No. 10-60940

United States Court of Appeals
for the Fifth Circuit

DAVID ATKINS,

Plaintiff - Appellant

v.

KEN SALAZAR, SECRETARY DEPARTMENT OF THE INTERIOR,
Defendant - Appellee

Appeal from the United States District Court
for the Northern District of Mississippi (Eastern Division)
No. 1:10-cv-00040-SA-JAD
Civil Proceeding

PLAINTIFF-APPELLANT'S OPENING BRIEF

John W. Griffin, Jr.
SBT 08460300
Robert E. McKnight, Jr.
SBT 24051839
Appeal Counsel
Marek, Griffin & Knaupp
203 N. Liberty Street
Victoria, TX 77901
(361) 573-5500 (voice)
(361) 573-5040 (fax)

Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

A. Parties and Others with a Financial Interest in the Litigation:

- David A. Atkins
- Ken Salazar

B. Counsel for the Parties and their Law Firms:

- John W. Griffin, Jr.
- Marek, Griffin & Knaupp
- Law Office of Robert E. McKnight, Jr.
- Robert E. McKnight, Jr.
- Ava Nicola Jackson
- U.S. Attorney's Office

/s/ Robert E. McKnight, Jr.
Robert E. McKnight, Jr.
Counsel for David A. Atkins

Statement Regarding Oral Argument

In granting summary judgment on a basis not requested by the moving party and without giving prior notice of intent to rely on an unargued basis, the district court committed an error that has been explored, and corrected, in previous published opinions. There is little need for oral argument on that issue.

In limited instances, the Court may find that summary judgment on an unargued basis, without prior notice from the district court, was harmless error. Mr. Atkins contends that the record is insufficient to justify affirming summary judgment for the reason on which the district court relied, or for any alternative reason. This is where oral argument will be helpful to the Court: to understand why the summary judgment was not harmless error. Hence, Mr. Atkins requests that the Court hear oral argument.

Table of Contents

Table of Authorities

Cases

Statutes

Rules

Other Authorities

Statement of Jurisdiction

(1) The district court had federal-question jurisdiction over Mr. Atkins's claims under the Rehabilitation Act of 1973 pursuant to 29 U.S.C. § 791 and 42 U.S.C. § 2000e-5(f)(3), as well as under 28 U.S.C. § 1331. (R. 5-6.)

(2) This Court has jurisdiction under 28 U.S.C. § 1291 of the appeal from the district court's final judgment of dismissal or, in the alternative, summary judgment. (R. Exc. 3.)

(3) The final judgment was entered on October 5, 2010, and Mr. Atkins appealed on November 29, 2010. (R. Excs. 2 & 3.) His appeal, filed within 60 days after the final judgment, was timely pursuant to FED. R. APP. P. 4(a)(1)(B).

(4) The appeal is from a final judgment that disposed of all parties' claims.

Statement of the Issues

1. Whether the district court violated a basic principle of Fifth Circuit case law by granting summary judgment for the defendant on a legal and factual basis not presented or argued by the defendant, *i.e.*, *sua sponte* on a new basis, and without notice to Mr. Atkins.

2. Whether the district court's erroneous grant of summary judgment was harmless.

Statement of the Case

David A. Atkins has filed this appeal because the district court dismissed his case on a legal and factual basis (more specifically, on a particular affirmative defense) that the defendant neither pleaded nor argued in its motion for summary judgment. Indeed, Mr. Atkins specifically pointed out to the district court in his response to the motion that the defendant did not present or argue the affirmative defense. Nonetheless, the district court granted summary judgment to the defendant on the basis of that defense.

Mr. Atkins had worked successfully for the National Park Service ("NPS"), within the U.S. Department of the Interior ("DOI"), as a law enforcement park ranger from 1987 until 2005. His law enforcement duties ended when NPS and/or DOI[1] unilaterally decided that his insulin-dependent diabetes — with which he had been diagnosed in 1986, of which DOI had knowledge through semi-annual physicals, and which had never impeded his work performance in any way — disqualified him from those duties.

Mr. Atkins contacted a DOI equal employment opportunity counselor, then proceeded to filing a formal administrative complaint. (R. 183.) The complaint progressed to a hearing before an administrative judge of the Equal Employment

[1] Since DOI is defending this case, not NPS, this brief will attribute all of the employer's actions to DOI.

Opportunity Commission, who found in favor of DOI. (R. 8 at ¶ 10.) After DOI entered a final order fully implementing the administrative judge's decision, Mr. Atkins timely appealed to the EEOC on August 6, 2007. (*Id.*) After the EEOC failed to resolve the appeal within 180 days, and while the appeal remained pending, Mr. Atkins filed this lawsuit on February 22, 2010. (R. 1-11.[2])

A. Mr. Atkins's Claims

Under § 791 of the Rehabilitation Act (and consistently with the Americans with Disabilities Act[3]), Mr. Atkins clearly and specifically pleaded that DOI

---

[2] Earlier, on December 14, 2007, Mr. Atkins sued DOI under the Rehabilitation Act for essentially the same discrimination alleged in this lawsuit. 42 U.S.C. § 2000e-16(c) and 29 C.F.R. § 1614.407 require an EEOC appellant to give the agency at least 180 days to resolve an appeal before filing suit. Because Mr. Atkins sued in 2007 *sooner* than 180 days, that lawsuit was dismissed with prejudice for lack of subject matter jurisdiction. This Court affirmed, but modified the dismissal to *without* prejudice. *Atkins v. Kempthorne*, No. 09-60401 (5th Cir. Nov. 27, 2009). The modification allowed Mr. Atkins to file the present lawsuit within the time constraints of 42 U.S.C. § 2000e-16(c) and 29 C.F.R. § 1614.407.

[3] "Under our precedent, federal employees may bring disability discrimination claims against the Government under either § 501 or § 504 of the Rehabilitation Act (29 U.S.C. §§ 791 & 794)." *Pinkerton v. Spellings*, 529 F. 3d 513, 515 (5th Cir. 2008) (panel reh'g granted). Mr. Atkins chose § 791. (R. 1-2 at ¶ 1.) Claims under § 791 are analyzed under the same standards — the same statutory provisions and the same case law — as employment claims brought under the Americans with Disabilities Act ("ADA"). 29 U.S.C. § 791(g); *Pinkerton*, 529 F.3d at 516-17.

All citations are to the version of the ADA statute and regulations that were in effect when DOI discriminated against Mr. Atkins in 2005. In particular, he acknowledges that the ADA Amendments Act of 2008 does not apply.

discriminated against him by "utilizing a qualification standard that screens out those with a disability." (R. 5, citing 42 U.S.C. § 12112(b)(6).) At § 12112(b)(6), Congress defined discrimination to include:

> using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

The definition is a legislative policy based on Congress' finding that "individuals with disabilities continually encounter ... the discriminatory effects of ... overprotective rules and policies, ... [and] exclusionary qualification standards and criteria." 42 U.S.C. § 12101(a)(5). Thus, Congress gave employers limited latitude for using such standards and criteria.

Mr. Atkins alleged that DOI's medical standards for park rangers with law enforcement duties screened out him, a person with diabetes. Further, he alleged that he satisfied the "individual with a disability" element of § 12112(b)(6) on the ground that he was either actually disabled with respect to eating, metabolizing food, and/or caring for himself (R. 6-9 at ¶¶ 5-16), or was perceived as disabled with respect to eating, metabolizing food, caring for himself, and/or working, (*id.* at 9-10 at ¶¶ 17-21), or had a record of disability (*id.*).

B. DOI's Motion to Dismiss or for Summary Judgment

Mr. Atkins's claim triggered DOI's option to prove, as an affirmative defense, that its medical standards, "as used by the covered entity, [were] ... job-related for the position in question and ... consistent with business necessity." 42 U.S.C. § 12112(b)(6); *see also id.* at § 12113(a).[4]

This defense permits a defendant to excuse its otherwise unlawful conduct under 42 U.S.C. § 12112(b)(6). DOI spurned the option. Without asserting the affirmative defense, it moved to dismiss for failure to state a claim or for summary judgment. (R. 17-19.) Since the issue on appeal is whether the district court erred by granting summary judgment on a ground that DOI did not argue, DOI's arguments will be explained here with exactitude.

First, it argued that Mr. Atkins was not actually disabled or perceived as disabled. (R. 205-12.) Later, in reply to Mr. Atkins's response, DOI also argued

---

[4] It may be a *defense* to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

42 U.S.C. § 12113(a) (emphasis added); *see also* 29 C.F.R. § 1630.15(b)(1) & (c) (describing the foregoing elements as a defense); *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 78 (2002) ("the Act creates an affirmative defense for action under a qualification standard 'shown to be job-related for the position in question and ... consistent with business necessity'").

that Mr. Atkins never stated a claim for discrimination on the basis of having a record of disability. (R. 303-04 at n.3.) The district court denied summary judgment to DOI on these grounds (R. Exc. 4 at 358-60, finding a genuine issue that Mr. Atkins was at least actually disabled with respect to eating). Since Mr. Atkins does not assert error with respect to that decision, this Brief will not discuss it further.

Second, DOI argued that even if Mr. Atkins was disabled in some respect, it was entitled to summary judgment under the *McDonnell Douglas* burden-shifting framework for resolving discrimination cases supported by circumstantial evidence. Although DOI did not cite by name *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), its argument was clearly rooted there:

> If a plaintiff succeeds in making a prima facie case of discrimination or perceived discrimination, the burden then shifts to the defendant to proffer a legitimate rationale for the underlying employment action.... If the defendant makes this showing, the burden shifts back to the plaintiff to demonstrate that the employer's articulated reason for the employment action was a pretext for discrimination.

(R. 212; citing *Aldrup v. Caldera*, 274 F.3d 282, 286 (5th Cir. 2001), citing in turn *McDonnell Douglas*, 411 U.S. at 804.)

Operating within the *McDonnell Douglas* framework, DOI explained that it promulgated medical standards, that it applied those standards to Mr. Atkins, and

that pursuant to those standards his law enforcement duties were eliminated.[5] It asserted — and *McDonnell Douglas* required no more — that it had a legitimate, nondiscriminatory purpose for promulgating the standards,[6] and then left Mr. Atkins with the burden of demonstrating pretext, which it told the district court Mr. Atkins would be unable to do.[7]

But in order to rely on *McDonnell Douglas*, rather than on the affirmative defense afforded by § 12112(b)(6) and § 12113(a), DOI had to ignore the fact that Mr. Atkins claimed, under § 12112(b)(6), that DOI eliminated his law enforcement duties by applying a qualification standard that *explicitly* screens out those with diabetes. This type of discrimination claim is distinct from *McDonnell Douglas*

---

[5] The Department of Interior (DOI) Medical Standards Program for the National Park Service (5 C.F.R. Part 339), mandated that all its bureaus that have law enforcement programs that are ard[u]ous duty must implement fitness and medical standards for all employees that fall under those occupations. The position Plaintiff held ... fell under this fitness and medical standard.... [On the ground that Mr. Atkins failed] to get his diabetes stabilized ...[,] his law enforcement commission was revoked .... [and he] was reassigned to duties that did not require a law enforcement commission ....

(R. 213.)

[6] "Defendant has a legitimate, nondiscriminatory reason for requiring its law enforcement personnel to be medically qualified, that reason being the safety of the public and its workers." (R. 218.)

[7] " ... Plaintiff cannot prove that Defendant's actions were a pretext for discrimination. Therefore, Plaintiff's lawsuit against Defendant must be dismissed with prejudice." (R. 219.)

claims — those in which an employee alleges that an employer took an adverse action *because of* discriminatory animus, the evidence for which is purely circumstantial. Rather, in a § 12112(b)(6) claim, no one's intent is at issue, and the question is not one of cause, but simply one of *effect*: did the agency "us[e] qualification standards, employment tests or other selection criteria that screen[ed] out or tend[ed] to screen out an individual with a disability." Standards that screen out or tend to screen out those with disabilities are per se violations of the statute, so in order to rely on those standards that DOI so frankly admitted that it promulgated and applied to Mr. Atkins, DOI had to *defend* them.

But by ignoring Mr. Atkins's claim under § 12112(b)(6), DOI altered the relative burdens of proof. Obviously, the defendant bears the burden of proving an affirmative defense to a qualification standards claim under § 12112(b)(6) (*see* n.4, *supra*). *McDonnell Douglas*, on the other hand, imposes on the defendant only a burden of *articulating* a legitimate, non-discriminatory reason, and then shifts the burden of *persuasion* back to the plaintiff to rebut the defendant's articulated reason or to show otherwise that the defendant's reason was a pretext for discrimination.

In sum, DOI responded to Mr. Atkins's claim about its qualification standards not by questioning the existence of those standards, or their application to Mr. Atkins, or the effect of their application; on the contrary, *it frankly*

acknowledged all of these essential elements of Mr. Atkins's § 12112(b)(6) claim (*see* n.5, *supra*). But instead of meeting that claim on its own terms, DOI shifted the argument to *McDonnell Douglas*, and thereby shed its burden of proving that its medical standards, "as used by the covered entity, [were] ... job-related for the position in question and ... consistent with business necessity." 42 U.S.C. § 12112(b)(6); *see also id.* at § 12113(a). The shift is most apparent where DOI argued that it had "a legitimate, nondiscriminatory *reason* for requiring its law enforcement personnel to be medically qualified." (R. 218; emphasis added.) Properly located under § 12112(b)(6), the real issue was whether DOI's medical standards had a discriminatory *effect* vis à vis Mr. Atkins and, if so, whether DOI could justify that effect under the job-related/business-necessity affirmative defense ("the business necessity defense").

C. The Parties' Subsequent Briefing

In response to DOI's *McDonnell Douglas* argument,[8] Mr. Atkins explained why it was misguided:

> The defendant's reference to the *McDonnell Douglas* burden-shifting framework for resolving discrimination cases supported by circumstantial evidence is completely irrelevant. This is *not* a burden-shifting case; Atkins's claims arise under 42 U.S.C. § 12112(b)(6)

[8] *Most* of the response brief, about 18 of its 30 pages, argued why DOI could not prevail under either Rule 12(b)(6) or Rule 56 on the issue of whether Mr. Atkins was disabled (actually, regarded as, or with a record of disability) with respect to any major life activity. At this stage, that argument may be disregarded.

> (incorporated in the Rehabilitation Act via 29 U.S.C. § 791(g)) .... In fact, the allegation could not be any plainer: on page 1 of the Complaint, Atkins alleges that "Defendant has violated the Rehabilitation Act by its utilizing a qualification standard that screens out those with a disability. See 42 U.S.C. § 12112(b)(6)." (Dkt. 1 at Introductory Paragraphs [R. 1].)

(R. 283-84.) Mr. Atkins then pointed to the summary judgment record evidence supporting what this Brief has previously described as DOI's frank acknowledgment (in its memorandum in support of summary judgment) of the existence of all essential elements of a § 12112(b)(6) claim. (R. 284) — *and to the absence of argument and evidence for the affirmative defense*:

> In this case, the defendant has not presented and argued *any evidence* relevant to the § 12113(a) issues of job relatedness and business necessity. This is an affirmative defense, and in order to cleanse otherwise unlawful disability discrimination, the factual elements of the defense (*see* n.26, *supra*[9]) must be established. The defendant's memorandum discusses various cases in which employers

---

[9] The referenced footnote provided this statement of the factual elements of the defense:

> The elements of the affirmative defense are expressed in FIFTH CIRCUIT LABOR & EMPLOYMENT LAW PATTERN JURY CHARGES Charge No. 11.7.4 (3d ed. 2009), *available at* http://www.lb5.uscourts.gov/juryinstructions/2009changes.pdf. They are "a. Uniformly applied; b. Job-related for the position in question; c. Consistent with business necessity; and d. Cannot be met by a person with plaintiff's disability even with a reasonable accommodation." The business necessity element is a combination of two factors: "a. The magnitude of possible harm; and b. The probability of occurrence." Since the defendant has not argued any evidence pertaining to the § 12113(a) defense, there is no need to address its various elements as set forth in the pattern jury charge.

> were allowed "to implement medical and fitness standards for certain positions" (Dkt. 5 at 18 [R. 214]), but other cases involving other employers' medical and fitness standards are not evidence of the job relatedness and business necessity of NPS's diabetes standard, and of whether the standard was uniformly applied to determine that Atkins's diabetes was not sufficiently controlled.

(R. 285-86.) Mr. Atkins stated, in other words, that DOI "cannot use the standard to disqualify [him] as an 'uncontrolled' diabetic without affirmatively defending the standard itself." (R. 260.)

Mr. Atkins also pointed out that an employer's "'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." (R. 288, citing 42 U.S.C. § 12113(b).) Thus, DOI actually had *two* choices for defending the medical standards that screened out Mr. Atkins: either they were job related and consistent with business necessity under § 12112(b)(6) and § 12113(a), or they legitimately screened out Mr. Atkins because, as a law enforcement officer with diabetes, he posed a direct threat under § 12113(b). (R. 288.[10]) But just as DOI did not shoulder the first burden, it did not shoulder the second, and so it was not entitled to summary judgment. (*Id.*[11])

---

[10] *See, generally*, *Equal Employment Opportunity Comm'n v. Exxon Corp.*, 203 F.3d 871, 874-75 (5th Cir. 2000) (discussing both defenses).

[11] Of course, Mr. Atkins had no reason to move under Rule 56(f) (now Rule 56(d)) for a delay of the summary judgment proceeding to discover evidence

(continued...)

In reply, DOI remained committed to its *McDonnell Douglas* argument. Under the heading of "Defendant's Legitimate Non-Discriminatory Reason" (R. 305[12]), DOI conceded — in even more detail than it did in its opening memorandum — all of the essential elements of Mr. Atkins's § 12112(b)(6) claim: that it promulgated medical qualification standards, that it applied them to Mr. Atkins, and that their application to Mr. Atkins resulted in the loss of his law enforcement duties. (R. 305-06.) But it still presented no evidence framed by argument on the possible affirmative defenses to a § 12112(b)(6) claim. In particular, it repeatedly described Mr. Atkins's diabetes as "uncontrolled" (R. 307-11), but never explained what this vague term meant. Further, it never defended uncontrolled diabetes as a standard for disqualification: as used in DOI's argument, the term was self-justifying and meaningless.

Also in its reply brief on its motion to dismiss, DOI for the *first time* argued that Mr. Atkins's "inability to control his diabetes posed a direct threat to himself,

---

[11](...continued)
relevant to either affirmative defense, since neither was a basis for DOI's motion.

[12] DOI even included a section headed "Plaintiff Misconstrues Defendant's Argument Regarding the McDonnell Douglas Burden Shifting Analysis." (R. 314.) In that section, DOI stated that "the revocation of the Plaintiff's law enforcement commission, due to his uncontrolled diabetes, is a legitimate business reason," (R. 315), and that "Plaintiff provides no argument that Defendant's decision to re-assign Plaintiff ... was a pretext for discrimination" (*id.* at 317). Such statements prove Mr. Atkins's point: that DOI staked its defense to *McDonnell Douglas*, which amounted to a failure to meet his § 12112(b)(6) claim.

fellow officers, and the public and establishes a defense to his allegations of discrimination." (R. 314.) The district court granted Mr. Atkins leave to file a sur-reply *strictly limited* to DOI's late-raised direct threat defense. (R. Exc. 3 at 352 & R. Exc. 4 at 353 at n.1.) He argued that the district court should not entertain the late-raised argument (R. 330-31) but, even so, that DOI's three pages of reply briefing failed to foreclose a genuine issue about such a fact-bound issue (*id.* at 331-32). The failure was especially apparent in light of the fact that there was *no* evidence that Mr. Atkins ever, in his two decades of service as a law enforcement park ranger with diabetes, performed his job less than successfully. (*Id.* at 333.)

D. The District Court's Ruling and Mr. Atkins's Appeal

After DOI's failure to address Mr. Atkins's § 12112(b)(6) claim, as highlighted by Mr. Atkins, the district court supplied the business necessity defense that DOI neglected and granted summary judgment on that basis: "The Court finds that Defendant has provided sufficient evidence that its Medical Standards medically disqualifying those with uncontrolled insulin-dependent diabetes are job-related and consistent with business necessity." (R. Exc. 4 at 364.) The district court totally disregarded DOI's misguided *McDonnell Douglas* analysis, but granted the motion to dismiss on the basis of the affirmative defense, even though DOI never pleaded nor presented an affirmative defense of the standard under which it found Mr. Atkins's diabetes to be "uncontrolled." In the

Argument, Mr. Atkins will explain why the district court should not have supplied the business necessity defense that DOI spurned and, further, why the evidence in the record was not sufficient to prove the defense as a matter of law.

After the district court entered a final judgment of dismissal (R. Exc. 3 at 352), Mr. Atkins timely appealed (R. Exc. 2 at 365-66).

Statement of the Facts[13]

In March 1999, DOI promulgated the medical qualification standards that affected Mr. Atkins. (R. 44.) The standard applicable to people with diabetes reads as follows:

> Any excess or deficiency in hormonal production can produce metabolic disturbances affecting weight, stress adaptation, energy production, and a variety of symptoms or pathology such as elevated blood pressure, weakness, fatigue and collapse. Any condition affecting normal hormonal/metabolic functioning and response that is likely to adversely affect safe and efficient job performance is generally disabling. Cases will be reviewed on a case-by-case basis.
>
> **CONDITIONS WHICH MAY RESULT IN DISQUALIFICATION INCLUDE, BUT ARE NOT LIMITED TO, THE FOLLOWING EXAMPLES:**
>
> ...
>
> 4. **INSULIN DEPENDENT DIABETES MELLITUS**

[13] The facts are presented here, and must be considered in, the light most favorable to Mr. Atkins. *Richard v. Wal-Mart Stores, Inc.*, 559 F.3d 341, 344 (5th Cir. 2009).

(R. 63; capitalization and bold-face in original.)

The standard's plain language puts all persons with diabetes at risk of disqualification, and discloses nothing about DOI's standard for deciding whether a person's diabetes "is likely to adversely affect safe and efficient job performance."

DOI explained that "[a]s a result of the new Occupational Medical Standards, all park rangers, including [Mr. Atkins], had to begin undergoing physical and medical examinations under the Defendant's fitness program." (R. 198.) In 1999, and since 1987, Mr. Atkins had been working for DOI as a law enforcement park ranger. (R. 22.) He had been diagnosed with diabetes in 1986. (R. 42.)

Mr. Atkins described as follows his duties as a law enforcement park ranger:

> My primary duty was Law Enforcement – [p]atrolling the park [the Natchez Trace Parkway] by foot or vehicle. I made arrests, issued tickets, wrote reports and handled all incidents given to me. I handle Emergency Medical Services – I was First Responder on numerous incidents including numerous motor vehicle accidents. I am a RED CARD Firefighter – qualified as a wild land firefighter with the rank of Engine Crew Boss and Fire Camp Security Manager.

(R. 22.)

The 1999 standards first affected Mr. Atkins in July 2000, when DOI issued a "Medical Review Form" that found him "not medically qualified to perform the essential functions of the job." (R. 144; capitalization and boldface omitted). The

finding was based on three medical conditions that DOI asserted "pose[d] a *significant risk* to the health and safety of yourself and/or others in the performance of essential job functions" (R. 144; italics in original), one of which conditions was diabetes: "You have diabetes and your blood sugar was elevated at 218." (R. 144.[14]) DOI requested from Mr. Atkins's doctor "a report regarding your diabetes control," and specified seven items that the report should cover. (R. 144-45.)

In June 2001, DOI cited Mr. Atkins's diabetes when restricting him from law enforcement duties. (R. 25.[15]) The restriction remained until 2002. In July 2002, DOI issued a memorandum stating that (1) its doctor had made "significant medical findings pertaining to your medical condition of diabetes" (R. 146), but that (2) its Medical Review Board's review of those findings led it to conclude that "your unique medical characteristics allow you to perform the full range of essential law enforcement duties specific to your position despite your diabetic condition." (R. 147.)

The Medical Review Board wanted, however, to continue close monitoring

---

[14] Vision and asthma were the other conditions (R. 144-45), but DOI ultimately did not use the medical standards pertaining to those conditions to eliminate Mr. Atkins's law enforcement duties. They have never been an issue in this case.

[15] " [Q.] Why were you placed on restricted duty on June 21, 2001? [A.] The Medical Review Board placed me on restrictions due to my diabetes ...." (R. 25.)

of Mr. Atkins. Thus, it "recommended a waiver of the medical standards pertaining to diabetes ... with [a number of specific] ... reasonable accommodations." (R. 147.) The "reasonable accommodations" were, in fact, a number of *conditions* for Mr. Atkins to keep his waiver. These conditions included use of an insulin pump rather than insulin injections, submission of blood-glucose testing logs to DOI, carrying a backup insulin pump or another redundant system of insulin delivery, documented participation in a supervisor- and doctor-approved exercise program, and continued disqualification for at least another year from "arduous duty wildland fire assignments" outside of Natchez Trace Parkway (R. 147-48.[16])

In 2003, DOI advised Mr. Atkins that it would renew his waiver:

> On June 30, 2003 you submitted documentation, signed by yourself and your supervisor, that your medical conditions have remained static and stable. This memorandum will serve as a renewal of your waiver, with the reasonable accommodations identified below,[17] until

---

[16] Reasonable accommodations are measures that an employer must provide if they would permit a disabled employee to perform a job's essential or non-essential functions. 42 U.S.C. § 12111(9). As noted in the text, what DOI really did was impose conditions on Mr. Atkins's waiver, not reasonably accommodate him.

[17] The "reasonable accommodations" were much the same as in 2002, but with the firefighting restriction now narrowed to "out of park *arduous* duty wildland fire assignments for the next year," thus allowing such assignments if they were not arduous, and with the suggestion that certain testing ("HA1C testing") might be dropped in the future. (R. 149-50; italics added). But this time, DOI came closer to acknowledging that these were conditions of a provisional waiver, not accommodations: "This waiver renewal carries the *provision* that you comply with the following reasonable accommodations." (R. 156; italics added.)

(continued...)

your next required medical examination and review.

(R. 156.) In renewing the waiver, DOI relied to some degree on a memorandum from Mr. Atkins's supervisor, Kim Korthuis, advising that Mr. Atkins "has maintained the level of medical conditions set forth in the waiver," "has continued to work with Dr. Sherry Martin [his treating physician] with regards to his diabetic control," and "has had NO adverse effects or any lost time from work due to ... his diabetes." (R. 152.)

The situation changed in the next couple of years, as evidenced by an undated memorandum recommending that Mr. Atkins be restricted to a type of light duty. (R. 154-56.[18]) The memorandum states that Mr. Atkins underwent a physical examination on August 5, 2004, and was "found not medically cleared for arduous duty as a National Park Service LE Officer" due to non-compliance with various conditions of the waiver as renewed in 2003. (R. 154.) The memorandum indicates that a complete analysis of Mr. Atkins's medical case had not yet been completed, but the information was sufficient for DOI to take action:

> The NPS [National Park Service] has generally not recommended light duty restrictions be placed on employees until a final decision on

---

[17](...continued)
(Footnote not in original.)

[18] It was issued between March 17, 2005 (the latest date referenced in the body of the memorandum) and April 25, 2005 (when Mr. Atkins appeared before DOI's Medical Review Board to discuss the recommendation).

> medical qualifications, by Comprehensive Health Services, Inc. (CHS),[19] has been determined. However, when CHS and the NPS Medical Standards Program Manager receive information that a potentially dangerous medical condition exists, they do recommend to the ranger's supervisor that immediate arduous duty restrictions be implemented pending the outcome of definitive testing.
>
> I am recommending that you be placed on temporary light duty status until completion of the testing requested by CHS and until CHS provides ... me with information that allows me to determine that you are not a present high risk safety concern for the NPS. In general, while in light duty status I recommend that you are not allowed to perform the full scope of the arduous duties of your position. Therefore, while in light duty status I recommend that you do not wear visible defensive equipment, or work in any law enforcement, emergency medical, or search and rescue capacity that may endanger your health and safety or the health and safety of the public we serve.... I am NOT recommending any restriction of your statutory law enforcement authority.

(R. 155-56.)

DOI implemented the recommended restrictions (R. 25) while Mr. Atkins appealed to DOI's Medical Standards Board, whose procedures included Mr. Atkins's personal appearance in April 2005 (transcribed at R. 157-74). In August 2005, DOI informed Mr. Atkins that "[t]he Medical Review Board made the determination not to grant you a waiver of your medical condition from the established medical standards" for diabetes (R. 178.) The Board's chief basis, and the basis echoed by DOI and by the district court (*see* pp. 12-15, *supra*), was that

[19] CHS "processed all medical examinations for Park Service law enforcement personnel." (R. 193.) (Footnote not in original.)

Mr. Atkins's diabetes was not "not well controlled." (R. 178; *id.* at 179: "The record demonstrates repeated and significant blood sugar fluctuations that the [Medical Review Board] has determined undermine your ability to perform the essential functions of your position of law enforcement ranger.")

As a result, Mr. Atkins's regional director revoked his law enforcement commission, as later confirmed in a "memorandum from the Washington office permanently revoking your law enforcement commission." (R. 180-82.) He was then presented with and accepted the option of retaining his GS-9 level grade in a "staff ranger" position without law enforcement duties. (R. 182.)

Summary of the Argument

Issue 1. The district court granted summary judgment for DOI, the defendant employer, by relying on an affirmative defense that DOI did not present or argue. Mr. Atkins alleged that DOI violated the Rehabilitation Act of 1973, at 29 U.S.C. § 791, by imposing a medical qualification standard that screened out persons with disabilities because of their having diabetes. In response to such a claim (identical to one under 42 U.S.C. § 12112(b)(6) of the Americans with Disabilities Act), DOI had the option of pleading and proving an affirmative defense ("the business necessity defense") under § 12112(b)(6) and § 12113(a). But in DOI's motion to dismiss or for summary judgment under Rules 12(b)(6) and

56, it mistakenly treated Mr. Atkins's claim as one under *McDonnell Douglas*. In doing so, it spurned the option of pleading and proving the business necessity defense, as Mr. Atkins pointed out in his response to the motion. Nonetheless, the district court relied on the business necessity defense for granting summary judgment.

Issue 2. The district court's reliance on the unpresented, unargued business necessity defense for granting summary judgment was not harmless error: the defense was not implicit in, or included in, DOI's *McDonnell Douglas* argument, and the record does not show that DOI prevailed on the defense as a matter of law. The record also does not support summary judgment on the alternative basis of the direct threat defense.

Argument

Issue 1. Whether the district court violated a basic principle of Fifth Circuit case law by granting summary judgment for the defendant on a legal and factual basis not presented or argued by the defendant, *i.e.*, *sua sponte* on a new basis, and without notice to Mr. Atkins.

A. Standard of Review

This Court's task under Issue 1 is not to decide, by reviewing the record *de novo*, whether the district court erred in granting summary judgment, but simply to decide whether the district court granted summary judgment on an unargued affirmative defense without giving prior notice of its intention to do so.

DOI, beyond its unsuccessful contentions about Mr. Atkins's disability status, made only one summary judgment argument to the district court: a *McDonnell Douglas* argument. But the district court implicitly rejected that argument and based summary judgment on an affirmative defense that DOI did not argue, and that differed markedly from DOI's *McDonnell Douglas* argument with respect to the factual elements and even the allocation of the burden of proof. This Court has held that a district court may not grant summary judgment *sua sponte* on an argument not raised by the movant without giving prior notice of its intention to do so. *Lozano v. Ocwen Federal Bank, FSB*, 489 F.3d 636, 641 (5th Cir. 2007) ("Generally, 'a district court may not grant summary judgment sua sponte on

grounds not requested by the moving party.' ...[20] An exception exists when the district court gives a party ten days notice; in those situations a court may grant summary judgment sua sponte on grounds not urged in a pending motion."[21]).

In *Lozano*, the plaintiffs "sought a declaratory judgment to set aside [a] ... foreclosure on three grounds." *Id.* at 639. The defendant's motion for summary judgment addressed only one of those three grounds, but the district court granted summary judgment on all three. While summary judgment on the argued basis was proper, the Fifth Circuit reversed on the other two. The record showed a lack of notice; the Court further held that the unargued bases were independent of what the

---

[20] Citing *Baker v. Metro Life Ins. Co.*, 364 F.3d 624, 632 (5th Cir. 2004) (quoting *John Deere Co. v. American Nat'l Bank*, 809 F.2d 1190, 1192 (5th Cir. 1987)). (Footnote not in original.)

[21] The essence of *Lozano*'s rule about *sua sponte* summary judgments is now contained in Rule 56(f), which became effective about two months after the district court ruled:

> (f) **Judgment Independent of the Motion.** After giving notice and a reasonable time to respond [which response might include a request for discovery], the court may:
>
> (1) grant summary judgment for a nonmovant;
>
> (2) grant the motion on grounds not raised by a party; or
>
> (3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

FED. R. CIV. P. 56(f).

defendant *did* argue. *Id.* at 641-42. Thus, it reversed and remanded.[22]

Here, the district court did not give notice of its intention to decide this case on the business necessity defense. It remains for Mr. Atkins to show that DOI did not seek summary judgment on that defense. (In Issue 2, Mr. Atkins goes further to explain why deciding the case on that defense was not harmless error, and why the direct threat defense is not a permissible alternative for affirming the summary judgment.)

B. The District Court Erroneously Relied on an Affirmative Defense that DOI did not Argue

There are marked differences between the *McDonnell Douglas* defense that DOI argued and the affirmative defense on which the district court rendered summary judgment.

---

[22] *Lozano*, and now Rule 56(f), describe when a *sua sponte* summary judgment may be proper and, therefore, affirmable. Closely related is this Court's rule on when it may affirm a district court's summary judgment on grounds other than the district court relied upon: *only if the movant proposed or asserted those grounds* (with some narrow exceptions). *See, e.g.*, *Bayle v. Allstate Ins. Co.*, 615 F.3d 350, 355 (5th Cir. 2010) ("[o]n appeal we may affirm a grant of summary judgment 'on any legal ground raised below, even if it was not the basis of the district court's decision'"); *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 443 (5th Cir. 2000) ("we can affirm a summary judgment on grounds not relied on by the district court so long as those grounds were proposed or asserted in that court by the movant"); *Johnson v. Sawyer*, 120 F.3d 1307, 1316 (5th Cir. 1997) ("[a]lthough we can affirm a summary judgment on grounds not relied on by the district court, those grounds must at least have been proposed or asserted in that court by the movant"). The common theme in *Lozano*, Rule 56(f), and these cases is *notice* to the nonmovant.

"*McDonnell Douglas* and subsequent decisions have 'established an allocation of the burden of production and an order for the presentation of proof in ... discriminatory treatment cases'" that rely on circumstantial evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000) (quoting *St. Mary's Honor Center v. Hicks,* 509 U. S. 502, 506 (1993)). This Court has, in countless cases, recited the *McDonnell Douglas* requirements. For example:

> "[F]irst, the plaintiff must establish a prima facie case of discrimination,"which shifts to respondent the burden to "produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason .... This burden is one of production, not persuasion; it 'can involve no credibility assessment.'" If this burden is met, the plaintiff "must be afforded the 'opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'"

Jackson v. Cal-Western Packaging Corp., 602 F.3d 374, 378 n.12 (5th Cir. 2010) (quoting *Reeves*, 530 U.S. 133, 142-43, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), quoting in turn *St. Mary's Honor Ctr.*, 509 U.S. at 509). The key points are that a *McDonnell Douglas* defense pertains to a claim for intentional discrimination supported by circumstantial evidence, and on which the plaintiff bears the burden of proof.

The Americans with Disabilities Act, and by extension the Rehabilitation Act, offer, of course, avenues of complaint about intentional discrimination. For example, § 12112(b)(1) prohibits a variety of actions that "adversely affect[] the

opportunities or status of [a person with a disability] ... because of the disability." Regarding similar language in Title VII,[23] the Supreme Court has remarked that intentional discrimination, or disparate treatment, "is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical ...." *Internat'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

Here, on the other hand, proof of discriminatory motive was not critical because it was already demonstrated by DOI's explicit focus on diabetes. For example, in *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 988 (9th Cir. 2007) (en banc),

> [t]he hearing standard at issue here is a *facially discriminatory* qualification standard because it focuses directly on an individual's disabling or potentially disabling condition....
>
> A burden-shifting protocol is ... unnecessary in this circumstance. The fact to be uncovered by such a protocol — whether the employer made an employment decision on a proscribed basis (here, disability in the form of hearing impairment) — is not in dispute.

The initial finding of the employer's liability (before consideration of its affirmative defense) rested merely on the plaintiffs' showing that

---

[23] Both subsections of 42 U.S.C. § 2000e-2(a) prohibit a variety of employer actions taken "because of such individual's race, color, religion, sex, or national origin."

> UPS applies a qualification standard that has the *effect* of discriminating on the basis of disability and/or screens out the class of employees who cannot pass the DOT hearing standard. *See* 42 U.S.C. § 12112(b)(6).[24] Such discrimination violates the ADA unless UPS can prove a valid defense to its use of the DOT hearing standard. We therefore turn to UPS's defense that its reliance on the DOT hearing standards is justified under the business necessity defense.

Id. at 994 (italics added).

Likewise, DOI's standard explicitly referred to diabetes, and DOI acknowledged that it curtailed Mr. Atkins's duties because of diabetes, so DOI's reliance on *McDonnell Douglas* as a way of focusing on what Mr. Atkins could prove about its motive was off-point: "[T]he *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination.'" *Rizzo v. Children's World Learning Ctrs., Inc.*, 84 F.3d 758, 762 (5th Cir. 1996) (internal quotation marks and citations omitted).

Instead of citing the inapposite *McDonnell Douglas*, DOI could have invoked the affirmative defense of showing that challenged qualification standards "as used by the covered entity, [are] ... job-related for the position in question and ... consistent with business necessity." 42 U.S.C. § 12112(b)(6); *see also* § 12113(a) & (b); 29 C.F.R. § 1630.15(b)(1) & (c); *Chevron*, 536 U.S. at 78 ("the Act creates an affirmative defense for action under a qualification standard 'shown

---

[24] The provision contains no "because of" or similar language necessitating inquiry into the existence of a prohibited motive. (Footnote not in original.)

to be job-related for *the* position in question and ... consistent with business necessity'"). The district court understood what DOI did not; realizing that Mr. Atkins's claim called for a different type of legal analysis than *McDonnell Douglas*, it proceeded to supply it.

In some cases, this Court has affirmed summary judgment on the same basis that the district court granted the judgment, even though the district court relied on somewhat different facts than the movant's argument. *See, e.g.*, *United States v. Houston Pipeline Co.*, 37 F.3d 224, 227 (5th Cir. 1994) (distinguishing *John Deere Co.*, *supra*); *Daniels v. Morris*, 746 F.2d 271, 276 (5th Cir. 1984) ("district judge is not compelled to limit the basis for a summary judgment to those facts listed in the motion").[25]

But in granting summary judgment, the district court had a different understanding of the *legal* nature of Mr. Atkins's claim, and of the facts and law relevant to the defense. The district court's reasoning did not merely emphasize different facts than DOI did, but it departed from the legal grounds that DOI argued in support of its motion, without prior notice to Mr. Atkins of its intent to do so. Under *Lozano*, *supra*, the judgment must be reversed with a remand for further proceedings.

---

[25] *Cf.* Rule 56(c)(3), effective Dec. 1, 2010 ("[t]he court need consider only the cited materials, but it may consider other materials in the record").

Issue 2. Whether the district court's erroneous grant of summary judgment was harmless.

A. Standard of Review

Since the district court relied without prior notice upon unargued law and facts, *Lozano* requires reversal and remand. This Court has held, however, that it may affirm summary judgment on a basis *different* than the district court's, and *different* from what the movant argued below, "where the lack of notice to the nonmovant is harmless, such as where 'the [unraised] issues were implicit or included in those raised below or the evidence in support thereof, or ... the record appears to be adequately developed in respect thereto.'" *McIntosh v. Partridge*, 540 F.3d 315, 326 (5th Cir. 2008) (alterations in original). Presumably, the Court would apply the same rule to affirming summary judgment on the *same* basis as the district court's, but *different* from what the movant argued in the district court.

Thus, Mr. Atkins explains below why DOI's unargued business necessity affirmative defense was not implicit or included in its *McDonnell Douglas* argument, and in what respects the record does not establish DOI's entitlement to judgment as a matter of law on the basis of that defense. He also explains why affirmance on a different basis — on the basis of the direct threat affirmative defense — is also not possible.

In reviewing the state of the record, the Court must adhere to the Rule 56 standard for summary judgment:

> [I]n entertaining a motion for [summary judgment], the court should review all of the evidence in the record.
>
> In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.... [I]t must disregard all evidence favorable to the moving party that the jury is not required to believe.... That is, the court should give credence to the evidence favoring the non-movant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses."

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 150-51 (ruling on a Rule 50 motion, but noting that the Rule 50 and Rule 56 standards are the same).

B. The District Court's Summary Judgment was not Harmless Error

1. Business Necessity was not Implicit or Included in DOI's *McDonnell Douglas* Argument

Under *McIntosh*, the district court's summary judgment might be affirmable if "'the [unraised] issues were implicit or included in those raised below.'" 540 F.3d at 326. That was not the case. As set forth above, there is a marked difference between a *McDonnell Douglas* claim of discrimination supported by circumstantial evidence and a § 12112(b)(6) claim based on a standard that directly refers to diabetes, both in terms of the evidence and the parties who have the burdens of producing it once the affirmative defense comes into play. These two types of claims are fundamentally distinct, with little or no evidentiary overlap.

2. The Evidentiary Record does not Support Affirmance on the Basis of Business Necessity

Also under *McIntosh*, the district court's summary judgment might be affirmable if "the evidence in support thereof, or ... the record appears to be adequately developed in respect thereto.'" *McIntosh*, 540 F.3d at 326 (alterations in original). That, too, was not the case.

To secure summary judgment on the business necessity defense to a § 12112(b)(6) claim, the defendant must show that the employer's standard, test, or other selection criteria "as used by the covered entity, is ... job-related for the position in question and is consistent with business necessity." *Id.*; *see also* § 12113(a) ("shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation"). The statutes and 29 C.F.R. § 1630.15(b)(1) & (c) are the basis for this circuit's pattern jury charge, which requires that the challenged standard be: "a. Uniformly applied; b. Job-related for the position in question; c. Consistent with business necessity; and d. Cannot be met by a person with plaintiff's disability even with a reasonable accommodation." FIFTH CIRCUIT LABOR & EMPLOYMENT LAW PATTERN JURY CHARGES Charge No. 11.7.4 (3d ed. 2009), *available at* http://www.lb5.uscourts.gov/juryinstructions/2009changes.pdf. The business necessity element is a combination of two factors: "a. The magnitude of possible harm; and b. The probability of occurrence." *Id.*; *Exxon Corp.*, 203 F.3d at 875.

On each element, the record is defective with respect to the evidence that

DOI presented, and further defective because, absent prior notice from the district court, Mr. Atkins did not have the opportunity to conduct discovery and present evidence contradicting what little DOI did present.

Consider, for example, the business necessity element of uniform application. The district court's opinion makes no reference to any evidence that DOI uniformly applied its medical standard regarding diabetes to Mr. Atkins and other park rangers with law enforcement duties; it is even devoid of reference to the concept of uniform application as an essential element of the business necessity defense. In light of the parties' lack of engagement on the defense, due to DOI's failure to argue it, the district court's oversight is understandable.

But regardless of that, the record would not support this Court's conclusion as a matter of law that DOI uniformly applied its medical standard regarding diabetes to park rangers with law enforcement duties. The standard itself is explicitly non-uniform: "Any condition affecting normal hormonal/metabolic functioning and response that is likely to adversely affect safe and efficient job performance[, including insulin dependent diabetes mellitus,] is generally disabling. Cases will be reviewed on a case-by-case basis." (R. 63; *see also* p.15, *supra*.) DOI's commitment to case-by-case evaluation is a commendable acknowledgment that diabetes affects people differently, but in this context it means that DOI needed to come forward with, for example, evidence of the

symptoms marking the point at which it would ordinarily determine that metabolic dysfunction was likely to have adverse effects on safety and efficiency, and evidence that it uniformly applied that cut-off point.

There is various evidence in the record of what concerned DOI about Mr. Atkins's diabetes, but apparently only one item somewhat relevant to the question of uniform application, and it is far from conclusive. It is the declaration of Jean Fisher, manager since 2009 (four years after the events of this case) of NPS's medical standards program. (R. 193.) Ms. Fisher testified:

> [D]iabetes in and of itself is not nor has it ever been considered a disqualifying condition. Indeed, several Park Rangers who are Type 1 Insulin Dependent diabetics are medically qualified to continue to perform arduous law enforcement duties; this has been the case since the [medical standards program] began. Despite having the condition, these individuals are medically qualified to perform their law enforcement duties because they have demonstrated the ability to stabilize their blood sugar at acceptable levels. In such instances the [Medical Review Board] has determined that these individuals do not present the same safety and health risks as Park Rangers whose diabetes is uncontrolled or unstable. On the other hand, however, Park Rangers whose particular medical conditions are not under control and therefore do not meet the Park Service's medical standards for law enforcement, have been determined to be not medically qualified to perform law enforcement duties.

(R. 195 at ¶ 5.) Ms. Fisher's testimony points straight at two issues that DOI has failed to prove: what exactly is the standard it used to determine that Mr. Atkins's diabetes was uncontrolled, and has it uniformly applied that standard? The six anecdotal cases that her declaration described after the above-quoted testimony —

only one of which cases concerned diabetes, and she described it in 22 words[26] — do not conclusively answer either question. Undefended concerns about someone's diabetes being uncontrolled do not amount to business necessity.[27]

Thus, the evidentiary record does not support affirmance of the district court's summary judgment on the unargued basis of the business necessity defense, so the Court should vacate and remand.

3. The Direct Threat Defense was also not Included or Implicit in DOI's Summary Judgment Argument, and the Evidentiary Record does not Support Affirmance on that Basis

Faced with a claim under § 12112(b)(6), an employer may affirmatively defend on the ground of business necessity *or* direct threat (the latter particularly "in cases in which an employer responds to an employee's supposed risk that is not addressed by an existing qualification standard," *Exxon Corp.*, 203 F.3d at 875). DOI's motion for summary judgment did not present the business necessity defense, and Mr. Atkins's response brief pointed that out. (R. 285.) It also did not

---

[26] "[I]n 2003, a Park Ranger at Amistad National Park in Texas was medically disqualified for law enforcement duties because of uncontrolled diabetes[.]" (R. 195.)

[27] *Cf. Rodriguez v. ConAgra Grocery Products Co.*, 436 F.3d 468, 480 (5th Cir. 2006) (panel reh'g granted) ("ConAgra's admission that it withdrew Rodriguez's job offer because of its *perception* that he suffers from *uncontrolled* diabetes, is the functional equivalent of an admission that it withdrew the offer because it *regarded him* as substantially limited by his diabetes").

present the direct threat defense, and Mr. Atkins's response brief pointed that out, too. (R. 288.)

The district court ruled for DOI on the basis of business necessity ("Defendant's affirmative business-necessity defense bars Atkins's claims in full" (R. Exc. 4 at 364)). Even so, *some* language in the district court's opinion suggests that it was also concerned with whether Mr. Atkins posed a direct threat; for example, it wrote that "the law does not require NPS to put the lives of Atkins, his fellow Park Rangers, and the citizens they serve at risk by taking the chance that he will not experience a hypoglycemic episode on the job." (R. Exc. 3 at 363.) Further, DOI did, for the first time in its *reply* brief, raise the issue of direct threat (*see* p.14, *supra*, and R. 314). Therefore, Mr. Atkins considers it prudent to explain why DOI's summary judgment may not be affirmed on the ground of direct threat.

Whether an employee is a direct threat is an intensely fact-bound issue:

> *Direct Threat* means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a 'direct threat' shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include: (1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential

harm.[28]

Clearly, there is little or no overlap between these facts, which DOI had to prove as a matter of law, and those about which Mr. Atkins had to raise a genuine issue under *McDonnell Douglas*: the direct threat affirmative defense was not implicit or included in DOI's opening memorandum for summary judgment.

Further, the record does not support summary judgment based on that defense. DOI's reply brief (assuming that it was proper for DOI to raise a new issue in a reply brief) introduced the topic of direct threat with a three-paragraph discussion of direct-threat case law; following that discussion, this — and this alone — was the factual argument specific to Mr. Atkins's case:

> As stated earlier, Plaintiff failed to maintain control of his diabetes, as mandated by the Medical Review Board. Even documented by Dr. Sherry Martin, Plaintiff's personal physician, his Hemoglobin A1c ranged between seven and nine, spiking at 9.4 during a test in January, 2005. Consequently, Plaintiff's inability to control his diabetes posed a direct threat to himself, fellow officers, and the public and establishes a defense to his allegations of discrimination against Defendant.

(R. 313-14; record citations omitted.)

The cited evidence about A1c measurements comes nowhere close to proving as a matter of law that Mr. Atkins was a direct threat under the standard set

---

[28] 29 C.F.R. § 1630.2(r); *see also Kapche v. City of San Antonio*, 304 F.3d 493, 500 (5th Cir. 2002) (requiring an individualized assessment of whether a person with diabetes posed a direct threat).

by § 1630.2(r). Absent, for example, is evidence that the Medical Review Board's assessment of the significance of those measurements "relie[d] on the most current medical knowledge and/or on the best available objective evidence." *Id.*

Further, the direct-threat case law that DOI discussed when introducing this defective factual argument was not even apposite. It discussed *Lewis v. Pennsylvania*, 609 F. Supp. 2d 409 (W.D. Pa. 2009), *Van v. Miami-Dade County*, 509 F. Supp. 2d 1295 (S.D. Fla. 2007), and *Smith v. U.S. Marshals Service*, 2006 WL 297725 (D. Vt. Feb. 7, 2006), *aff'd*, 268 Fed. App'x 41 (2nd Cir. 2008), citing from each case the plaintiffs' A1c measurements. But none of those cases used the plaintiffs' blood chemistry to find that they were direct threats with uncontrolled diabetes. On the contrary, all three courts found that the plaintiffs were not disabled and/or not perceived as disabled; they did not hold *anything* with respect to the direct threat defense, much less did they hold that the plaintiffs' blood chemistry proved that they were direct threats. *Lewis*, 609 F. Supp. 2d at 413 ("plaintiff has failed to proffer sufficient evidence to permit a finding that defendants regarded plaintiff's impairment as substantially limiting a major life activity and their summary judgment motion must be granted"); *Van*, 509 F. Supp. 2d at 1303 ("[i]n conclusion, because Van is not a person with a disability as defined by the ADA, his claims that the County discriminated against him based on disability fail as a matter of law"); *Smith*, 2006 WL at *4-5 ("The fact that AKAL

has found the plaintiff unsuitable to serve as a CSO, in and of itself, does not demonstrate the existence of an impairment which otherwise substantially limits his major life activity of working, thereby bringing him within the protections afforded by the Rehabilitation Act.... The record contains no support for plaintiff's suggestion that the defendants perceived him to be substantially disabled because he is diabetic ....").

Even worse for DOI, *Lewis* was reversed on appeal after the defendant conceded that the plaintiff was disabled; the parties filed a joint motion for remand. *Lewis v. Pennsylvania*, 2010 WL 4968270, at *1 (W.D. Penn. Oct. 5, 2010). On remand, the defendant argued in a new motion for summary judgment that Lewis — an applicant to become a Pennsylvania State Trooper — "presented an unacceptably high risk of a future hypoglycemic episode that would render [him] unable to perform the essential functions of a State Trooper." *Id.* at *2. The magistrate judge recommended denying the motion and specifically rejected Pennsylvania's reliance on A1c measurements above 7 as evidence of Lewis's riskiness: "Whatever the significance of Hgb [hemoglobin] A1C levels above 7%, the evidence indicates that such levels, standing alone, do not indicate a sufficient risk of future hypoglycemic episode[s] that would preclude an individual from

performing the 'essential functions' of a State Trooper." *Id.* at *3.[29] The district court adopted the magistrate judge's recommendation. *Lewis v. Pennsylvania*, 2010 WL 5287419 (W.D. Penn. Dec. 1, 2010).

Thus, DOI's reply argument for summary judgment on the basis of direct threat lacked both factual and legal support.

And if the Court looks beyond DOI's reply argument to the whole record, it will not find the evidence necessary to establish the direct threat defense as a matter of law. Nowhere in the record did DOI present any scientific evidence supporting its argument about the significance of Mr. Atkins's blood chemistry fluctuations, apart from the decision itself to disqualify Mr. Atkins. There is also no evidence that Mr. Atkins's blood chemistry fluctuations "impeded [his] work performance to any degree. For the purpose of this motion, the Court must assume that [Mr.] Atkins successfully performed all of the essential functions of a law enforcement park ranger." (R. 260.) In other words, DOI not only failed to explain how or why Mr. Atkins's various blood chemistry measurements proved as a matter of law that he was a direct threat according to the most current medical knowledge, but it also failed to rebut the objective evidence that he was not a direct

[29] Lewis, unlike Mr. Atkins, presented a *McDonnell Douglas*-type claim, for which he had to present prima evidence that he was qualified to counter the defendant's argument that his A1c measurements were evidence that he was not qualified. *Id.* at *2. Here, on the other hand, DOI had the burden of presenting evidence that Mr. Atkins's A1c measurements proved he was a direct threat.

threat because he performed his law enforcement job fully adequately for years notwithstanding the fluctuations.

The district court thought it inconsequential that Mr. Atkins had "never had a severe hypoglycemic event at work" (R. Exc. 4 at 363), but that real-life fact is plainly relevant to the direct-threat consideration of the "likelihood that the potential harm will occur," especially given that DOI did not carry its burden of showing that it relied on the best available medical knowledge and/or objective evidence in deciding that Mr. Atkins's blood chemistry fluctuations pointed to such a likelihood.

The district court also erroneously cited *Chandler v. City of Dallas*, 2 F.3d 1385, 1395 (5th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994), for the holding that "persons with diabetes have been lawfully excluded from occupations in the transportation industries because of the potential impact on safety." (R. Exc. 4 at 362.) Since *Kapche v. City of San Antonio*, 176 F.3d 840 (5th Cir. 1999), and *Kapche v. City of San Antonio*, 304 F.3d 493, 500 (5th Cir. 2002), the type of blanket ban that *Chandler* sanctioned has been unlawful.[30] Contrary to the district court's holding, *Chandler* does not provide DOI a short-cut to prevailing on the direct threat defense: it must take the long road through an individualized

[30] "More recent decisions of the United States Supreme Court now render the per se rule of *Chandler* ... inapplicable to the present case." *Kapche*, 304 F.3d at 497.

assessment in compliance with 29 C.F.R. § 1630.2(r).

Conclusion

The Court must vacate the district court's summary judgment granted on the ground that DOI proved its affirmative defense of business necessity, and remand for further proceedings on the merits, with an award of costs in favor of Mr. Atkins.

Date: February 16, 2010

Respectfully submitted,

/s/ Robert E. McKnight, Jr.
John W. Griffin, Jr. (#08460300)
Robert E. McKnight, Jr. (#24051839)
Appeal Counsel
Marek, Griffin & Knaupp
203 N. Liberty Street
Victoria, TX 77901
(361) 573-5500 (v)
(361) 573-5040 (f)

Attorneys for David A. Atkins

CERTIFICATE OF SERVICE

I certify that today, February 16, 2010, I served the foregoing appellant's opening brief and a copy of the record excerpts on counsel listed below through the Fifth Circuit's CM/ECF system:

Ava Nicola Jackson
Assistant U.S. Attorney Office
Northern District of Mississippi
900 Jefferson Avenue
Oxford, MS 38655

/s/ Robert E. McKnight, Jr.
Robert E. McKnight, Jr.

Certificate of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

1. ✔ this brief contains 10,076 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

   □ this brief uses a monospaced typeface and contains [state the number of] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   ✔ this brief has been prepared in a proportionally spaced typeface using WordPerfect 12 in 14-point Times New Roman, or

   □ this brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

/s/ Robert E. McKnight, Jr.
Robert E. McKnight, Jr.
Attorney for David A. Atkins

Dated: February 16, 2010