most critically, whether accommodations intended to limit the progression of diabetes are covered by the ADA.

The ADA definition of disability—impairment that substantially limits a major life activity—is read closely by the courts. In *Bragdon v. Abbott*, the United States Supreme Court considered whether an asymptomatic disease—HIV—could be a disability under the ADA.[23] The plaintiff's dentist refused

[20] Rehrs v. Iams Co., No. 4:05-CV-3014, 2006 WL 296591 (D. Neb. 2006), *aff'd*, 486 F.3d 353 (8th Cir. 2007).

[21] *Id.* at 4 (citing Treanor v. MCI Telecomm. Corp., 200 F.3d 570, 575 (8th Cir. 2000); Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112-13 (8th Cir. 1995)).

[22] US Airways, Inc. v. Barnett. 535 U.S. 391 (2002).

[23] Bragdon v. Abbott, 524 U.S. 624 (1998).

to fill a cavity in the plaintiff's tooth in his office, asserting that he did not have sufficient infection control equipment. The lawsuit was brought under the public facilities section of the ADA, but the test for disability is the same as in the employment section.

The Supreme Court first inquired into whether asymptomatic HIV infection was an impairment. The court held the profound effects of HIV on the immune system qualify it as an impairment, without requiring that the impairment produce symptomatic disease. This is a critical ruling for diabetes, which is a complex disease that affects many systems in the body. It is not, as several courts have opined, just an imbalance in sugar metabolism that is cured with insulin.

Having found HIV was an impairment, the Court next inquired into whether the impairment could substantially limit a major life activity though not yet causing symptomatic illness. The court found being infected with HIV would affect decisions about one's major life activities and, in the plaintiffs case, would affect the decision to bear children. The *Abbott* decision is applicable to preventive measures for diabetes, in that the person with diabetes must change aspects of major life activities to mitigate the effects of the disease, just as the *Abbott* plaintiff would have to modify her decisions about bearing children.

With proper expert testimony, it should be simple to establish that diabetes is an impairment when it has progressed to the point that it is diagnosable by laboratory tests such as blood sugar levels or hemoglobin Al C status,[24] and it is generally recognized as such. The more difficult question is whether it substantially limits a major life activity.

To avoid circular definitions of disability, EEOC regulations reject limitations in a particular job as being sufficient to make the person substantially limited in the major life activity of working:

> With respect to the major life activity of working—(i) The term substantially limits means 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.[25]

In *Salim v. MGM Grand Detroit, L.L.C.*, the court rejected the claim of a person with diabetes as being substantially limited in working, thinking, and taking care of herself, noting that not being able to perform a job during a particular time (a schedule-specific restriction) does not rise to the

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[24] NATIONAL DIABETES EDUCATION PROGRAM, DIABETES CONTROL, IF YOU HAVE DIABETES, KNOW YOUR BLOOD SUGAR NUMBERS! (2005), *available at* http://ndep.nih.gov/diabetes/pubs/KnowNumbers_Eng.pdf (last accessed Aug. 21, 2007).

[25] 29 C.F.R. § 1630.2 (2006).

level of being substantially limited in the major life activity of working.[26] Similarly, *Berg v. Norand Corp*., found that being restricted to working 40 to 50 hour weeks is not substantially limiting in the major life activity of working.[27]

Thus, claims based on interference with working are unlikely to succeed. Because all individuals with diabetes must control their diet to manage the disease, the key precedents are those holding that eating is a major life activity. For instance, the court in *Lawson v. CSX Transportation, Inc*. determined a jury could reasonably find the plaintiff substantially limited in the major life activity of eating as a result of his diabetes severely restricting what and when he could eat.[28] That court recognized that being substantially limited in eating does not require the plaintiff to demonstrate there is a physical barrier to being able to consume and digest food.

In *Downs v. AOL Time Warner, Inc*.,[29] the plaintiff was obese, had Type II diabetes, and was working the night shift. He sought a switch to the day shift as an accommodation, but was fired, allegedly for reasons unrelated to his disability. He brought an ADA claim, arguing his firing was due to his disability. In determining that he could be found disabled because of the effect of the diabetes on his eating, the court stressed that plaintiffs making this argument must present evidence that their disability substantially limits them in a major life activity to support their claim. The court noted that, in *McPherson v. Federal Express Corp*., the diabetic plaintiff alleged he was impaired in the major life activity of eating, but his claim was denied because he failed to submit evidence that his diabetes significantly limited him in a major life activity.[30] These cases make it clear that a mere diagnosis is insufficient to prove sufficiently limiting; instead, evidence must be proffered to link behavior, such as restrictions on timing of meals, to diabetes.

However, not all courts show this level of understanding of diabetes. A federal district court in New York said: "Shields [the plaintiff] suffers no impairment to his ability to eat and digest food, and a dietary modification does not constitute a restriction 'as to the condition, manner or duration under which an individual can perform' the activity of eating."[31] The court then said, in a footnote, that many people choose to make changes in their diets.[32] *Shields* seems to say that dietary modification is insufficient to rise to the level of being substantially limiting in the major life activity of eating.

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[26] Salim v. MGM Grand Detroit, L.L.C., 106 Fed. Appx. 454 (6th Cir. 2004).
[27] Berg v. Norand Corp., 169 F.3d 1140 (8th Cir. 1999).
[28] Lawson v. CSX Transp., Inc., 245 F.3d 916, 923 (7th Cir. 2001), *rev'd*, 101 F. Supp. 2d 1089 (1999).
[29] Downs v. AOL Time Warner, Inc., 2006 WL 162563 (S.D. Ohio 2006).
[30] McPherson v. Federal Express Corp., 2005 WL 3008648 (W.D. Tenn. 2005), *aff'd*, 241 Fed. Appx. 277, 35 NDLR P 72 (6th Cir. 2007).
[31] Shields v. Robinson-Van Vuren Assoc., Inc., 2000 WL 565191 (S.D.N.Y. 2000).
[32] *Id*. at 5.

Even the *Lawson* court stressed that its decision hinged on the severity of the plaintiff's diabetes, which led to immediate health problems when he ate improperly.[33]

These conflicting and confusing analyses stem from the lag between the evolution of the scientific understanding of diabetes and the incorporation of this information into legal policy. We return to this problem in Section IV.

B. Does Insulin Cure Diabetes?

The most difficult issue for many courts is the role of insulin and, by extension, the effects of diet and exercise on blood sugar. In *Sutton v. United Air Lines, Inc.*, the United States Supreme Court looked at whether a condition is still an impairment when it has been successfully treated.[34] The plaintiff in *Sutton* was vision impaired, but the impairment could be completely corrected by wearing glasses. The defendant barred from its workforce pilots who wore glasses. The Supreme Court ruled the mitigating measures must be taken into account in determining whether an individual is disabled. Thus, the plaintiff was not disabled when wearing her glasses and hence could not bring a successful claim under the ADA.

The *Sutton* Court rejected the notion that there are *per se* disabilities and stressed employers must base their decisions on an assessment of the individual employee's condition. Unfortunately, very few disabling conditions are cured by interventions in the way simple vision impairment is cured by glasses. Even though diabetes was not at issue in the case, the *Sutton* Court applied this model to diabetes as an arbitrary example, saying that all diabetics would be disabled if they did not use insulin.[35]

Some courts read *Sutton* as holding that insulin is like the glasses in *Sutton*. For example, in *Rivera v. Apple Industrial Corp.*, a federal district court held "[w]ith respect to his diabetes, Rivera acknowledges that with insulin injections and a proper diet, he can control his diabetes and prevent diabetic attacks. Under the reasoning in *Sutton*, therefore, since Rivera can control his diabetes, he does not have a disability for purposes of the ADA."[36] In *Herman v. Kvaerner of Philadelphia Shipyard, Inc.*, another federal district court held: "There is no Third Circuit authority on the question of what kind of diabetes might amount to a disability. The Supreme Court has indicated that not all diabetics are 'disabled' under the law, considering corrective measures."[37]

The *Lawson* court distinguished its facts from those of *Sutton*, noting that the Supreme Court in *Sutton* also required courts to consider negative side

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[33] *Lawson*, 245 F.3d at 924.
[34] Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).
[35] *Id.* at 483.
[36] Rivera v. Apple Indus. Corp., 148 F. Supp. 2d 202, 213 (E.D.N.Y. 2001).
[37] Herman v. Kvaerner of Phil. Shipyard, Inc., 461 F. Supp. 2d 332, 335 (E.D. Pa. 2006).

effects of the mitigating measures.[38] The *Lawson* plaintiff's insulin produced effects such as hypoglycemia, while the plaintiff in *Sutton* did not require such constant attention as Lawson. Although not considered directly by the *Lawson* court, the most important characteristic of diabetes is that insulin is only part of the management strategy. A diabetic on insulin or other agents must still control his or her diet and still undergoes long-term degenerative disease of many organ systems. Insulin only slows the course of diabetes, it does not cure it.

Because the *Abbott* Court encouraged courts reviewing ADA cases to take a hard look at the underlying mechanism of chronic diseases, there is a good legal basis for expanding the coverage of diabetes as a disability as new research better defines the effects of even early diabetes on the body. However, translating this information to the courts remains problematic, depending on both the skills of the plaintiff's attorney and the technical sophistication of the judge. As discussed below, the EEOC can develop regulations to assure the courts properly translate scientific information into ADA policy.

IV. EMPLOYMENT POLICY ISSUES POSED BY THE ADA

At the time the ADA was passed, there was little concern paid to workplace accommodations to aid employees in controlling chronic diseases. Attention was focused only on providing accommodations that addressed immediate issues in performing the job. Since 1990 when the ADA was passed, the burden of chronic disease, including diabetes, has increased. Diabetes is affecting younger workers. The construction of the ADA by the courts makes it unnecessarily difficult for workers with diabetes to gain protection. Courts have paid little attention to the problems of diabetes management in the workplace, although that may be the most important issue in keeping diabetic employees in the workplace.

A close reading of the case law indicates employees are often poorly informed about their rights under the ADA and how to properly request accommodations. There are established programs for health education for diabetic patients. These could be a vehicle for educating diabetic patients about their rights and duties under the ADA, including what accommodations might help them in managing their diabetes. The development of a consistent education program for diabetic workers should also involve employers, with the goal of improving communication and reducing legal problems for both parties.

A central problem with diabetes under the ADA is the judiciary's confusion over whether and when diabetes is a disability. The ADA requires an individualized determination of each employee's fitness for the job, but this has come to mean an individualized determination by each court of the science

[38] *Lawson*, 245 F.3d at 925.

of diabetes and the basic principles of diabetes management in the workplace. This puts an enormous burden on each plaintiff to present expert testimony about the nature of diabetes, and it depends on the court to have sufficient technical sophistication to appreciate this information and translate it into appropriate legal standards. The result is two-fold: inconsistent decisions and decisions based on case precedents decided years earlier, a development that tends to freeze legal standards in the face of advancing science.

The EEOC, with the assistance of the Centers for Disease Control (CDC), can solve much of the problem by assuring ADA decisions are based on current science. Agencies can issue regulations, which have the same legal effect as statutes passed by Congress. This process, called rulemaking, can be used to resolve issues that would otherwise require individual determinations by the courts. For example, regulations were used to define criteria for disability under the Social Security Act. The courts were then bound by these criteria and no longer had to make individual factual determinations if the individual's condition fell under the defined criteria.[39]

The EEOC could issue regulations specifying diagnostic criteria to define when an employee's diabetes constitutes an ADA disability. These could include blood sugar or hemoglobin A1c levels, incidents of hypo- or hyperglycemia, the presence of metabolic syndrome, or other criteria as determined by the best available science. Such regulations can be amended as knowledge evolves, assuring the courts will have a definitive guide to the best available science, rather than trying to piece it together from adversary testimony.

The EEOC could also promulgate guidelines to clarify the difference between essential job functions and the structure of the job, as well as the role of job restructuring in accommodating disabled workers. Guidelines have less legal force than regulations, but are better suited to areas such as this, which do not lend themselves to specific requirements. Although job restructuring is part of the ADA, the courts have been reluctant to require it.

Job restructuring becomes more contentious when employers restructure jobs to encourage healthy lifestyles. That action can be used as a subterfuge to make it more difficult for workers with disabilities to qualify for the jobs. For example, increasing the physical activity involved in sedentary jobs would be good for employees, reducing their risk of heart disease and making it easier for them to achieve and maintain a healthy weight. But this same strategy could also be used to make it more difficult for grossly obese workers to qualify for the job, as was the claim about a job restructuring plan proposed by Wal-Mart.[40] Employers face conflicting incentives in this area: the ADA

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[39] Heckler v. Campbell, 461 U.S. 458, 467 (1983).

[40] Reed Abelson, *One Giant's Struggle Is Corporate America's, Too*, N.Y. TIMES, Oct. 29, 2005, at C1 (discussing a Wal-Mart Corporation internal memorandum suggesting the amount employee insurance benefit plans could be reduced if employees were encouraged to be more active).

pushes them to employ disabled workers and to accommodate their needs; the CDC recommends encouraging physical activity in the workplace; and health insurance costs make workers with chronic illnesses much more expensive.

Most importantly, if the courts find that the rulemaking recommended here is beyond the EEOC's legal authority, Congress should modify the ADA to require employers to provide accommodations that allow employees to mitigate the progression of chronic diseases, not just accommodations that are necessary to physically accomplish the job in the short term. Congress should also extend these protections to employees in workplaces currently excluded from the ADA.

CONCLUSION

The ADA was passed in 1990. It was based on a static model of disability, in that it focuses on accommodating existing disabilities, with no provisions for assisting workers to prevent the worsening of these disabilities. As the population ages and obesity drives the diabetes epidemic, the management of chronic disease has become a critical workplace issue. It is in the interest of both individual workers and the country to help persons with chronic diseases such as diabetes stay in the best possible health for the longest possible time. This demands that chronic disease management be extended to the workplace. Managing diabetes cannot be done only at home; it is a 24/7 process.

Clarifying the ADA with federal regulations and enhancing ADA education for workers with diabetes would significantly improve the working situation for persons with diabetes and other chronic diseases. In the longer term, these initiatives should be combined with new legislation that refocuses the ADA on preventing the development of disability while also accommodating existing disability.