IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
and	)	
KEVIN ARMSTRONG,	)	
Intervening Plaintiff	)	
	)	CIVIL ACTION NO.00-2916G/A
NORTHWEST AIRLINES, INC.,	)	
Defendant.	)	

PLAINTIFF EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff Equal Employment Opportunity Commission ("Commission" or "EEOC") submits this memorandum in opposition to Defendant's Motion for Summary Judgment. The Court should deny Defendant's motion because there are genuine issues of material fact that preclude summary judgment, including but not limited to, the following:

1. Kevin Armstrong is a qualified individual with a disability under the Americans with Disabilities Act of 1990 (ADA);

2. Defendant failed to conduct an individualized assessment in violation of the ADA; and

3. Kevin Armstrong's disability does not pose a direct threat to the health or safety of himself or others.

I. SUMMARY OF FACTS

Kevin Armstrong has had insulin-dependent diabetes since he was nine years old. *Exh.1, Medical Records from Dr. Myers.* In order to manage his blood sugar levels, he is required to coordinate his insulin intake, diet and exercise. He must carefully monitor his blood sugar levels to avoid problematic fluctuations. Typically, he takes his blood sugar two to three times a day. *Exh.* 2, *Armstrong*

Dep.153:15-25, 154:1-14. Prior to June 1998, he self administered insulin injections twice a day or more. *Exh.1, Medical Records of Dr. Myers.* After receiving an insulin pump in late June 1998, he began using that device to administer insulin. *Id.*

In May 1998, Armstrong applied for an Equipment Service Employee ("ESE") position (also called a luggage handler) at Northwest Airlines. *Exh.3, Job Description.* At that time, he was working for Air Tran as a ramp agent or luggage handler. Prior to his position at Air Tran, he was employed as a luggage handler at Northwest Airlink, a regional partner with Northwest Airlines. *Exh.* 4, *Employment Application, Exh.* 5, *Northwest Airlines Annual Report.* After Defendant received Armstrong's application, it extended him a conditional job offer. Armstrong was examined at Baptist Minor Medical Center, where he was "[m]edically recommended" for the ESE position. *Exh.6, Baptist Minor Medical Center Records.* He was then scheduled to start his training program. *Exh.* 7, *Williams Letter of May* 9,1998. Meanwhile, Dr. Kevin O'Connell, Defendant's medical contractor at the Minnesota Airport Medical Clinic, requested lab reports from Armstrong regarding his blood sugars over the last three years. *Exh.* 2, *Armstrong Dep..,* 126: 23-25. After Armstrong provided the lab reports, Defendant advised him that, due to certain medical restrictions, he could not start work. *Exh.* 8, *Williams Letter of June* 22. Thereafter, Armstrong filed a charge of discrimination. Following an EEOC investigation and failed conciliation efforts, the Commission filed the instant lawsuit alleging that Defendant violated the ADA when it failed to hire Armstrong because of his disability, insulin dependent-diabetes. **(1)** Armstrong subsequently intervened as a Plaintiff.

II. APPLICABLE LAW

A. Summary Judgment

Summary judgment should be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. A factual dispute is material only if it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). Whether a genuine issue of material fact is presented will be determined by asking if a reasonable jury could return a verdict for the non-moving party. *Id.* When evaluating a motion for summary judgment, the facts are to be construed in a light most favorable to the non-moving party. *Matsushita Electric Industrial Co.* v: *Zenith Radio Corp.,* 475 U. S. 574, 587 (1986). Indeed, the evidence of the non-movant is to be believed and justifiable inferences are to be drawn in his favor. *Kalamazoo River Study Group v. Rockwell International,* 171 F. 3d 1065, 1068 (6th Cir. 1998).

B. Americans With Disabilities Act Standards

The ADA prohibits an employer from discriminating against an employee or applicant based upon his or her disability. 42 U.S.C. § 12112(a) (2000). Disability is defined in the statute as:

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

42 U.S.C. § 12102(2); *See also Sutton v. United Airlines,* 527 U.S. 471 (1999).

The Supreme Court enunciated in *Bragdon v. Abbott,* 524 U.S. 624, 631 (1998) a three-step process for determining whether an individual has "a physical or mental impairment that substantially limits one or more of the major life activities":

> First, we consider whether [the individual's claimed disability] was a physical Impairment **(2)**. Second, we identify the life activity upon which the [individual] relies…and determine whether it constitutes a major life activity under the ADA. Third, tying the two statutory phrases together, we ask whether the impairment substantially limited the major life activity.

The Supreme Court noted that the word "major denotes comparative importance and suggests that the touchstone for determining an activity's inclusion under the statutory rubric is its significance," and further explained that the phrase "major life activities" includes those that "are central to the life process *itself."/d.* at 638. The Supreme Court in *Bragdon* also noted that "the ADA must be construed to be consistent with the regulations issued to implement the Rehabilitation Act." *See* 42 U.S.C. § 12201(a). The Court noted that while the Rehabilitation Act provides a representative list of major life activities to include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working," the list is illustrative, not exhaustive. *Bragdon,* 524 U.S. at 639,118 S.Ct. 2205. *See also* EEOC Regulations, Appendix to Part 1630-lnterpretive Guidance on Title I of the ADA, 29 C.F .R. § 1630.2(i). The ADA regulations also define "major life activities" as those basic activities that the average person in the general population can perform with little or no difficulty. 29 C.F .R. § 1630.2(i).

For a major life activity to be substantially limited "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long-term." *Toyota Motor Manufacturing, Kentucky, Inc.,* v. *Williams,* 122 S. Ct. 681,685 (2002) *See also* 29 C.F.R. § 1630.2(j)(1).

C. Prima Facie Case Under the ADA

In order to establish a *prima facie* case of disability discrimination under the ADA, a plaintiff must demonstrate that: (1) he is an individual with a disability; (2) he is otherwise qualified to perform the job requirements, with or without reasonable accommodation; and (3) he suffered an ~dverse employment action because of his disability. *Holiday* v. *City of Chattanooga,* 206 F.3d 637,642 (6th Cir. 2000). In a direct evidence case, such as this one, the Defendant will then bear the burden of establishing any affirmative defenses. *See Monette* v.

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2. The EEOC Regulations define a physical impairment as any "physiological disorder or condition. ..affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory. ..cardiovascular, ...digestive, genito-urinary, hemic, lymphatic, skin and endocrine. 29 C.F.R. Section 1630.2(h)(1). The Supreme Court has noted the significance of these definitions

Electronic Data Systems Corp, 90 F.3d 1173, 1186 (6th Cir. 1996). **(3)**

III. ARGUMENT

In this case, Defendant maintains that it is entitled to summary judgment, in large part, because Armstrong is not substantially limited in the major life activity of working. However, it should be noted at the outset that the Commission is not advancing an argument that Armstrong is substantially limited in the major life activity of working. Rather, the Commission contends, as outlined below, that Armstrong is substantially limited in the major life activities of eating and self care. In addition, the Commission contends that Defendant regarded Armstrong as substantially limited in several other major life activities.

A. Armstrong's Diabetes is a Physical Impairment

In applying the three step analysis set *forth* by the Supreme Court in *Bragdon*, the Commission asserts that Armstrong's diabetes constitutes a physical impairment under the *ADA.* In *Bragdon,* 524 U.S. at 633, Justice Kennedy, writing *for* the Court, noted that when the Department of Health, Education and Welfare (HEW) issued the first regulations interpreting the Rehabilitation Act in 1977, the commentary contained a representative list of disorders and conditions constituting physical impairments. Included therein was "diabetes." When the responsibility *for* enforcement and implementation of the Rehabilitation Act was transferred to the Attorney General, it retained the representative list of diseases and conditions, including "diabetes" as a physical impairment. In this case, it is undisputed that Armstrong's insulin-dependent diabetes constitutes a physical impairment. (Defendants motion at page 6)

A. Eating and Caring for One's Self Are Major Life Activities

The Commission submits that eating and caring for one's self are major life activities. In the recent case of *Lawson* v. *CSXTransportation, Inc.*, 245 F.3d 916,923 (7th Cir. 2001), the Seventh Circuit held that eating for an insulin dependent diabetic is a major life activity as defined by the ADA. The Court noted that the ability to eat is integral to a person's daily existence, as much as or more so than the activities listed in the implementing regulations. A number of other courts also have held that "eating and carrying for one's self' are major life activities. *Land* v. *Baptist Medical Center,* 164 F.3d 423, 424 (8th Cir. 1999) (holding that eating is a major life activity within the contemplation of the ADA); *Gonsalves v.J:F. Fredericks Tool Co.*, 964 F. Supp. 616, 621 (D. Conn. 1997) (holding that genuine issue of fact created when affidavit and deposition testimony produced evidence that diabetic plaintiff had "difficulty" eating and "dizziness and blurry vision when his blood sugar level became high"); *Amir* v. *St. Louis Univ.,* 184 *F. 3d 1017, 1027 (8th Cir.* 1999) (holding that eating is a major life activity for purposes of ADA coverage). *Erjavac* v. *Holy Family Health* Plus, 13 F. Supp. 2d 737

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3. Under the subsection ll,B(l) of its memo at page 12, Defendant argues that the *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973), burden-shifting analysis applies to this case. However, the Sixth Circuit has held that when, as in this case, there is direct evidence that the employer's decision was based on the employee's disability, the burden-shifting framework is not appropriate because the bases for the employer's decision "sought to be extracted through application of *McDonnell Douglas.* ..is already established." *Monette* v. *Electronic Data Systems Corp.*, 90 F. 3d 1173, 1180-1181 (6th Cir. 1996). Instead, the question is whether the adverse action was based solely on the employee's disability. *Id.* "This question is resolved by answering. ..whether the employee is, otherwise qualified, with or without a reasonable accommodation, to perform the essential functions of the job. *Id. Accord Rizzo* v. *Children's World Learning Centers, Inc.,* 84 F. 3d 758 (5th Cir. 1996)

(N.D. Ill. 1998) (holding that self-treatment for diabetes substantially limits plaintiffs freedom and life as compared to general population). Thus, Armstrong meets the second step as outlined in *Bragdon,* that eating and self care constitute major life activities.

B. Armstrong Is Substantially Limited in the Major Life Activities of Eating and Self Care

The third step in *Bragdon* requires a determination of whether the impairment substantially limits a major life activity. The regulations under the ADA list several factors that should be considered in making the decision of whether an impairment is substantially limiting. These are: the nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long term impact of, or resulting from the impairment. *See* 29 C.P.R. §1630.2(j)(2).

Kevin Armstrong is a Type I, insulin-dependent diabetic. *Exh.* 1, *Medical Records from Dr. Myers.* Evidence produced during discovery establishes that he is substantially limited in the major life activities of eating and caring for himself. Specifically, must contend with significant dietary restrictions, and unlike the average person, he must, on a daily basis, engage in a balancing act between the insulin doses he must administer and the food he eats. He has to consider what he is eating, how much he is going to eat (meal or snack) and whether the food is high in carbohydrates, protein or sugars. *Exh.* 2, *Armstrong Dep.* 162: 1 *0-21.* At one point, Armstrong resorted to actually counting the carbohydrates in each meal, but that proved to be too complicated. *Exh.9, Myers Dep.* 84: 21-25. When Armstrong's blood sugar levels fall, he has to eat something. *Exh.* 2, *Armstrong Dep.* 187:25, 188:1-25. His blood sugar levels can drop simply because he exercises more strenuously or gives himself too much insulin. *[d. 193:10-14.* Conversely, when his blood sugar levels rise, he has to increase insulin intake. *Id. 189:6-14.*

Despite Armstrong's constant dietary vigilance, his hemoglobin A-I C levels have remained elevated above 7.9. **(4)** *Exh.l, Medical Records from Dr. Myers.* According to his treating physician, a board certified endocrinologist, these elevated levels are associated with risks of future complications such as developing kidney failure, diabetic eye problems or foot problems. *Exh.* 9, *Myers Dep. 66:10-18.* After numerous unsuccessful adjustments to dosages of self-administered injections, Armstrong and his doctor, in frustration, turned to the insulin pump. *[d.* 92:5-12, 98:1-12. Even after the insulin pump was installed, Armstrong's blood sugar levels remained high. *[d. 105:* 14-17.

In *Lawson, supra,* John Lawson was a Type I insulin-dependent diabetic. **(5)** He had to adhere to a strict treatment regimen including injecting insulin, following a diet plan, exercising and testing his blood sugar several times a day. Like Armstrong, Lawson had great difficulty regulating his blood sugars and suffered from persistent "elevated A-I C hemoglobin tests." *Lawson* 245 F. 3d at 919. In ruling that a jury question existed regarding Lawson's substantial limitation of the major life activity of eating, the Court of Appeals noted

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4. The Hemoglobin A-I C is a blood test that measures the average level of blood sugars over a two to three month interval. *Exh.l0 Levin Export Report.* According to the American Diabetes Association, hemoglobin A-IC levels between 7 and 7.9 are considered fair. Over 7.9 is considered poor control. *Exh.,* 9, *Myers Dep,* 67:1-12.

5. It is noteworthy that in *Lawson,* as in this case, the employer described the conductor's job (the position Lawson was seeking) as "dangerous and physically demanding" as"[c]onductors work outdoors much of the time, with many distractions, and they perform activities on and around moving equipment." *Lawson,* 245 at 920, n5.

that "[t]he record contains undisputed testimony that, even when taking insulin, 'Mr. Lawson's 'ability to regulate his blood sugar and metabolize food is difficult, erratic, and substantially limited.'" *Id. at* 924.

In support of its claim that Am1strong does not have a substantial limitation of a major life activity because the insulin he takes is a mitigating measure, Defendant relies on dicta in *Sutton* that "[a] diabetic whose illness does not impair his or her daily activities would. ..not be considered disabled simply because he or she has diabetes." *Sutton,* 527 U.S. at 483 (1999). Contrary to Defendant's contention, this quote is not dispositive of this case because as the *Lawson* court explained:

> This statement does not mean, however, that no diabetic can ever be considered disabled under the ADA's meaning. Such an approach would contradict the Court's view that whether a person is disabled under the ADA is an individualized inquiry based on the particular circumstances of each case. See *Id.* Moreover, as we have explained, the particular nature of Mr. Lawson's diabetes, even after treatment, could be said to significantly impair his daily activities, unlike the situation in *Sutton.*

Lawson at 926. The myopic plaintiffs in *Sutton* needed only to wear corrective lenses--a simple and painless treatment--to completely ameliorate their vision impairments. They encountered no disabling symptoms with life-threatening consequences and long term complications.

In this case, there is ample testimony that despite the mitigating measure of the insulin, Armstrong's blood sugar levels have not been controlled. Like Lawson, Armstrong is at risk of long term complications. Armstrong's treating physician, confirmed that his chronic elevated blood sugars place Armstrong at risk for long- term complications of kidney failure, diabetic eye problems and losing a foot. *Exh.9, Myers Dep., 67:10-19.*

In the final analysis, the evidence of Armstrong's treatment regimen, uncontrolled blood sugars and long term complications is sufficient for a jury to find that with respect to the major life activities of eating and self care, Armstrong is "significantly restricted. ..as compared to ... the average person in the general population." See 29 C.F.R. §1630.2(j)(1)(ii).

C. Northwest Airlines Regarded Armstrong as Disabled

In analyzing the "regarded as" prong of the ADA, the Supreme Court explained that there are two ways in which individuals may fall within this statutory definition: (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. In both cases, it is necessary that a covered entity entertain misperceptions about the individual. *Sutton* v. *United Air Lines,* 527 U.S. at 489 (1999).

To be substantially limited in the major life activity of working, an individual must be "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2G)(3)(i); *Murphy* v. *United Parcel Service, Inc.,* 527 U.S. 516 (1999). Here, there is extensive evidence that Defendant regarded Armstrong as substantially limited in the major life activity of working. First, the restrictions placed on

perception that Armstrong was always at risk of sudden incapacitation and altered states of consciousness, would exclude Am1strong, not only from thousands of ESE positions, but from any other positions such as mechanics, customer service agents, cleaner positions, where one has to be conscious to perform the job, operate heavy equipment or drive vehicles. In fact, Mark Williams, Defendant's human resources generalist and Fed. R. Civ. P. 30(b)(6) witness, testified that, when he inquired of a Northwest Airlines manager whether there were any jobs that Armstrong could perform in Memphis, he was told that no jobs were available. *Exh.* 11, *Williams Dep. 170:8-25* 171 :8-25. *See Coleman* v. *Keebler* Co., 997 F. Supp. 1102, 1114 (N.D. Ind. 1998) (genuine issue of material fact existed as to whether employer regarded plaintiff as substantially limited in major life activity of working where employer concluded that plaintiff could not perform any available jobs in production plant). In addition, Am1strong would have been precluded from many of the jobs he has held. He could not have operated the forklift at NexAir (heavy equipment). *Exh.* 2, *Armstrong Dep.* 99:21-25. He also could not have been employed at Firestone or the DeSoto County Sheriffs office, based on Defendant's misperceptions because Am1strong was hired in these last two positions only after his treating physician wrote letters to dispel similar notions. *Exh.12, Dr. Myers Letters of December* 9, *2001, Exh.* 13, *Myers Letter of April* 18, 1999. Clearly there is sufficient evidence to create a jury question on this issue.

Moreover, it is evident that Defendant regarded Am1strong as substantially limited in several other major life activities. Defendant's witnesses have asserted that, not only should Am1strong be restricted from driving, operating heavy equipment and working at heights, but that Am1strong could suffer diabetic episodes causing blurred vision, sudden incapacitation or altered consciousness and other conditions that affect concentration, alertness and coordination. (See Defendant's evidence cited in n B(2) of Defendant's memo at page 13-17). If Armstrong were as incapacitated as Defendant perceived him to be, he would be substantially limited in the major life activities of seeing, walking and speaking. In a recent case involving a plaintiff s ability to remain conscious, the court rejected the Defendant's argument that the plaintiff was merely restricted from climbing ladders, and looked more broadly to the life activities that were actually affected by plaintiffs seizures including speaking, walking and seeing when she lost consciousness due to the seizures. *Otting v.* J:C. *Penney Co.,* 223 F. 3d 704,710 (8th Cir. 2000). *See also, Mattice v. Memorial Hospital of South Bend Inc.,* 249 F. 3d 682,685 (7th Cir. 2001) (holding that anesthesiologist's ADA claim survived motion to dismiss where employer regarded him as having a substantial impairment "in the major life activity of cognitive thinking"). Under the facts presented in this case, a jury could fmd that Defendant regarded Armstrong as substantially limited in the major life activities of seeing, walking and speaking.

D. Armstrong Is Qualified to Perform the Essential Functions of the ESE Position

Mark Williams, Defendant's designated Fed. R. Civ. P. 30 (b) (6) witness, testified that starting ESE's, such as Armstrong, are placed in the Ramp or Unit Operation function. *Exh.* 11, *Williams Dep.47:* 1-25.481-25, 491-25, *50:* 1-7. Williams further testified that the Ramp or Unit Operation job description is correctly set out in the document entitled Northwest Airlines Equipment Service Job Descriptions and Medical Recommendations. *Id., Exh.* 14, *Northwest Airlines Equipment Service Job Descriptions and Medical*

Unit personnel are responsible for loading and unloading planes. Employees with less seniority tend to work on narrow body (727, DC-9) planes. Here they load and unload approximately nine flights per day. This can vary between seven to 12 flights per day. Each flight is allowed up to 40 minutes on the ground. People with more seniority typically work wide body planes (747, DC-10).

In either type of plane, workers are assembled in crews of five-seven people. Crews are responsible for three gates each. The primary jobs within the crew are to: 1) work directly at unloading the bins; 2) work on the conveyer loader transferring bags to carts; or 3) drive tugs. In larger planes, there is also paperwork performed. These separate jobs will be rotated within a team.

The process of preparing for the arrival of a plane includes making up trains of empty containers to receive the baggage, with three-five carts forming a train. The carts or dollies are moved by hand and require pushing and pulling forces of 40-60 pounds or up to 120 pounds of force, depending on the surface.

As the plane arrives, an ESE directs the plane to the loading gate. After this is done, chocks are placed at the wheels. In narrow body planes, the loader is driven to the bin, the door opened by manual hydraulics and one-two workers enter the bin to remove the baggage. The bin in a 757 is 45 to 54 inches high*, in a 727 approximately 39 inches. The worker typically works on their knees or in a bent position pushing and pulling bags to the lip of the bin, where they are either pushed or lifted onto the lip of the loader. The conveyer belt loader lowers the bags to ground level at 36 inches. At this point, the bag is either lifted by the sides with both hands or by the handle. The bag may be set on the ground or put in a cart. The carts are ten feet long, four-five feet deep and 3.5-four feet high. They are 27 inches off the ground. The cart trains are driven by either transfer drivers or unit people.

Exh. 14, *Northwest Airlines Equipment Service Job Descriptions and Medical Recommendations,* p.4.

A review of Armstrong's undisputed testimony establishes that his jobs at Northwest Airlink and Air Tran were, indeed, very similar to the ESE position he was seeking at Northwest Airlines. Armstrong testified that at Northwest Airlink, his job duties included loading and unloading airplanes, transferring luggage from one airplane to another and parking airplanes. *Exh.* 2, *Armstrong Dep.*, 22:3-6. When the planes came in, he had to go into the tail of the planes (7 or 8 feet off the ground) where the luggage was stored and hand the baggage down to another person who stacked the luggage on a cart. *[d.* 23: 18-25, 24:1-3. The equipment he used included belt loaders, tugs and baggage carts (the same equipment used by ESEs). *[d.* 25:9-14. He also had to park the airplanes by waiving the planes into the parking spots and back out. *[d.* 26: *18-20.*

At Air Tran, Armstrong worked on 737s, 7l7s and DC-9s (new ESE's worked on727s and DC-9s). *[d.* 32:15-22. He also operated push-backs, belt loaders, tows and bobtail trucks (similar to ESEs). *[d.* 36:5-8. Armstrong described a push-back as heavy equipment that pushes the planes out. *[d. 35:10-16.* Armstrong also serviced the planes using an APU, which starts the plane's engine by blowing air through the engine. *[d.* 36:11-17. This APU equipment had to be physically hooked to a tug and pulled close to the airplane. *[d.* 36:22-25. Further, Armstrong testified that sometimes he had to work with just one other person, loading and unloading six planes a night (ESE crews operated with 5 to 7 people). *Id., 69:17-20.* Most important, during the entire time Armstrong worked at Northwest Airlink and Air Tran, he was never involved in an on-the-job accident and he only missed one day of work related to his diabetes when his insulin pump fell out of his leg, during the night, and he took the next day off. *Id.* 27:25, 28: 1-4, *38:23-25,39:1,12-20.*

E. There Is Sufficient Evidence for Armstrong to Establish a Prima Facie Case

As outlined above, sufficient evidence has been presented, in this case, through documents, depositions and discovery responses to support a *prima facie* case of disability discrimination. The evidence demonstrates that: (1) Armstrong has an impairment, insulin-dependent diabetes, that substantially limits his major life activities of eating and self care; (2) Defendant regarded him as substantially

the ESE position. Finally, as discussed below, Defendant cannot support its burden of showing that Armstrong poses a direct threat to himself or others.

F. Defendant Cannot Support Its Burden of Proving that Armstrong is a Direct Threat to Himself or Others.

Defendant asserts that Armstrong's offer of employment was revoked because he posed a direct threat to the health or safety of himself and others due to the poor control of his blood sugar levels. **(6)** The EEOC Interpretive Guidance provides the analytical framework for the direct threat defense, placing the burden on the employer to show "significant risk of substantial harm to the health or safety of the individual or others. ..." 29 C.F.R. § 1630.2(r). *See also Hamlin* v. *Charter Tp. of Flint* 165 F. 3d 426 (6th Cir. 1999). The Interpretive Guidance further provides that the determination of whether an individual poses a significant risk of substantial harm must be made on a case by case basis. The employer should identify the specific risk posed by the individual For employees with physical disabilities, the employer should identify that aspect of the disability that would pose the direct threat. Thereafter, the employer should consider the following factors: (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. *Id; Hamlin at* 432. In considering the above factors, the employer must rely on objective factual evidence--not subjective perceptions, patronizing attitudes or stereotypes about the nature of the disability. *See Bragdon* v. *Abbott*, 524 U.S. at 626-627 (risk assessment must be based on objective evidence, not simply a good-faith belief that a significant risk exist).

Specifically, the determination must "be based on an individualized assessment of the individual's present ability to perform the essential functions of the job" which must be founded on "a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence." 29 C.F.R. § 1630.2(r). Such evidence includes input from the disabled individual, the experience of the disabled individual in previous jobs, and documentation from medical doctors or other health care professionals "who have expertise in the disability involved and/or direct knowledge of the individual with the disability." *[d.* and Appendix.

1. Defendant Failed to Conduct an Individualized Assessment

A review of the evidence shows that Defendant failed to conduct the individualized assessment mandated by the ADA. The case of *Holiday* v. *City of Chattanooga,* 206 F. 3d 637 (6th Cir. 2000) is instructive on this issue. In that failure to hire case, the City contracted with an outside health care provider to perform post offer physical examinations. *[d. at 640.* Dr. Steve Dowlen, M.D., the City's contract.physician, conducted a pre-employment physical exam of Holiday and then completed a medical report. *Id. at* 641.

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6 Defendant contends, in part II B of its memo at pp. 12-22, that Armstrong failed to support his burden that he did not pose a direct threat to the himself or his co-workers. This argument is a misapplication of the direct threat burden of proof. Contrary to Defendant's assertion, the direct threat is not part of the burden-shifting analysis. Instead, the direct threat defense is an affirmative defense that must be proved by the Defendant. Several circuits, including the Sixth Circuit, have referred to the defense of direct threat and expressly stated that the burden of proof lies with the employer. *See Hamlin* v. *Charter Township of Flint,* 165 F. 3d 426,431 (6th Cir. 1999) (as a defense, defendant argued that plaintiff posed a direct threat);

Nunes v. *Wal-Mart Stores, Inc.,* 164 F. 3d 1243, 1247 (9th Cir. 1999) (holding that because direct threat is an affirmative defense, defendant bears the burden of proof); *Rizzo* v. *Children's World Learning Centers, Inc,* 213 F. 3d 209,213 (5th Cir. 2000) *cert. denied,* 531 U.S. 958 (2000)(en banc) (holding that the district court under plain error standard did not commit error by instructing jury that defendant had the burden of proving plaintiff was a direct threat). *But see EEOC* v. *Amego, Inc.,* 110 F. 3d 135, 144 (1 st Cir. 1996) (burden of proof on plaintiff in some cases); *Moses* v. *American Nonwovens, Inc.,* 97 F. 3d 446,447 (11th Cir. 1996) (employee retains burden

Shortly thereafter, he reported to the City that "Holiday was physically unable to perform the duties of a police officer." *[d.* The City decided not to employ Holiday. The Sixth Circuit held that the trial court erred in accepting the physician's report as dispositive evidence of Holiday's inability to work as a police officer where the physician had failed to conduct the individualized inquiry mandated by the ADA and Holiday raised sufficient facts to show he was qualified to perform the position. In ruling that Holiday raised a genuine issue of material fact as to whether an individualized inquiry was conducted, the Court stated that:

> The district court thus erred in holding that the City had the right to rely on Dr. Dowlen's unsubstantiated and cursory medical opinion, and in treating the physician's opinion as having settled the question of whether Holiday was qualified for the job. Employers do not escape their legal obligations under the ADA by contracting out certain hiring and personnel functions to third parties. *Id.* at 645.

Further, the Court held that it was an important factor that Holiday had served as a police officer for another employer, where he "had performed the very functions that Dr. Dowlen deemed him unable to perform." *[d.* The "fact that an ADA plaintiff currently holds a position similar to the one from which he was previously terminated constitutes sufficient evidence to create a factual question as to whether the plaintiff was qualified to perform the essential functions of the job." *Holiday,* 206 F.2d at 644,645, quoting *Gilday* v. *Mecosta County,* 124 F.3d 760,765-66 (6th Cir. 1997).

Under the rational of *Holiday,* Defendant did not perform an examination that amounts to an individualized assessment. Dr. O'Connell never examined Kevin Armstrong and only reviewed blood levels from a total of five lab reports, before placing the restrictions on Armstrong. *Exh.* 15, 0 *'Connell Dep.* 48:21-25, 49:6-14, *Exh.* 16, Lab Reports. During his deposition, Dr. O'Connell admitted that he neither obtained a complete set of Armstrong's medical records nor contacted Armstrong's treating physician at the time he placed the restrictions on Armstrong. *Exh.* 15, *O'Connell Dep.131* :23-25, 132:1-8.

Dr. O'Connell's testimony establishes that, like the doctor in *Holiday,* he did not have any evidence that Armstrong had actually ever experienced sudden incapacitation or loss of consciousness. Indeed, Dr. O'Connell acknowledged that there was nothing in Armstrong's medical records that indicated that Armstrong had ever experienced sudden incapacitation or altered states of consciousness. *Id. 107:1-7.* Although Dr. O'Connell based his restrictions on the assumption that Armstrong would experience such episodes, he never bothered to ask Armstrong about any diabetes-related symptoms. *Id. 130:4-9.* Moreover, despite the fact that Dr. O'Connell knew that Armstrong had been employed in similar jobs as a luggage handler (including Northwest Airlink, one of Defendant's regional partners), he failed to seek any information about how Armstrong performed on those jobs. *Id.* 131:15-25, 131:1-2. This oversight is critical because, as noted in *Holiday,* a person's performance in a similar job is an important factor to be considered in conducting an individualized assessment. *Holiday* at 644, Finally, Dr. O'Connell conceded that he did not consult an endocrinologist even though he does not treat diabetic patients and had not taken recent course work on diabetes. *Id.* 55:1-15, 83: 13-15. What is particularly noteworthy, here, is that the physician who actually examined Armstrong during his Northwest Airlines pre-placement physical at the Baptist Minor Medical , facility in Memphis, recommended Armstrong for the position. *Exh.* 6, *Baptist Minor Medical Records.* Armstrong's treating physician also believes he could perform the essential job duties. *Exh.* 9, *Myers Dep. 158:10-19.*

Even more troubling is the evidence that Dr. O'Connell, after a cursory review of a few lab reports, simply applied the standard medical restrictions that the Airport Medical Clinic imposes on applicants who are insulin-dependent diabetics. During deposition testimony, Dr. David Zanick, Defendant's expert witness and medical consultant at the Airport Medical Clinic, testified that the standard restrictions listed on the Northwest Airlines Result Form correspond to a list of restrictions prepared by the Airport Medical Clinic several years ago. *Exh.* 17, *Zanick Dep.* 41:1-25, 42:1-25, 43:1-25., *Exh.* 18, *Northwest Airlines Results Form,. Exh. 19,Restriction Script.* Although Dr. Zanick indicated that the doctors no longer refer to the list, he acknowledged that "I think if you take a poll of any of the physicians at this clinic, we'd probably all use similar language under similar circumstances." *Id.* 41:15-19. These same standard restrictions were used in rejecting Armstrong. Although Dr. O'Connell didn't refer to "number 18, insulin-dependent diabetes" on the list, he wrote the standard restrictions outline in number 18: (1) No working at unprotected heights above 5 feet and (2) No driving/operating vehicles and/or heavy equipment. *Exh.* 19, *Restriction Script.* An indication that insulin-dependent diabetics are routinely rejected is Dr. O'Connell's testimony that he had not personally approved any insulin-dependent diabetic for employment as an ESE at Northwest Airlines. *Exh.* 15, *0 'Connell Dep. 147:5-10.* Also, in response to interrogatories, Defendant acknowledged that it is not aware of any diabetics hired as ESEs. *Exh. 20, Defendant's Supplemental Response to EEOC's Interrogatories.*

It is clear from the evidence, presented in this case, that Dr. O'Connell did not conduct an individualized assessment of Armstrong's ability to safely perform the essential functions of the job, as required by 29 C.F.R. § 1630.2(r).**(7)** An individualized assessment of the effect of an , impairment is particularly necessary when the impairment is one whose symptoms vary widely from person to person." *Toyota,* 122 S. Ct. at 685.

2. Armstrong Did Not Pose a Direct Threat to Himself or Others

Despite Defendant's dire predictions that, if hired, Armstrong would injure other workers and passengers, it has no evidence to support its assertion that Armstrong posed such a direct threat.**(8)** Dr. Myers, Armstrong's treating physician and a board certified endocrinologist, testified that as long as Armstrong checks his blood sugar and has access to food he could do the job. *Exh.* 9, *Myers Dep.*, 159:11-17. She explained that the references to poor control in Armstrong's medical records --that were so heavily relied on by Dr. O'Connell in reaching the conclusion that Armstrong was at risk of sudden incapacitation or altered consciousness-- would actually be more likely to prevent Armstrong from such hypoglycemia episodes. During her deposition, Dr. Myers testified as follows:

> Q. Let me understand. If some doctor was asked to review the records, just the written --your written records, it would not be it would be fair for them to conclude that he had poor control?

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7 Defendant may argue that, to the extent that Defendant employed a general safety standard, in this case, it only must show a business necessity and job-relatedness. See *EEOC v. Exxon Corp.*, 203 F. 3d 871, 873-874. As with a direct threat defense, however,the Defendant must show that "the risks are real and not a product of stereotypical assumptions." *Id.* at 875. Defendant has failed to meet that burden.

8 Defendant cites to Kevin Frommelt's investigation of an incident were two people were killed when an employee driving a cargo van passed out do to a medical condition. When questioned about the incident, however, Frommelt admitted he wasn't sure about the employee's medical condition. *Exh.* 21, *Frommelt* 46: 1-25,48: 1-25, 49:1-25. Frommelt also stated that the person was driving a cargo van and was coming from off-site. *Id.* This situation would be very different from an employee driving the vehicles typically used by ESEs because as Frommelt acknowledged, vehicles used on the tarmac have governors, which prevent them from

A. Well, he does have poor control.

Q. And it would be also fair for that doctor, medically for that doctor to draw conclusions from that, from your medical records?

A. Well, let me clarify something. It depends what your --what it is that you are trying to prevent by looking at his blood sugars. Are you worried that he is going to have a severe hypoglycemic reaction resulting in his crashing this little car into the airplane? Then you are worried about the possibility of severe low blood sugars resulting in loss of consciousness. Let's say that is what you are worried about. He hasn't had any of that.

Exh. 9, *Myers Dep.* 15612-25, 157:1-2

Further, Dr. Myers specifically disagreed with the conclusion of Dr. Garber, the expert witness hired by Defendant to support Dr. O'Connell's conclusion that Armstrong could not perform the essential functions of the job.

Q. Did you tell them that you disagreed with Doctor Garber's conclusions?

A. I told them that he looks worse on paper than he really is, if you see him. And that -

Q. That is not my question. My question is, did you tell Ms. Smith and Mr. Wyatt when you met with them that you disagreed with the conclusions that Doctor Garber had reached?

A. Yes.

Id.,158:10-19

Q. Is there anything else that you told Mr. Wyatt and Ms. Smith concerning Doctor Garber's letter?

A. I told them one more thing. And that is that the higher your average blood sugar is, the less likely you are to have hypoglycemia. And that was just something else I told them. His hemoglobin Alc [sic] had been running higher, which actually is in some way a benefit for him to not have as many lows.

Id.,160:6-13

In essence, Dr. Myers' testimony establishes that Dr. O'Connell misinterpreted the references to poor control in the lab reports he reviewed. While the fact that Armstrong's inability to bring down his blood sugar levels will ultimately result in long-term complications, the elevated blood sugar levels actually protect Armstrong from the hypoglycemic episodes that would cause sudden incapacitation or altered consciousness. **(9)** Dr. Myers indicated that she could have talked to someone at Northwest Airlines about this if someone had just called her. *Id. 168: 14-19. In fact, on two other occasions, Dr. Myers has written letters to prospective employers regarding Armstrong's*

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9 Dr. Levin, the Commission's expert witness, concurred that when the hemoglobin A-ICs are running moderately high, the "chances of getting hypoglycemia are or are small." *Exh.* 33, *Levin Dep.* 83:3-7.

condition. On both occasions, Dr. Myers advised the employers that Armstrong could do the respective jobs and Armstrong was hired for both positions. Exh. 12, *Myers Letter of December* 9, *2001, Exh.13, Myers Letter of April* 18, 1999.

Furthermore, Armstrong, the person in the best position to know his symptoms, testified that he has never experienced blurred vision or loss of consciousness. *Exh.* 2, *Armstrong Dep.*, 187:6-17. He testified that the only symptoms he experiences from low blood sugar are that his body feels "almost weaker" and a slight trembling, but nothing other than that. *Id.* 159:1-11. In explaining these minor symptoms, Dr. Myers testified that shaking hands and weakness, resulting from low blood sugars, lasts a few minutes and as soon as carbohydrates are eaten, blood sugar start rising immediately. *Exh.* 9, *Myers Dep.*, 77:3-15. Armstrong testified that he always carries little pieces of hard candy and eating just one piece of peppermint would be enough to raise his blood sugar within five minutes. *Exh.* 2, *Armstrong Dep.*, 188:7-25, 189:1-5. Armstrong also testified that he has not experienced significant fluctuations at work that would cause him to have to stop and take care of it. *Id. 190:3-25,* 191:1-12. In fact, Armstrong only missed one day of work, because of his diabetes, when his insulin pump fell out of his leg, during the night while he was sleeping, causing his blood sugar to rise. *Id.* 39: *12-20.* To the extent that Armstrong experienced any significant low blood sugars, they occurred either during the night or in the morning when he was just waking up. *Exh.* 1, *Medical Records of Dr. Myers.* Finally, as discussed in more detail above (See at 1lI. D, supra), Armstrong worked a similar job for two years without incident. *Exh.* 2, *Armstrong, Dep.* 38:23-25, 39:1, *12-20.*

In its memo, Defendant attempts to support its direct treat argument with a number of factual statements that are either taken out of context or complete misstatements of the record. On page 15 of the memo, Defendant states that Armstrong did not properly manage his diabetes because he often failed to follow his doctor's instructions, missed appointments, failed to keep records, and ate at irregular intervals. With regard to following directions, Dr. Myers stated that it is not uncommon for her patients to change their insulin dosage and she gives her patients leeway to make adjustments to her instructions. *Exh.* 9, *Myers Dep., 70:1-25,* 71:1. She also testified that Armstrong was taking his blood sugars, he just didn't always keep the records, and that it is common for patients to take their blood sugars and make their decisions, but not write them down. *Id.*, 79:17-25. As to missing appointments, the evidence shows that Armstrong changed jobs on several occasions which affected his insurance and disrupted appointments. For example, when asked about scheduled appointments in 2001, he stated that he had to wait until his insurance coverage became effective because the visits costs $600. *Exh. Armstrong Dep.*, 182: 14-24. As to the statement that Armstrong's blood sugar variations were triggered by his exercise and irregular eating, Dr. Myers testified that when Armstrong had an erratic eating and exercise schedule, she simply changed his insulin "so it would more fit into his life rather than trying to fit his eating schedule into his insulin." *Exh.* 9, *Myers Dep.*, 72:22-25, 73:1-3. Dr. Myers also testified that eating at regular times is not as important because she changed Armstrong to humalog and later the insulin pump. *Id.* 113:18-23. Further, Dr. Levin, in his expert report, addressed how an irregular schedule can be easily managed:

> The patient whose job requires significant physical activity is instructed to check the blood sugar at appropriate intervals and adjust the food intake and insulin dosage accordingly, thus preventing hypoglycemia. Because the measurement of blood sugar takes only a few seconds to do, it does not interfere with the patient's work schedule

Exh. 10, Expert Report of Dr. Levin.

On page 18 of its memo, Defendant states that Armstrong "had actually experienced diabetic episodes involving muscle cramps, tiredness, general weakness, and trembling" ...and that he did not report these "episodes to his employer." **(10)** Here, Defendant has embellished Armstrong's testimony to suit its purposes. As noted above, Armstrong testified that he had one incident with muscle cramps which occurred when his insulin pump fell out of his leg while he was asleep. *Exh. 2,ArmstrongDep.,* 39: *12-20.* This one-time event did not occur at work, as Defendant implies. *Id.* 189:7-25, *190:1-2.* Further, the symptoms of "weakness" and "trembling" were characterized by Dr. Myers as very minor and resolved "immediately" with carbohydrate intake. *Exh.9, Myers Dep.,* 77:3-25, 78:1-3.

Finally, Defendant states at page 18, that Debbie Lemkhule Armstrong's mother, confirmed the disorientation. Here again, Defendant has taken this testimony out of context. When asked to describe periods of disorientation, Lemkhule testified that disorientation occurred when Armstrong had a hard time waking up and sometimes he wasn't aware of his need to eat, but "[t]here was never an issue of he didn't know who we were or didn't know where he was or any of that with the blood sugar episodes." *Exh.* 23, *Lemkhu/e Dep.* 69:1-7. Lemkhule further indicated that the incidents only occurred three or four times in a year. *Id.* 65:8-13.

Defendant cites *Hutton* v. *Elf Atochem N Am., Inc.,* 273 F. 3d 884 (9th Cir. 2001), for the proposition that Armstrong should be disqualified because of his diabetes. However, in *Hutton,* the Court granted summary judgment for Defendant based on facts very dissimilar to this case. First, Hutton had numerous on-the-job episodes of altered states of consciousness. On one occasion, Hutton went into insulin shock. Another time, Hutton had a seizure and lost consciousness completely. Medical attention was required both times. *Id. at* 886, 887. Then, after Hutton had another episode, but before a decision to take further action, the employer conducted an individualized assessment. The company doctor reviewed Hutton's medical records, consulted with Hutton's treating physician and retained a neutral endocrinologist to examine Hutton. In granting summary judgment, the Court noted the importance of the individualized assessment which focused on specific facts including Hutton's somewhat erratic medical history and the unpredictability of Hutton's condition. *Id. at* 894, 895. In the case at bar, Armstrong has exhibited none of the symptoms of sudden incapacitation or altered states of consciousness and ~ had any incidents while performing his job as a baggage handler at Northwest Airlink or Air Tran. *Exh.* 2, *Armstrong Dep.27:25,* 28:1-4, 38:23-25, *39:1,12-20.* Defendant also cites *Wallin* v. *Minnesota Dept. of Corrections,* 153 F. 3d 681 (8th Cir. 1998). That case is completely inapplicable. There, the Court determined that there was no inference of disability discrimination and that Wallin was terminated because of his egregious misconduct.

Clearly, Defendant's defense of direct threat, which encompasses the individualized assessment, is rife with disputed issues of material fact. As the Court in *Rizzo* v. *Children's World Learning Centers, Inc.,* 213 F. 3d 209,211 (5th Cir.), *cert. denied,* 531 U.S. 958 (2000), aptly observed, "[w]hether one is a direct threat to the safety of herself or others is a complicated, fact intensive determination, not a question of law." As such, Defendant's request for summary judgment on the issue of direct threat must be denied.

G. Northwest's Argument That Armstrong's ADA Claim Is Barred Because He Failed to Engage in the Interactive Process Is Irrelevant and Not Supported by the Evidence

Under subheading II C of its memo at p. 25, Defendant advances the argument that when a plaintiff refuses to participate in the interactive process, he is precluded from ADA protections. This assertion is an inaccurate statement of the law because the interactive process is not germane to all ADA cases. The interactive process is only triggered when the employee requests a reasonable accommodation. *See Bennettv.* u: S. *Air, Inc.,* 228 F. 3d 1105, (9th Cir. 2000), *cert. granted in part on other issues,* -U.S.-,121 S. Ct. 1600 (April 16, 2001) (interactive process triggered when employee gives notice of disability and desire for accommodation). In essence, an employee's refusal to engage in the interactive process is only relevant to a claim that the employer violated the ADA by refusing to provide a reasonable accommodation. *Beck v University of Wisconsin Bd. Of Regents,* 75 F. ed 1130 (7th Cir. 1996) (summary judgment granted where issue on appeal was Defendant's alleged failure to provide reasonable accommodations within the meaning of the ADA). A review of the cases cited by Defendant, underscores this point because, in each case, the issue of participation in the interactive process is addressed solely within the context of the employee's claim that the employer failed to provide a reasonable accommodation. **(11)** In this case, the issue of failure to provide a reasonable accommodation is not before the Court. Armstrong has never requested a reasonable accommodation and neither the Commission nor Armstrong have raised failure to accommodate as an issue in this lawsuit. Notwithstanding the fact that a request for accommodation is not before this Court, the evidence belies Defendant's argument that Armstrong failed to cooperate. First, Armstrong had already cooperated with Defendant by obtaining the lab reports requested by for Dr. O'Connell. *Exh.2, Armstrong Dep.* 129:1-25, *130:1-2.* Then, when Williams, the human resources generalist, invited Armstrong to participate in the accommodation process, Armstrong replied that he didn't need an accommodation, but requested that Williams respond to the letter so that they could address the matter further. *Exh.* 8, *Williams Letter of June* 22, 1998, *Exh.* 24, *Armstrong Letter of July* 2, 1998. Williams admitted, during his testimony, that he never responded to Armstrong's letter. *Exh.* 11, *Williams Dep.120:7-19.* Williams further conceded that Armstrong never told Williams that he was refusing to participate in the interactive process. *ld.* 132:24-25, 24: 1-8. Finally, Williams also acknowledged that he had no authority to override the restrictions placed on Armstrong and, based on the restrictions, there were no accommodations available. *ld.* 122:1-25,124:1-25, 125:1-25,126:22-25. Karen Moore, Defendant's accommodations manager and designated Rule30(b)(6) witness, also testified that there were no accommodations available based on the restrictions placed on Armstrong. *Exh.25, Moore Dep. 40:1-25,* 41:1-25, 42:1-25, 43:1-3. Thus, in reality, there was never a genuine opportunity to engage in an interactive process because the letter inviting Armstrong to request a reasonable accommodation was meaningless.

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11. See, for example, *Kennedy v. Superior Printing Co.* 215 F. 3d 650 (6th Cir. 2000) (issue before the court was plaintiffs claim that employer failed to provide reasonable accommodation); *Taylor v. Principal Fin. Group, Inc.,* 93 F. 3d 155, 165 (5th Cir) , *cert. denied,* 519 U.S. 1029 (1996) (holding that employee could not establish failure to accommodate claim where he failed to request accommodation); *Louselged v. Akzo Nobel Inc.,* 178 F. 3d 731 (5th Cir. 1999) (holding that plaintiff claimed that defendant failed to provide reasonable accommodation after back surgery); *Umble v. Arrowhead Community Hosp. & Medical Center,* WL 427276

H. Federal Aviation Administration Regulations (FAA) Do Not Exclude Armstrong from the ESE Position

Defendant argues that 49 U.S.C. § 44701 (d)(l)(A) requires airlines to perform their services, with the "highest possible degree of safety." Based on this regulation, Defendant contends that Armstrong was not able to perform the essential functions of the ESE position "with the highest possible degree of safety at all times."

Contrary to Defendant's assertion, there is no provision in the FAA regulation that necessitates the rejection of Armstrong for the ESE position. Under 29 C.F.R.§ 1630.15(e), an employer may assert a "defense to a charge of discrimination under [the] ADA that a challenged action is required or necessitated by another federal law or regulation. ..." However, in order to invoke 29 C.F .R. § 1630.15(e), the employer must show that its action was "required" or "necessitated" by another federal regulation. Defendant can point to no regulatory provision that required it to reject Armstrong. Indeed, Kevin Frommelt, Defendant's manager of safety and regulatory compliance, testified during his deposition that there was no federal regulation applicable to insulin-dependent diabetics in the ESE positions. Further, despite Defendant's claim that safety was a crucial factor in the decision to reject Armstrong, Dr. Zanick, Defendant's medical consultant, conceded that safety policies vary from airline to airline and Defendant doesn't concern itself with the safety policies of any of its 15 or so partner airlines. Exh. 17, Zanick Dep. 60:9-25, 61:1-25, 62:1-25. Defendant also does not screen current employees to determine if they have become insulin dependent-diabetics. Id. 62:17-25, 63:1-8

Further, Supreme Court precedents render Northwest Airlines' argument unavailable as a matter of law. In *Western Airlines* v. *Criswell,* 472 *U.* S. 400 (1985), the Supreme Court rejected an airline's attempt to bar an age discrimination action challenging its policy of prohibiting pilots from serving as flight engineers after age 60. The airline contended that it adopted the policy in light of the FAA's mandate that it operate for the safety of the public. The Court refused to give conclusive weight to the FAA regulations, and held that "[e]ven in cases involving public safety, the ADEA plainly does not permit the trier of fact to give complete deference to the employer's decision." *Id.* at 423. This Court should reject Defendant's defense that the FAA regulations somehow allowed it to preclude Armstrong from the job because he purportedly cannot meet the "highest possible degree of safety" because there is no basis for this argument in FAA regulations. Further, such a defense nullifies the ADA's direct threat defense which requires an employer to show that the person excluded based on safety-based qualification standard presented a "significant risk" of substantial harm to the health or safety of the individual or others. 24 *U.S.C.* § 12113(b); 29 C.F.R. §1603.2(b). .s..e..e. *Western Airlines,* 472 *U.S.* at 418 (relevance of federal standards depended on safety rationale behind standard and congruity of the positions).

IV. CONCLUSION

Because Armstrong has presented sufficient evidence for a jury to find that he has an ADA covered disability, and that Defendant refused to hire him because of his disability in violation of the ADA, the EEOC urges this Court to deny Defendant's summary judgment motion.

Respectfully Submitted,

NICHOLAS M. INZEO
Acting Deputy General Counsel

GWEDNDOLYN REAMS
Associate General Counsel

TERRY BECK
Supervisory Trial Attorney
BPR # 9346

DEIDRE SMITH
Trial Attorney
BPR #018499

EQUAL EMPLOYMEN OPPURTUNITY COMMISSION
1407 Union Avenue, Suite 621
Memphis, Tennessee 38104
(901) 544-0140

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Plaintiff Equal Employment Opportunity Commission's Memorandum in Opposition to Defendant's Motion for Summary Judgment was mailed this date via U.S. Mail to the following counsel of record.

Herbert Gerson, Esq.
Timothy Bland, Esq.
Ford and Harrison, LLP
6750 Poplar Avenue, Suite 600
Memphis, TN 38187 -1375

Joe Lee Wyatt, Esq.
McWhirter & Wyatt
Union Commons
73 Union Ave.
Memphis, TN 38103

Date

Deidre Smith