NO. 03-3599

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GARY L. BRANHAM,

Plaintiff-Appellant,

v.

PAUL HENRY O'NEILL, ET AL

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION
THE HONORABLE JOHN DANIEL TINDER, PRESIDING

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 03-3599

Short Caption: Gary L. Branham vs. Paul H. O'Neill

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Gary L. Branham

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Krieg DeVault, LLP
Houston, Marek & Griffin, L.L.P.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Attorney's Signature: ______________ Date: 10/03/03

Attorney's Printed Name: Elizabeth G. Russell

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ______ **No** ______

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N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: ____________________ Date: 11/05/03

Attorney's Printed Name: John W. Griffin

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ______ **No** ______

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STATEMENT REGARDING ORAL ARGUMENTS

Oral arguments would be helpful in this case in order for the Court to fully understand the summary judgment record, the legal issue involved, and the trial court's analysis of both.

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JURISDICTIONAL STATEMENT

The district court's jurisdiction in this matter was based upon a federal question pursuant to 28 U.S.C. § 1331. Appellant Gary Branham, ("Branham"), was employed by the Appellees Paul Henry O'Neill, Secretary United States Department of Treasury/Internal Revenue Service ("IRS") and was promoted pending the IRS's medical approval. The IRS then revoked the promotion because it deemed him medically disqualified due to his Type 1 diabetes. Branham alleged that his disqualification was in violation of the Rehabilitation Act, 29 U.S.C.§ 701 *et seq*.

The Appellate Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1291. In the district court, the IRS filed a Motion for Summary Judgment including the argument that Branham failed to establish as a matter of law that he was disabled or "regarded as" disabled under the Americans with Disabilities Act ("ADA"), which contains the applicable standards. Branham filed a Motion for Partial Summary Judgment arguing that the IRS failed to establish its defense that Branham was a "direct threat" as defined by 42 U.S.C. § 12111(3). Branham and the IRS filed respective responses to the opposing party's motion and various evidentiary materials in accordance with Local Rule 56.1. The district court granted the IRS's summary judgment, ruling that Branham failed to raise a fact question as to whether he was substantially limited in the major life activities of eating and caring for himself or "regarded as" disabled. It therefore denied as moot Branham's motion for partial summary judgment.

The district court entered its Order on August 28, 2003. The Notice of Appeal was timely filed on September 26, 2003, and all necessary fees were paid. This appeal is taken from a final order that dismissed Branham's case.

STATEMENT OF ISSUES FOR REVIEW

The issue presented is whether the district court erroneously determined that Branham raised no issue of fact as to whether his insulin treated diabetes constituted a disability, and whether the IRS regarded him as having a disability.

STATEMENT OF THE CASE

Branham, Appellant, has Type 1, insulin treated[1] diabetes. He has been employed by the IRS as an Internal Revenue Agent since September 29, 1986. In 1998, he applied for a promotion to the position of Special Agent with the IRS. After being tentatively approved for that position, the IRS later informed him that he was medically disqualified due to his diabetes. Branham timely filed a charge of discrimination on December 2, 1999. He fulfilled his administrative prerequisites and filed his Complaint on February 6, 2001.

At the conclusion of discovery, the IRS filed a motion for summary judgment arguing that Branham did not have a disability, was not regarded as disabled, and was not substantially limited in a major life activity, nor was he able to perform the essential elements of the Special Agent position with or without accommodation. Branham responded by presenting evidence that he has Type 1 diabetes, and that he raised a fact issue on the question of whether his diabetes constituted a disability in the major life activities of eating and caring for himself, and whether the IRS regarded him as having such a disability. Branham filed a motion for summary judgment seeking to dismiss the IRS's direct threat defense.

The district court entered its opinion on August 28, 2003, granting the IRS's Motion for

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[1]Although "insulin treated" is the correct terminology, other terms are found throughout this document referring to Branham's Type 1 insulin treated diabetes. This is a result of the IRS's use of other terminology in its testimony. In order to correctly reflect the record these separate terms will be included where necessary.

Summary Judgment, opining that Branham has no disability, nor does the IRS regard him as having a disability, and denying Branham's Motion for Partial Summary Judgment as moot. The Notice of Appeal was timely filed on September 26, 2003.

STATEMENT OF FACTS

Gary Branham has had Type 1 diabetes requiring multiple daily injections of insulin since 1991. (Record 45, Attachment A, Branham dep., p. 64, ll. 10-15, p.66, 3-17). Diabetes is a disease that affects a person's ability to make insulin, or in some cases, a person's ability to effectively utilize insulin. In Branham's case, his pancreas produces no insulin. (R. 53, Ex. 4, p. 1, ¶2). Because insulin is necessary for Branham's body's proper use and absorption of sugar, sugar levels in the bloodstream will become toxic in the absence of insulin. High blood glucose levels (hyperglycemia), left untreated, will cause death, and all people who had this disease before 1921 simply died. Death is the immediate consequence of toxic hyperglycemia. (R.53, Ex. 5, Declaration of Paul A. Skierczynski, M.D., p. 3, ¶5).

At lower, but still dangerous levels, hyperglycemia causes *long-term* complications such a blindness, kidney failure and heart disease. (R. 45, Attachment C-16, p. 2). During his years of living with diabetes, Branham maintained his blood sugar levels within a safe range. (R.53, Ex. 4, p. 3, ¶ 6). In order to safely manage his diabetes however, Branham strictly follows a daily regimen which includes exercise, a strict diet and strict scheduling. He also must take at least four insulin shots per day[2] and at least four checks, sometimes five, of his blood sugar levels each day. (R.53, Ex. 1, Declaration of Gary L. Branham, pp.2-6).

Exact replication of the human endocrine system is impossible, so even with the most vigilant care, there are problems. Hyperglycemia is one. Another is too little glucose in the bloodstream (hypoglycemia). Hypoglycemia can be caused by administering too much insulin, skipping or delaying meals or snacks, not eating enough food, exercise or a combination of two or

[2]Branham has since started utilizing an insulin pump, which is a sophisticated electronic device that is controlled by the user to inject insulin into the bloodstream.

more of these factors. It is the most immediate danger of Type 1 diabetes and, if not detected and treated properly, can lead to unconsciousness, convulsions, or death. Therefore, in order to safely live with diabetes, Branham must *carefully* and *constantly* balance food intake, exercise, medications and other factors in order to try to keep his blood glucose levels in a safe range. This is a dynamic process that must be assessed and needed alterations made numerous times every day and every night. Even with strict adherence to his regimen, Branham still suffers low blood sugar levels that cause detrimental physical responses, including trembling and sweating. (R. 45, Attachment A, Branham dep., p. 81, ll. 18-25, p. 82, ll. 1-25, p. 83, ll. 1-6). He has these episodes once every three weeks or more. (R. 45, Attachment A, Branham dep., p. 162, ll. 3-10). Branham is constantly vigilant and responds to these warning signs of hypoglycemia by immediately ingesting carbohydrates. If he does not quickly respond to these symptoms, Branham's condition can deteriorate rapidly, leading to confusion, disorientation, unconsciousness, and even death.(R. 45, Attachment C-16, p. 3.).

Despite this life limiting, onerous burden of constant vigilance and treatment, Branham has been successfully employed by the IRS since 1986 as an Internal Revenue Agent.(R.45, Ex. 1, Declaration of Gary L. Branham, p. 3). In 1998, Branham applied for the position of a Criminal Investigator ("CI") Special Agent GS-1811-7 with the IRS. (R. 45, Attachment A, p. 83, ll. 24-25, p. 84, ll. 1-16). He was informed in early March of 1999 that he was approved for the position, pending a physical examination[3]. (R.45, Attachment C-4). On June 15, 1999, the IRS deemed

[3]The letter stated "Congratulations on your *tentative selection* for a position as a Criminal Investigator..." (R. 45, Attachment C-4). However, once it was determined that Branham had Type 1 diabetes, he received a rejection letter instead: "I regret to inform you that a review and evaluation of your medical records substantiate that you are medically disqualified for the position of Criminal Investigator...". (R. 45, Attachment C-11).

Branham medically disqualified because of its perception that he could not perform the essential functions of the Special Agent position because of his Type 1 diabetes. (R.45, Attachment C-11). Branham requested reconsideration of this decision and submitted additional documentation to the IRS. (R.45, Attachments C-13 and C-20). On June 6, 2000, following a Committee review, the IRS informed Branham that it deemed him medically disqualified for the position of Special Agent. (R. 45, Attachment C-45).

In making its determination, the IRS had Dr. Richard Miller[4], the primary medical reviewer for the IRS at that relevant time, review Branham's records to determine if he was or was not medically qualified. He did not examine or talk to Branham. (R. 53, Ex.2, Miller dep. p. 84, ll. 17-25, p. 85, ll. 1-4). Dr. Miller stated his opinion that Branham had substantial limitations which, in Dr. Miller's view, caused Branham to be unreliable and unable to respond at all times as a law enforcement officer (Special Agent). (R. 45, Attachment B, Miller dep. p. 203, ll. 15-25). He also opined that there was a risk for all people with Type 1 diabetes to experience symptoms ranging from subtle incapacitation to sudden incapacitation and complete loss of consciousness. (R.45, Attachment C-10). The IRS refused to promote Branham as a result of its perception of Branham's limitations, specifically the restrictions imposed by his treatment regime and the potential consequences of insulin use. (R. 45, Attachment C-11, C-16, pp. 1-4).

SUMMARY OF THE ARGUMENT

Gary Branham has a chronic, incurable disease. This disease is life-shortening. It is life

[4]Dr. Miller works for the United States Public Health Service as a Director. The United States Public Health Service holds an intra-agency agreement with the IRS to conduct the IRS's applicant's medical reviews. (R.45, Attachment B, Deposition of Dr. Miller, p. 26, ll. 20-25, p. 29, ll. 14-25, p. 30, ll. 1-17).

threatening every minute of every hour of every day, unless he fundamentally alters his life as compared to the lives of those who do not have Type 1 diabetes. Branham makes these alterations, constantly, and, as a result, has maintained his safety. Branham's physician and medical expert opine that because of his success in managing his diabetes, he would be able to safely and effectively perform the job of Special Agent for the IRS.

The IRS admits that it refused to hire Branham for the job in question because he has Type 1 diabetes *and* because, in the view of the IRS's medical experts, Branham has not been successful enough in managing this disease. Yet, the IRS claims that this disease that disqualifies Branham for the Special Agent position does not limit him sufficiently that he should be able to seek the protections of federal anti-discrimination law. Simply put, Branham is too sick to be a safe, reliable employee, but too healthy to be protected from discrimination.

What emerges from the above two paragraphs is that this case brings together complex fact issues about the intersection between qualification for coverage under the Rehabilitation Act and qualification for the job in question. What is patently obvious is that the medical questions about what Branham can and cannot do are very much controverted and, as such, are questions for a jury to resolve based upon a full trial on the merits.

First, in reaching its conclusion that Branham neither has a disability nor was regarded as having one, the district court ignored the evidence (and drew improper inferences) in the summary judgment record that showed substantial limitations caused by Branham's treatment regimen, physical symptoms, and possible consequences. This is especially true in light of the summary judgment standard that requires all inferences to be construed in favor of the non-movant. *Metropolitan Life Ins. Co. v. Johnson*, 297 F.3d 558, 561-62 (7th Cir. 2002).

Second, the court completely misinterpreted this Court's opinion in *Lawson v. CSX Transp., Inc*., 245 F.3d 916 (7th Cir. 2001). The court failed to consider the burdensome life altering regime Branham lives every day as well as the extent of the lifestyle and dietary restrictions imposed by Branham's mandatory treatment regimen and the serious consequences of non-compliance with that regime. This created a fact question regarding a substantial limitation in Branham's major life activities of caring for himself and eating. Ignoring *Lawson*, the court inappropriately focused only on the fact that Appellant is able to largely keep his blood glucose level in a safe range by his life altering treatment plan. The fundamental mistake made by both the IRS and the district court is the assumption that the Rehabilitation Act is only intended to protect those who have chronic conditions that render them *unable* to perform a wide-range of functions. To the contrary, these laws are intended to protect those who, through substantial alteration in how they live their lives, are ultimately able to safely perform the tasks in question. This fixation on Branham's success in overcoming the obstacles of his diabetes is error.

Third, the district court incorrectly applied *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), by failing to distinguish between the variety of characteristics of diabetes even after mitigation measures. For example, diabetes can range from cases of Type 2 diabetes, which may only require losing some weight, to Type 1 diabetes, which is the most invasive, aggressive form of diabetes. Type 1 diabetes, which means a person produces no insulin, is the most serious and life altering form of the disease. The Court in *Sutton* clearly recognized this wide variation in diabetes cases, but the trial court did not.

The record demonstrates that even in its treated form, Branham's Type 1 diabetes requires a strict daily regimen of insulin shots, careful timing of meals and exercise, and careful vigilance

in carbohydrate management, constant care, self-monitoring, and treatment. The record also demonstrates that if the regimen is not followed, Branham, unlike the average person without Type 1 diabetes, could suffer from dire consequences such as a coma or even death. Because there is a genuine issue of material fact regarding the burdensome nature of treatment and regimen and of limitation, this case presents a question for the jury, and summary judgment is inappropriate.

Finally, the district court determined their was no issue of material fact on the question of whether the IRS regarded Branham as having a disability only by a tortured reading of the facts, in which the claims of IRS's medical expert that Branham is substantially limited are ignored, but the unsupported assertion by this same expert that Branham could do a different law enforcement job is accepted as dispositive. Because there is a genuine issue of material fact regarding Branham's medical condition as well as the IRS's perception of Branham's medical condition, the district court should not have granted summary judgment.

ARGUMENT

Standard of Review

This Court reviews a grant of summary judgment *de novo*, viewing the record in the light most favorable to the nonmovant, Branham. *Gorbitz v. Corvilla, Inc.*, 196 F.3d 879, 881 (7th Cir. 1999). This Court shall affirm a grant of summary judgment only if there is no genuine issue as to any material fact. *See* Fed. R. Civ. P. 56(C); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2552 (1986). A grant of summary judgment will not be sustained if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). It is only proper "where there is no reasonably

contestable issue of fact that is potentially outcome determinative." *EEOC v. Sears, Roebuck & Co.*, 233 F.3d 432, 436 (7th Cir. 2000).

Finally, in reviewing the evidence on the record, "the Court must draw all reasonable inferences in favor of the non-moving party [Branham] and it may not make credibility determinations or weigh the evidence." *Lytle v. Household Mfg. Inc.*, 494 U.S. 545, 554-555, 110 S.Ct. 1331, 108 L.Ed. 504 (1990)(additional citations omitted). Accordingly, for purposes of reviewing the IRS's Motion for Summary Judgment, Branham's evidence must be taken as true, and all reasonable inferences must be drawn in his favor. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 152, 120 S.Ct. 2097, 2110, 147 L.Ed.2d 105 (2000) ("...the court must draw all reasonable inferences in favor of the nonmoving party....it must *disregard all evidence favorable to the moving party* that the jury is not required to believe.")[emphasis supplied].

Discussion

The District Court Erred in Concluding That Branham Raised No Issue of Fact as to Whether His Insulin Treated Diabetes Is a Disability

The summary judgment record clearly shows that Branham's abilities to eat and care for himself, both major life activities, are substantially limited by his Type 1 diabetes[5]. Under the summary judgment standard, this creates, at the very least, a fact issue that should go to the jury.

A plaintiff such as Branham seeking relief under the Rehabilitation Act must show that he: (1) is an individual with a disability; (2) is otherwise qualified for the job with or without reasonable

[5] The IRS, in its Motion for Summary Judgment, argued that Branham was not disabled, was not regarded as disabled and was not substantially limited in a major life activity, nor was he able to perform the essential elements of the Special Agent position with or without accommodation. (R. 44, p.7). The district court granted the IRS's summary judgment motion on the basis of its conclusion that Branham was not substantially limited in the activities of eating and caring for himself. (R. 68, p. 23). As a result, it never reached the issue of Branham's ability to perform the essential elements of the position.

accommodation; and (3) is being discriminated against because of his disability. *Crocker v. Runyon*, 207 F.3d 314, 318 (6th Cir. 2000). An "individual with a disability" must prove that he "(i) has a physical...impairment which substantially limits one or more of [his] major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment." *Knapp v. Northwestern Univ.*, 101 F.3d 473, 478 (7th Cir. 1996); 29 U.S.C. § 705(20)(B). In making a determination as to whether or not a violation of the Rehabilitation Act occurred in an employment situation, this Court looks to the standards set forth under the Americans with Disabilities Act, 42 U.S.C. § 12102(2); *Peters v. City of Mauston*, 311 F.3d 835, 843 (7th Cir. 2002).

Under these standards, Branham is not required to show an "utter" inability. *Bragdon v. Abbott*, 524 U.S. 624, 641 (1998). Thus, the district court's fixation on the fact that Branham has largely been able to maintain his blood sugar levels in a safe range most of the time, and has avoided potentially deadly extreme blood sugar levels, is not controlling. Instead, the law provides that an impairment substantially limits an individual's ability to care for himself, "if due to the impairment, an individual is significantly restricted *as compared to the average person in the general population* in performing basic activities such as [eating and caring for one's self]." 29 C.F.R. § 1630.2(j); *Nawrot v. CPC International*, 277 F.3d 896, 904 (7th Cir. 2002); *Humphrey v. Memorial Hospitals Assoc.*, 239 F.3d 1128, 1135 (9th Cir. 2001)(emphasis added). *Lawson v CSX Transp., Inc.*, 245 F.3d 916 (7th Cir. 2001) follows *Bragdon* and further emphasizes that courts must also consider the extent of restrictions imposed and consequences of noncompliance with a treatment regimen. *Id*. at 924. This the district court ignored.

The IRS and the district court concede that Branham's Type 1 diabetes is an impairment and that eating and caring for one's self are major life activities. (R.68, p.12). *See* 29 C.F.R. §

1620.2(1)(major life activities include, but are not limited to, functions such as caring for oneself); *Lawson, supra* at 923. The district court properly *identified* the central issue; i.e. whether or not Branham's Type 1 diabetes substantially limits him in the activities or eating and caring for himself. (R. 68, p.13).

Twice before this Court determined that people with insulin treated diabetes had a disability under the American with Disabilities Act. *See Lawson v CSX Transp., Inc.*, 245 F.3d 916 (7th Cir. 2001) and *Nawrot v. CPC International*, 277 F.3d 896 (7th Cir. 2002). The only factual difference between this case and those is that Branham does not yet have any long-term complications of diabetes, and his constant vigilance has resulted in fewer short-term complications[6]. Thus, this case presents the question of whether someone with Type 1 diabetes such as Branham, who has been largely successful thus far in warding off complications, is precluded from seeking redress under the ADA and the Rehabilitation Act when he is denied a job because of his diabetes. As is demonstrated below, the answer is clearly no.

A. The district court ignored facts that showed Branham's Type 1 insulin-treated diabetes and its burdensome treatment regimen and lifestyle are substantially limiting[7].

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[6]This is not to say that Nawrot and Lawson themselves were not vigilant in their treatment.

[7]The district court appears perplexed about the relative positions taken by the parties with respect to the parties' alternative positions. That is, the IRS attempted to show how limited Branham was in proving its direct threat defense, and Branham attempted to show how fit he was. On the other hand, the IRS argued, in its own motion for summary judgment, that Branham has no limitations at all and thus is not disabled, while Branham argued that he is limited. (R.68, pp.10-11). These were two separate fact issues the court was considering: (1) the disability of Branham and (2) his qualification to perform the job without presenting a direct threat. The district court erred in conflating these two alternative issues. As noted above, the intersection of these two issues strongly supports Branham's view that there is a fact issue for the jury as to how Branham's diabetes does or does not affect him. Moreover, there is an easy answer to the district court's concern. For each dispositive motion, the court must indulge all inferences

The district court focused almost exclusively on the fact that Branham has largely been successful in keeping his blood glucose level in a safe range, and can, with sacrifice, adequately function. In doing so, the district court ignored the standard of review, and ignored Supreme Court authority. The Rehabilitation Act, like the ADA, "addresses substantial limitations on major life activities, not utter inabilities." *Bragdon,* 524 U.S. at 641, 118 S.Ct. 2196. When an impairment results in significant limitations, that impairment is substantially limiting even if the limitations are not "insurmountable" (*see id.),* as was concisely pointed out in the case of *Gillon v. Fallon Ambulance Service, Inc*., 283 F.3d 11 (1st Cir. 2002).

Gillon is a genetic amputee with only one completely functioning arm. Like Branham, Gillon did not consider herself an invalid. The Court explained:

> In concluding that the appellant had no substantial limitation on her ability to lift, the district court relied upon two items. The first of these was the appellant's optimistic self-assessment of her capabilities. This consideration deserves little weight. Although the appellant took an upbeat view of her prowess (when FAS's counsel asked, during her deposition, if there was anything that she would like to do that she had not been able to do because of her missing hand, she replied "no"), that was more a testament to her determination than to her condition. She did not dwell on the restrictions on lifting that she had to overcome in order to achieve her objectives -- and those restrictions comprise the focal point of this prong of the ADA inquiry. *The key question is not whether a handicapped person accomplishes her goals, but whether she encounters significant handicap-related obstacles in doing so.* For summary judgment purposes, we must resolve this question in the appellant's favor.
> *Id*. at 22 (emphasis added).

In other words, just because Branham has been able to be a success within the limitations of his diabetes and chafes at being labeled as handicapped does not trump the actual limitations that

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against the movant. The only motion the court granted was the IRS's motion, and thus the court was required to make all inferences in Branham's favor, including the evidence presented by the IRS about Branham's inability to perform various functions. This the court did not do. *See Reeves v. Sanderson Plumbing Prod., Inc*., 530 U.S. 133, 152, 120 S.Ct. 2097, 2110, 147 L.Ed.2d 105 (2000)

his diabetes imposes.

In addressing both Branham's motion for partial summary judgment on "direct threat" and the IRS's summary judgment motion on the issue of Branham's disability, the district court was compelled by law under *Reeves*[8] to draw all inferences in favor of the IRS in Branham's motion, and to *disregard* the IRS's evidence and draw all inferences in Branham's favor when considering the IRS's motion. This it did not do. Instead, when deliberating the IRS's summary judgment motion, the district court ignored all other evidence in the record that identified and described not only the day to day burden of Branham's Type 1 diabetes regimen, but also the IRS's testimony identifying Branham's limitations. It also drew inferences in favor the IRS and adopted the IRS' "spin" on Branham's medical readings. (R.68, pp. 19-20). The record shows a dispute between the parties as to the actual control by Branham over his diabetes, as well as the effects of his diabetes and its strict treatment regimen on the major life activities of eating and taking care of himself. This evidence creates, at the very least, a fact issue.

Branham has a burdensome treatment regimen that impacts almost every facet of his life. If he deviates from this regimen, the consequences are dire, and potentially life threatening. The day-to-day maintenance required by his insulin-treated diabetes substantially limits and restricts his ability to eat and care for himself, in stark contrast to the average person with out these burdensome restrictions. For Gary Branham, treatment is not an option, it is required to survive. Branham's body produces no insulin. This hormone is necessary for life in that it breaks down carbohydrates and converts them into energy. Without insulin, Branham will die of toxic hyperglycemia - a toxic amount of sugar in the bloodstream. (R. 53, Ex. 6, p. 3, ¶ 5). The brain requires glucose as its energy

[8]*Reeves, supra* 530 U.S. at 152

substrate. Without insulin, the brain will be "starved" for glucose, and Branham would experience seizure, stroke and permanent neurological damage. (R. 45,Attachment E, p.4). People who do not have diabetes have a functioning pancreas that works with the liver to constantly adjust insulin output to regulate blood sugar levels. In people who do not have diabetes, the liver and the pancreas work together in a checks-and-balance system, to regulate the amount of sugar in the blood stream. (R. 53, Ex. 5, p. 6, ¶ 12).

Before the discovery of insulin in 1921, all people with Type 1 diabetes simply died of toxic high blood sugar levels. (R. 53, Ex. 6, p. 3, ¶ 5). In 2004, however, insulin is used by patients such as Branham, in order to attempt to mimic the pancreas' function of insulin production and regulation. Since there is not automatic regulation of blood sugars in people with diabetes, Branham must undergo a careful and comprehensive balancing act, one that must be adjusted throughout every day to make sure that food, exercise, and medication stay in the proper balance.

The IRS conceded the following about Branham's limitations as compared to members of the population who do not have diabetes: (1) that the "realities" of Type 1 "insulin dependent diabetic management....requires constant monitoring, the administration of insulin three to four times a day, strict adherence to a diet and timing of each meal, planned exercise and frequent monitoring" by doctors. (R. 45, Attachment C- 26, p. 7); (2) that the regimen is "intensive", requiring a "delicate balance between diet, exercise, and insulin". (R. 45, Attachment C-16, p. 2, Attachment C-41. p 3); (3) that Branham's diabetes is "a chronically active disease that progresses to a multitude of recognized long-term complications." (R. 45, Attachment C-16, p. 2); (4) that, unlike the rest of us, before Branham can exercise, he has to have "anticipation of physical exertion and advanced preparation: lower the insulin dose and increase the carbohydrate intake, depending on the amount

of exercise anticipated." (R. 45, Attachment C-26 p. 4); and (5) that "monitoring should be performed prior to exercise and after exercise [and that any] alterations in physical exertion, missed meals due to occupational demands, etc. have a significant effect on the control status of diabetes that day." (R. 45, Attachment C- 26 p. 4).

The IRS describes someone who must eat and care for himself in ways that are significantly more onerous than if Branham did not have Type 1 diabetes. Branham agrees, only differing with the IRS with regard to how successful Branham's efforts may have been. Branham unfortunately has been dependent on multiple daily insulin shots, i.e. he must give himself a shot at least four times per day. (R.53, Ex. 4, p. 3, ¶ 6). This means taking a vial of insulin out and drawing it into a syringe, carefully measuring the precise amount of insulin[9]. The amount of insulin to be injected depends on Branham's blood sugar level, his anticipated food intake and anticipated physical activities. (R.53, Ex. 4, p. 3, ¶ 6, p. 5, ¶ 12).

Branham's blood sugar level is checked by the use of a device called a glucometer, or blood glucose monitor. (R.53, Ex. 1, p. 2, ¶ 4). Branham must prick his finger, squeeze a drop of blood, then apply it to a small strip that is inserted into the glucometer. The result then appears on the monitor. (R.53, Ex. 1, p. 2, ¶ 4). He must write down each of these readings as he takes them. (R. 45, Attachment A, Branham dep., p. 69, ll. 20-25). He must wake up at 1:00 a.m. periodically to check his blood glucose. (R. 45, Attachment C- 27). This means, 120 to 150 times per month, he must prick his finger, apply blood to the glucometer, wait for the result, write it down, and re-act

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[9]Appellant has since started utilizing an insulin pump, which is an electronic device that is connected to the human body by a small plastic tube to a catheter inserted under the skin. It remains in place and must be changed every two to three days. Branham controls the pump, and must both check his blood glucose regularly and adjust the insulin intake. (R. 45, Attachment E, p. 4).

accordingly; e.g., injecting insulin if his blood sugar is high, or consume carbohydrate if it is low. A reading of 70 -120 mm/dl is "normal" for people who do not have diabetes. If Branham's level is higher, he must inject extra insulin to bring it down. If it is lower, he must ingest carbohydrates to raise it. (R. 45, Attachment A, Branham dep. p. 76, ll. 13-19). Blood sugar levels can also be adversely affected by factors beyond Branham's control, such as illness, infection or stress. Finally, he must carefully consider any exercise and adjust his insulin intake. (R. 45, Attachment C-26). All this is the daily, dynamic burden presented by Branham's Type 1 diabetes.

Since this process is subject to factors outside Branham's control, it is not as precise as a non-diabetic's liver and pancreas automatically working together. Thus, Branham must constantly be aware of his blood sugar level, i.e. he must perform a finger stick test every few hours. He must monitor his blood glucose level *at least* four times a day, in the morning after he wakes up, each time before eating, and before going to bed. (R. 53, Ex. 1, p. 2). He has also been called upon to monitor his blood glucose level at one thirty in the morning. (R. 45, Appendix C-27). This testing is not an option, but instead Branham must test to avoid short term as well as long term complications, ranging from blurred vision and sweating to blindness, kidney disease, coma or death. (R. 45, Appendix C-16, p. 2). Even with his life limiting regimen performed faithfully, Branham still has regular low blood sugar levels which causes detrimental physical responses, including trembling, the sweats and dizziness. (R. 45, Attachment A, Deposition of Gary L. Branham, p. 162, ll. 3-10). If he does not quickly respond to these symptoms, Branham's condition can deteriorate rapidly, leading to confusion, disorientation, unconsciousness and even death. (R.45, Attachment C-16, p. 3).

Branham must also monitor what he eats, and when he eats, and anticipate stress or

additional exercise, as well as modify his regimen carefully if he becomes ill. (R. 45, Attachment C-26, p. 7). In addition, to hold back immediate as well as long term complications, Branham follows a strict exercise program of regularly running two miles, completing 200 sit ups, 100 push ups as well as various stretching and calisthenic exercises. (R. 53, Ex. 1, p. 6). When performing exercise, he adjusts and compensates with insulin or food intake for any sudden increases, (R. 45, Attachment C-16, p.2), and monitors his condition before and after exercise (R. 45, Attachment C-26, p. 4).

In addition to these limitations, Branham must follow an intensive insulin therapy regimen that includes ongoing outpatient visits to a health provider, and frequent adjustments of the insulin dose based upon blood glucose levels, diet and exercise. (R. 45, Attachment C-16, p. 2). Branham must be "constantly vigilant", and have a "very cautious balance" of food intake, insulin and physical activity. (R. 45, Attachment B, Miller dep., p.204, ll.2-7, p. 205, ll.16-21). If not for this constant vigilance twenty-four hours a day, seven days a week, Branham can experience serious medical complications including death. These are the "realities" of Branham's insulin dependent diabetes. (R. 45, Attachment C-26, p. 7). All of this is ignored by the district court. The sweats, trembling and other effects of low blood sugar levels experienced by Branham within a three-week period (or more often[10])are not even mentioned by the district court.

These facts, including drawing all inferences in Branham's favor, preclude a summary judgment ruling as a matter of law that Branham does not have a disability.

B. The lower court erroneously disregarded this Court's holdings.

Lawson v CSX Transp., Inc., 245 F.3d 916 (7th Cir. 2001) sets the standard in this Circuit for

[10](R. 45, Attachment A, Branham dep., p. 162, ll. 3-10).

what a court is to consider when determining if a disability substantially limits one or more of the major life activities. This Court unambiguously stated in *Lawson* that the extent of restrictions imposed upon a person with Type1 diabetes, as well as the consequences of non-compliance with a treatment regimen, are factors to be considered in determining if an individual has a substantial limitation. *Id*. at 924. This Court found that Lawson presented a question of fact for the jury on the issue of whether he had a disability. In doing so, the Court identified the facts surrounding Lawson's Type 1 diabetes and the "severity of the restrictions that he [Lawson] must follow if he is to avoid dire and immediate consequences":

> On a daily basis Mr. Lawson must endure the discomfort of multiple blood tests to monitor his blood glucose levels. He must also adjust his food intake and level of exertion to take into account fluctuations in blood sugar. When his blood sugar drops, he 'must stop all other activities and find the kinds of food that will bring his levels back to normal or he will experience disabling episodes of dizziness, weakness, loss of mentation and concentration, and a deterioration of bodily functions.'...if Mr. Lawson fails to adhere strictly to this demanding regimen, the consequences could be dire: he could experience debilitating, and potentially life-threatening, symptoms. *This evidence is sufficient for a jury to find that Mr. Lawson is substantially limited with respect to the major life activity of eating*. *Lawson, supra* at 924 (additional citations omitted)(emphasis added).

This is precisely what we have here with Gary Branham. Incredibly, the IRS conceded that every single word of *Lawson's* holding applies to Branham. This Court's holding in *Lawson* is exactly what this record presents. The parallels between Mr. Lawson and Mr. Branham are numerous and undeniable. As contained in the summary judgment record, there is undisputed evidence, that upon comparison with Lawson's, clearly shows Branham undergoes the same strict treatment regimen as Lawson.

Branham's regimen not only includes exercise and a strict diet, but also four insulin shots per day and at least four checks of his blood sugar levels per day. He must also adjust his food

intake, and "stop all other activities" if he needs to adjust his blood sugar levels. Even with daily adherence to this regimen, Branham still suffered regular low blood sugar levels that cause detrimental physical responses, including trembling, the sweats and dizziness. If he does not quickly respond to these symptoms, Branham's condition, like Lawson's, can deteriorate rapidly, leading to confusion, disorientation, unconsciousness and even death. This evidence provided by Branham, like Lawson, is also sufficient for a jury to find that Branham is substantially limited with respect to the major life activity of eating and of caring for himself[11]. After all, it is obvious that eating is merely a substrate of caring for one's self.

The IRS, recognizing the precariousness of its position in light of *Lawson*, desperately attempts to dodge the language quoted above. It heaves a "Hail Mary" and argues that Lawson had some long term complications, and serious hypoglycemic episodes while Branham so far, does not. The problem is that the *holding* did not *turn* on this distinction. Nowhere in the language of the *Lawson* holding quoted above is here any mention of actual long-term complications. This Court listed what was enough to create a fact issue, and every single item listed in the *Lawson* holding is present in this case, and more.

Lawson focuses on the substantial limitations that arise from the prescribed treatment and burdensome regimen that Lawson had to follow or die. *Id*. at 925, 927. The trial court in *Lawson* failed to consider the extent of Lawson's restrictions and consequences of noncompliance, and this Court overturned the lower court, emphasizing that such a ruling conflicts with *Bragdon*. *Lawson*

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[11]As noted above, Branham is substantially limited in eating. However, the restrictions on eating are part of an overall regimen that includes balancing medication, food and activity. As such, this is more comprehensively seen as a restriction upon how Branham cares for himself. He simply cannot eat when and what he would like. Nor can he exercise when or how much he wants to.

supra at 924. In this case, the district court made the same mistake. There is clearly a fact issue as to whether Branham is substantially limited in the life activities of eating and caring for one's self. The trial court erred in fixating on Branham's success in keeping his blood sugar level in a safe range and his lack of long-term complications.

C. The lower court misinterpreted the Supreme Court's use of mitigating measures in *Sutton*.

In determining that there was not a fact issue raised and Branham did not have a disability that substantially limited the major life activities of eating and taking care of oneself, the district court incorrectly applied *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). According to *Sutton*, persons are to be evaluated after taking into account corrective or mitigating measures, both positive and *negative*. *Id* at 482. In *Sutton*, the mitigating measure at issue was putting on corrective lenses that completely corrected the vision problem without a single adverse consequence. Such a mitigating measure is in a completely different universe than the insulin Branham uses that itself can cause the most life-threatening complication of diabetes, hypoglycemia. As millions and millions of Americans do each day, the Sutton sisters put on a pair of glasses then forgot about their imperfect vision. Branham cannot forget about his diabetes.

Moreover, the district court misinterpreted the dicta in *Sutton* with regard to diabetes. The Supreme Court warned that "[a] diabetic whose illness does not impair his or her daily activities " should not be considered disabled "simply because he or she has diabetes." We agree. But, as the record in this case makes clear, that is *not* the case here. Gary Branham is a person whose illness constantly impairs his daily activities, because *his* diabetes is the most serious of all.

What the district court ignores, and *Sutton* does not, is that there is a huge spectrum of diabetes and corresponding conditions. These range from an individual with Type 2 diabetes who

only needs to lose a few pounds to correct his or her condition to Gary Branham with an invasive and aggressive condition, Type 1 diabetes. The Court in *Sutton* acknowledges this by stating that each individual, including those with diabetes, is to have an individualized assessment in order to determine the effect the impairment has *on the life of the individual*. *Id*. at 482-483.

There is ample evidence in the record that Branham's Type 1 diabetes substantially impairs the major life activities of eating and taking care of himself, considering the disease, its mitigation and treatment. Not only does Branham have a burdensome treatment regimen, and not only does he face potentially dire consequences every day if he does not strictly follow this regimen (or cannot strictly follow this regimen), but he also suffers from physical symptoms even when he does everything he is supposed to do. (R. 45, Attachment A, Branham dep., p. 162, ll. 3-10). Further, the average person, without his condition, does not face these limitations on day-to-day activities that are faced by Branham.

When viewing *Lawson* and *Sutton* together, Branham is substantially limited in the major life activities of eating and taking care of himself based upon the evidence of the IRS's doctors. At the very least, this issue should go to the jury. After all, whether or not there is a substantial limitation is a fact issue given the weight of the Rule 56 evidence of Branham's strict regimen.

Not only does Branham have a burdensome and strict regimen that impacts his daily life, but he is also still considered, by the IRS, to experience debilitating and high risk complications from his diabetes. Dr. Miller, the doctor who preformed the review for the IRS and medically disqualified Branham, stated that even with the use of *Sutton* mitigating measures, Branham still had "very high levels of blood sugars", "very low levels of blood sugar", and "very significant hypoglycemia." Dr. Miller stated that Branham continued to have his insulin dosage modified and was not stable (R45,

Miller dep., p. 132, ll. 20-24), and that Branham was having low blood sugar levels and not recognizing hypoglycemia. (R.45, Miller dep., p. 153, ll. 2-5). Also, he concluded that Branham exhibited "erratic blood glucose levels...all low enough to cause significant hypoglycemic effects", (R.45, Attachment C-16, p. 1), and stated that all individuals with insulin dependent diabetes mellitus, such as Branham, will experience hypoglycemia at some time, possible on a daily basis. This condition, according to the IRS, causes "alterations in cognitive function including memory performance, reasoning ability, confusion, and concentration... impairs reaction time, causes blurred vision, drowsiness, trembling and shakiness." (R.45, Attachment C-16, p. 4). These are debilitating symptoms that Branham experienced and the IRS believes he will experience "possibly on a daily basis". The IRS further stated that even with insulin treatment, Branham was unlikely to be reliable at all times or be able to respond at all times, and had slow reaction time and critical thinking process. (R.45, Attachment B, Miller dep., p. 203, ll. 15-25, P. 205, ll. 1-5) Dr. Miller also stated that Branham's regimen of diet, exercise and medication still left him at risk of sudden incapacitation. (R.45, Attachment C-10).

Moreover, when directly asked about Branham's limitations, Dr. Miller concedes that Branham's ability to eat and digest food is impaired, that Branham must be more vigilant in taking care of himself, and he must make sacrifices-all in contrast with the life of someone who does not have Type 1 diabetes. (R. 53, Ex.2, Miller dep., p. 112, ll. 11-25, p. 113, ll. 1-22.) Dr. Miller also states that because of his disease, Branham must "take time to eat proper foods at required times, go to a rest room and take insulin at the pre-planned time, exercise at pre-planned times, or compensate by adjusting medication to an expected increase in exercise or stress". (R. 45, Attachment C-41, p. 2).

These conclusions were only reinforced by Dr. Joshua Cohen, another expert witness for the IRS who concluded that Branham's "intensive treatment program" including frequent blood glucose monitoring and multiple daily injections of insulin was associated with an *increased* risk of severe hypoglycemic events. (R.45, Attachment C-45, p.3). Dr. Cohen emphasizes that the record documents indicated "significant" long and short term variations in glycemic control, including episodes of hyperglycemia and hypoglycemia. He explains that these two conditions, which he testified were reflected by Branham's readings, may include mood disturbances, fatigue, blurred vision, impaired complex motor skills, and confusion or impaired cognitive function to seizures, stroke or permanent neurological damage. (R. 45, Attachment C-45, p.4). After reviewing Branham's records, Dr. Cohen states that Branham's records indicate a *worsening* of Branham's glycemic control. (R. 45, Attachment C-45, p.6).

Branham agrees with some of these assessments by the IRS and disagrees with others, but what is beyond question is that this does not leave the court with an uncontroverted factual record on the issue of whether Branham has a disability.

D. The district court erred in concluding that Branham raised no issue of fact as to whether the IRS regarded him as having a disability

In addition to asserting that he has an actual disability protected by the Rehabilitation Act, Branham also argued that the IRS regarded him as having a disability, an alternative means for coverage under the Act. The court below also rejected this claim.

To qualify for coverage under the "regarded as" prong, Branham must show that:

> (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or
>
> (2) a covered entity mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities.

Mack v. Great Dane Trailers, 308 F.3d 776, 780 (7th Cir. 2002).

As was comprehensively summarized above, the view of the IRS, through its medical experts, is that Branham is substantially limited. This limitation, as the IRS saw it, was from the extreme high and low blood sugar levels that the IRS claims that Branham experienced, and will continue to experience, possibly on a daily basis, that prevent him from being able to think and react. The person described by the IRS's experts would be substantially limited in caring for himself.

Despite this, the court below found Miller's testimony did not even raise a fact issue as to whether the IRS regarded Branham as having a disability. The court cited two basic reasons: (1) Dr. Miller did not, in fact, *know* if Branham had experienced debilitating hypoglycemia; (2) Dr. Miller stated that he felt Brahman could medically qualify for another law enforcement position. (R. 68, pp. 22-23).

With regard to the first reason, the issue is not whether or not Branham faced the limitations Dr. Miller asserts, but rather, that this was IRS *assessment* of him -- wrong though it may be. It is an assessment of someone whose diabetes is not in good control, who experiences severe hypoglycemia, and who could not perform any tasks, let alone any job, that required critical thinking and reacting on a daily basis.

The second reason, Dr. Miller's claim that Branham could perform other law enforcement jobs, seems to be the lynchpin of the court's assessment of the "regarded as" claim, having referenced it twice[12]. This bald assertion, however, is nothing but an unsupported declaration of an interested witness, and must be disregarded. Dr. Miller's statement is belied by his dire assessment

[12]The court stated "Even so, it is hard to see how Dr. Miller could believe, on the one hand, that the Plaintiff could medically qualify for another law enforcement position, yet at the same time *also* hold that Plaintiff is substantially limited in the activities of eating and caring for himself." (R. 68, p. 23).

of Branham's diabetes. Saying he *would have* approved Branham for "other" jobs simply does not make it so. Moreover, Dr. Miller admitted that in his numerous years of assessing people with diabetes for law enforcement jobs he had *never* found a single individual with Type 1 diabetes qualified for *any* law enforcement position. (R.53, Miller dep., p. 53, ll. 1-23). Yet this unsupported assertion of an interested witness was enough to defeat a "regarded as" claim in a case where the IRS explicitly failed to hire Branham *because of* its misassessment of his diabetes.

CONCLUSION

Gary Branham is a winner. He is someone who is able to achieve his goals despite a life-altering chronic disease. That is, he was until the IRS prevented him from becoming a Special Agent *solely* because of that disease.

The issue in this case is how do our federal disability laws treat "winners" like Branham? "The key question is not whether a handicapped person accomplishes her goals, but whether [the individual] encounters significant handicap-related obstacles in doing so." *Gillon v. Fallon Ambulance Service, Inc*., 283 F.3d 11, 22 (1st Cir. 2002). Branham encounters significant obstacles and will continue to do so until the day Type 1 diabetes is cured. However, although Branham contends that it is beyond question that he faces such obstacles, for the purposes of the matter before this Court, it need not be beyond question, or even more likely than not, that Branham faces such obstacles. There is ample evidence on the record that Branham encounters these obstacles every day of his life. Because of this, Gary Branham has the right to fully explain his diabetes to a jury unless there is no genuine issue of material fact with regard to whether Branham either has a disability or was regarded by the IRS as having a disability. What exactly are Branham's limitations? How does diabetes affect his life on a constant basis? How did the IRS view his limitations? The record in this

case if rife with contradictory evidence on these questions. Summary judgment should be reversed and the case remanded for a trial on the merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, John Griffin, Jr., the attorney of record in this matter, do hereby certify that this brief complies with the type-volume limitation for briefs established by the Federal Rules of Appellate Procedure and the Rules of the Unites States Court of Appeals for the Seventh Circuit. The word count is 9,284.

____
John Griffin, Jr.

CERTIFICATE OF SERVICE

I, John W. Griffin, Jr., hereby certify that one original and fourteen paper copies along with one electronic copy of the Appellant's Brief were sent this _____ day of March, 2004, via overnight commercial carrier to:

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