Diabetes Discrimination and the Department of Defense

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I. INTRODUCTION

The purpose of this memo is to answer two questions: Are civilian positions in the Department of Defense protected from disability discrimination, i.e., can there be a blanket diabetes ban? What is the legal basis for the diabetes ban in military positions?

The Department of Defense (DoD) employs both civilians and military personnel and is one of the largest employers in the United States. In order to determine what the legal rights of employees and applicants with diabetes are in DoD, it is necessary to determine whether discrimination on the basis of disability is permitted in the DoD and whether there are medical qualifications that may screen out people with diabetes. Caselaw, federal statutes, federal regulations, DoD directives, DoD instructions, and the various military departments' regulations show that the Rehabilitation Act protects civilian DoD employees from disability discrimination, but that the Rehabilitation Act does not apply to the military. Section II of this memo discusses the Rehabilitation Act and DoD implementing regulations applicable to civilian DoD positions and how this applies to people with diabetes. Section III discusses the exception to the Rehabilitation

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Act in the military, and describes various military medical requirements and how they apply to people with diabetes. People with diabetes may be qualified for civilian positions within the DoD, and are protected from blanket diabetes bans, but people with diabetes are subject to various discriminatory medical standards and blanket bans disqualifying them from military positions within the DoD.

II. CIVILIAN POSITIONS WITHIN THE DOD ARE COVERED BY THE REHABILITATION ACT

The various DoD branches and offices and any program funded by the DoD may not discriminate on the basis of disability in civilian employment. The Rehabilitation Act, Equal Employment Opportunity Commission guidance, and DoD regulations require DoD to adopt a policy of non-discrimination on the basis of disability that applies to all civilian employees and applicants within the DoD, as well as all civilian employees and applicants within entities receiving DoD funding, worldwide.

Discrimination in DoD civilian positions is governed by the Rehabilitation Act of 1973 which generally applies the same standards for employment as the Americans with Disabilities Act. 29 U.S.C. § 701 (2008). Section 504 of the Rehabilitation Act forbids disability discrimination in programs or activities receiving federal financial assistance. 29 U.S.C. § 794(a) (2008). Federal regulations specifically apply the Rehabilitation Act to military departments. 29 C.F.R. 1614.101(a) (“It is the policy of the Government of the United States to provide equal opportunity in employment for all persons, to prohibit

discrimination in employment because of race, color, religion, sex, national origin, age or handicap" and this policy applies to "military departments." 29 C.F.R. 1614.103(b)(1) (2008)). However, as will be discussed in Section III, this policy does not apply to "uniformed members of the military departments," only civilians. 29 C.F.R. 1614.103(d)(1) (2008). Further, the Sixth Circuit has considered whether certain positions, such as those within the National Guard, are uniformed positions or civilian positions in order to determine whether the employee is protected by the Rehabilitation Act; the test is whether the position is "irreducibly military in nature." Leistiko v. Stone, 134 F.3d 817 at 820-21 (6th Cir. 1998) (finding that civilian DoD positions contingent upon simultaneous membership in the National Guard are irreducibly military in nature and thus not subject to the Rehabilitation Act).

The DoD has issued regulations implementing the Rehabilitation Act's anti-discrimination requirement through the DoD Civilian Equal Employment Opportunity Program (EEO Program), which applies to the various DoD components, including "the Military Departments," "the Defense Agencies, the Army and Air Force Exchange Service, [and] the National Guard Bureau" and "applies worldwide to all civilian employees and applicants for civilian employment within the Department of Defense." 32 C.F.R. § 191.2(a),(b) (2008). The EEO Program defines people with disabilities as "people who have physical or mental impairments that substantially limits [sic] one or more major life activities, has [sic] a record of such impairment, or is [sic] regarded as having such an impairment." 32 C.F.R. § 191.3 (2008). The regulations require the Heads of DoD components to ensure the component complies with Equal Employment

Opportunity Commission (EEOC) guidance and Office of Personnel Management guidance and to ensure that "people with disabilities receive full and fair consideration for civilian employment in all grade levels, occupations, and major organizations." 32 C.F.R. § 191.5(b)(2) (2008).

The EEOC has published guidance regarding diabetes in employment that is applicable to DOD. *See*, "Questions and Answers about Diabetes in the Workplace and the Americans with Disabilities Act (ADA)," *available at* www.eeoc.gov/facts/diabetes.html. The EEOC diabetes fact sheet specifically explains: "Employers also should avoid policies or practices that categorically exclude people with diabetes from certain jobs and, instead, should assess each applicant's and employee's ability to perform a particular job with or without reasonable accommodation." Id. DoD components thus are advised by the EEOC guidance to avoid diabetes bans.

In addition to a policy of non-discrimination, the DoD policy requires the DoD to "eliminate barriers and practices that impede equal employment opportunity for all employees and applicants for employment, including… barriers affecting people with disabilities." 32 C.F.R. 191.4(e), (f) (2008). The regulations further require DoD to "evaluate employment policies, practices, and patterns… and identify and correct and [sic] institutional barriers that restrict opportunities" for people with disabilities. 32 C.F.R. 191.5 (b)(9) (2008).

Authorized by Section 504 of the Rehabilitation Act, additional DoD regulations prohibit employment discrimination on the basis of handicap in programs and activities not directly performed within or by DoD, but receiving DoD funding. 32 C.F.R. § 56.8(a), (b) (2008). Disability discrimination is forbidden in recruitment, advertising, processing of applications, job assignments, job classifications, organizational structures, position descriptions, and any other term, condition, or privilege of employment. 32 C.F.R. § 56.8(b) (2008).

In conclusion, DoD civilian employees are protected from disability discrimination under the Rehabilitation Act. Similarly, DoD-funded programs are covered by the Rehabilitation Act. As a result, the fact that a civilian federal employee is employed by the DoD or a DoD funded program does not lessen his or her disability discrimination protection, and the DoD has the same legal obligation not to discriminate on the basis of disability against civilian employees and applicants as other federal government agencies covered by the Rehabilitation Act.

III. THE REHABILITATION ACT DOES NOT COVER MILITARY POSITIONS

The military exception to the Rehabilitation Act is articulated in case law interpreting the statutory language. EEOC and DoD regulations explicitly exempt military positions in the DoD from disability anti-discrimination policies and procedures. DoD physical requirements for military positions affirmatively discriminate on the basis of disability, including on the basis of diabetes, and the courts have interpreted the

military's statutory authority to prescribe physical standards as overriding the requirements of the Rehabilitation Act.

In reference to the civil rights of military personnel, the Supreme Court explained in Chappell v. Wallace, "The special status of the military has required, the Constitution has contemplated, Congress has created, and this court has long recognized two systems of justice… one for civilians and one for military personnel." 462 U.S. 296, 303-04 (1983). The Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have interpreted the Rehabilitation Act, as it applies to federal employees, to include various Title VII procedural requirements based on Congressional intent to apply the same administrative remedies to Rehabilitation Act claimants as claimants bringing Title VII actions. Doe v. Garrett, 903 F.2d 1455, 1460 (11th Cir. 1990) (discussing the agreement among the Federal Courts of Appeals that aspects of the Rehabilitation Act track Title VII). The courts have interpreted Title VII as inapplicable to the military because Title VII's statutory language refers to "military departments," the definition of which includes civilian employees, and does not refer to "armed forces," which is defined to include uniformed military personnel. Gonzalez v. Alexander, 718 F.2d 926, 928 (9th Cir. 1983), *citing* Johnson v. Alexander, 572 F.2d 1219, 1223-24 (8th Cir. 1978), *cert. denied* 439 U.S. 986 (1978). Because the Rehabilitation Act is silent as to whether it applies to military personnel, the Sixth and Eleventh Circuits interpreted the Rehabilitation Act in light of the Title VII military exception and held that military personnel may not bring claims under the Rehabilitation Act; none of the other Circuits have considered the question. Coffman v. Michigan, 120 F.3d 57, 59 (6th Cir. 1997) (plaintiff was discharged

because he could not pass a physical fitness test; he argued that he was unable to pass due to disability but did not raise an argument that the Rehabilitation Act impacts the military's ability to determine physical qualifications for service: "Both parties agree that the Americans With Disabilities Act, Title V of the Rehabilitation Act, and the Michigan Handicapper's Civil Rights Act do not limit the Secretary of the Army's plenary authority to determine the physical qualifications for service in the Guard." Coffman v. Michigan, 914 F. Supp. 172 (W.D. Mich. 1995)); Doe v. Garrett, 903 F.2d 1455, 1460-61 (11th Cir. 1990) (plaintiff argued that his HIV status constituted a disability and that, under the Rehabilitation Act, the Navy must use an affirmative action policy for people with disabilities; the lower court did not discuss any argument by the plaintiff why the Rehabilitation Act should apply, but rather found that the plaintiff failed to state a claim because the Rehabilitation Act does not apply to the Navy. Doe v. Ball, 725 F. Supp. 1210, 1214 (M.D. Fla. 1989).

The EEOC regulation regarding the Rehabilitation Act's application to the federal government has a specific exemption for "uniformed members of the military departments." 29 C.F.R. 1614.103(d)(1) (2008). Additionally, the DoD's policy of equal opportunity for people with disabilities does not apply to military positions. 32 C.F.R. § 191.2(b) (2008). Although unlawful discrimination against military personnel based on race, color, religion, sex, or national origin "shall not be condoned" by the DoD, there is no such protection for disability discrimination for military personnel. DoD Directive 1350.2 (4.2) (August 18, 1995) (However, this directive also requires on-base activities

and, to the extent possible, off-base activities available to military personnel and their families to be equally available regardless of physical or mental disability. Id. at 4.7).

By federal statute, military personnel must be "qualified, effective, and able-bodied." 10 U.S.C. § 505(a) (2008). To effectuate this DoD has determined "to utilize common physical standards for the acquisition of personnel for the Armed Forces." DoD Directive 6130.3(3.1) (December 15, 2000). These physical standards are intended to "ensure that individuals under consideration for appointment, enlistment, or induction in the United States Armed Forces" are "[f]ree of medical conditions or physical defects that may require excessive time lost from duty for necessary treatment or hospitalization or probably will result in separation from the Service for medical unfitness." DoD Directive 6130.3 (3.3) (December 15, 2000). The Eleventh Circuit held in Smith v. Christian that a Navy reservist could not bring a Section 504 claim against the Naval Reserve Medical Service Corps because the Navy's specific statutory authority to prescribe physical qualifications for enlistees overrode the general statutory guidelines of Section 504. 763 F.2d 1322, 1325 (11th Cir. 1985). As the lower court explained, Rehabilitation Act claims are "at least colorable under the plain language of Section 504 of the Act" for military personnel, but in light of the conflicting requirements of 10 U.S.C. § 505(a) and the Rehabilitation Act, the courts must try to effectuate both. Smith v. United States Navy, 573 F. Supp. 1361, 1366 (S.D. Fla. 1983). The specific authority of 10 U.S.C. § 505(a), which requires that military personnel be physically fit, and the general language of the Rehabilitation Act, which does not specifically refer to military personnel, led the court to find that the Rehabilitation Act does not prohibit the military

from setting physical standards for military personnel, even if they would violate the Rehabilitation Act. 573 F. Supp. 1361, 1366 (S.D. Fla. 1983). Thus, physical qualification standards for military positions are not subject to the requirements of the Rehabilitation Act, such as individualized assessment.

The physical standards "if not met, are grounds for rejection for military service" and apply to applicants for enlistment, appointment, reenlistment, scholarship, retention, and induction in: 1) the United States Coast Guard when it is operated by the Department of Homeland Security; 2) the Armed Forces; 3) the Regular, Active, and Reserve components of the Armed Forces; 4) the National Guard; 5) Advanced Course Reserve Officers Training Corps (ROTC); all other Armed Forces' special officer personnel procurement programs; and the U.S. Service academies. DoD Instruction 6130.4 (2.1-2.2) (January 18, 2005). Additionally, when it is questionable whether a particular position is a military position, the previously discussed decision in Leistiko v. Stone held that positions within the DoD which are not clearly delineated as either civilian positions or military positions will be considered military if they are "irreducibly military in nature." 134 F.3d 817, 820-21 (6th Cir. 1998).

The DoD medical standards include a specific diabetes ban. The DoD "Medical Standards for Appointment, Enlistment, or Induction in the Armed Forces" (DoD Medical Standards) explain that "the conditions listed… are those that would be disqualifying by virtue of current diagnosis or for which the candidate has a verified past medical history." DoD Instruction 6130.4 (E1) (January 18, 2005). A current diagnosis

or verified past medical history of diabetes mellitus is among the medical conditions listed as disqualifying. DoD Instruction 6130.4 (E1.23.2) (January 18, 2005).

Secretaries of the various military departments are directed to each apply the DoD Medical Standards, resulting in separate, but similar, standards for each military department. DoD Instruction 6130.4 (4.3) (January 18, 2008). The DoD Medical Standards makes reference to the DoD Medical Examination Review Board (MEB). DoD Instruction 6130.4 (4.1.2) (January 18, 2005). As explained in the context of the Air Force, "In order to maintain a fit and vital force, the Secretary of the Air Force relies on disability laws to remove active duty… members who can no longer perform their military duties… the MEB is the first step in the Air Force disability evaluation process." AFI 41-210, Patient Administration Functions, P 10.1.1 (Mar. 22, 2006). Each military department's standards are used to disqualify military applicants with certain medical conditions, and to initiate an MEB process for active servicemembers with certain medical conditions to determine whether the servicemember will be separated from the military.

To exemplify the general trends of the military departments' medical standards applicable to people with diabetes, the Army and Air Force medical standards are discussed below. However, there are some differences in each department's medical standards. The Army operates the Army National Guard and the Army Reserve, and the Air Force operates the Air Force National Guard and the Air Force Reserve, so a large proportion of military positions' medical standards are addressed. However, this memo

does not address the Navy's medical standards, which cover the Marine Corps, the Coast Guard, and the Navy Reserve; nor does it discuss the medical standards for other military positions covered by the DoD medical standard (discussed above) including the Service Academies and ROTC. As a result, more research would be required to exhaustively determine what medical standards apply to every military position.

A. Medical Standards in the Army: A Blanket Diabetes Ban for Enlistment, but Individual Assessment for Active Servicemembers and Deployment

The Army is the only military department whose medical standards are cited in DoD regulations. 32 C.F.R. § 571.2(c) (2008) ("Non-prior and prior service applicants must meet medical fitness standards prescribed in AR 40-502."). The Army has separate standards for: 1) enlistment, induction, and appointment; 2) retention and separation; and 3) geographical assignment. Army Regulation 40-501 "Standards of Medical Fitness," 1-1(a); 3-2; 5-2 (January 14, 2008). These standards are based on the overall DoD military medical standards and must be in accordance with DoD Directive 6130.3 and DoD Instruction 6130.4. Army Regulation 40-501, "Standards of Medical Fitness," 2-2(d)(1-2) (January 14, 2008).

1. Army Regulations Include a General Ban on People with Diabetes in the Army, which May Be Overridden by a Waiver

Under the Army regulations, a "current [diagnosis] or history of diabetes mellitus is disqualifying" for enlistment, appointment, or induction, although individuals may request a waiver of the medical fitness standards. Army Regulation 40-501 "Standards of Medical Fitness," 2-8(b) (January 14, 2008); Army Regulation 40-501, "Standards of Medical Fitness," 2-2(d)(3) (January 14, 2008) (the Secretary of the Army has "authority to grant a waiver of the standards in individual cases for applicable reasons"). Thus, although an individualized assessment is not mandatory, individuals "may request a waiver of the medical fitness standards in accordance with the basic administrative directive governing the personnel action." Army Regulation 40-501, "Standards of Medical Fitness," 1-6(b) (January 14, 2008). However, waivers for enlistment or appointment will not be granted if the applicant does not meet the standards of retention. Army Regulation 40-501, "Standards of Medical Fitness," 1-6(i) (January 14, 2008). Unfortunately, the standards and regulations do not elaborate upon the process for getting a waiver, nor specific standards related to health, fitness, or diabetes that must be met to be awarded a waiver.

2. The Standards of Retention: Current Army Servicemembers Who Control Diabetes without Medication Do Not Need a Medical Evaluation; Applicants for Enlistment with Diabetes Must Get a Waiver and Meet the Standards of Retention; and Current Servicemembers Who Use Any Medication for Diabetes Must Have a Medical Evaluation.

The standards of retention are used to evaluate current servicemembers, i.e., individuals who are already active in the military, and are also applied to applicants for enlistment who seek a waiver. Army Regulation 40-501, "Standards of Medical Fitness," 3-2 (January 14, 2008). Servicemembers with diabetes mellitus will be referred to an MEB "unless hemoglobin A1c can be maintained at < (less than) 7% using only lifestyle modifications (diet, exercise)." Army Regulation 40-501, "Standards of Medical Fitness," 3-11(d) (January 14, 2008). Applicants for enlistement may request and be granted a waiver, but must still meet the standards for retention, and so these individuals must be able to control their diabetes solely with diet and exercise and maintain an A1C of 7% or less. Similarly, an individual already in a military position in the Army who was diagnosed would not be referred to an MEB and would be able to remain in the Army so long as his or her diabetes was controlled without medication with an A1C of 7% or less. Those individuals who attempt to enlist will be subject to the diabetes ban if diagnosed with diabetes requiring any form of medication, or who do not take medication but have an A1C above 7%, because they will not meet the standards of retention. An active servicemember who uses medication or controls his or her diabetes with diet and exercise but has an A1C above 7% will have to go through the MEB process to determine whether he or she will remain a servicemember.

However, "Possession of one or more of the conditions listed in [the chapter for retention] does not mean automatic retirement or separation from the Service… It is critical that MEBs are complete" because they are used to make a final fitness determination. Army Regulation 40-501, "Standards of Medical Fitness," 3-4 (January

14, 2008). As with the waiver determination, there are no clearly delineated standards to determine whether a person with diabetes will or will not meet the fitness determination. For example, there is no information related to A1C cutoffs, specific insulin regimens that are required, nor a basic explanation of whether a specific set of tasks are listed that a person with diabetes must be able to perform.

3. Standards for Army Deployment: A Person with Diabetes May Meet the Medical Fitness Standards to Enlist or Remain as a Servicemember and Be Limited in Deployment.

There are separate Army standards of medical fitness for deployment. These standards explain:

> Medical standards for deployment are meant as general guides. The final recommendation is based on clinical judgment and commander input, which considers the geographical area in which the Soldier will be assigned and the potential environmental/austere conditions to which the Soldier may be subject. The following medical conditions must be reviewed carefully by the clinician before making a recommendation as to whether the Soldier can deploy to duty in a combat zone (or austere isolated area where medical treatment may not be readily available).

Army Regulation 40-501, "Standards of Medical Fitness," 5-13 (January 14, 2008). First, the list refers to insulin-dependent diabetes and states: "Diabetes requiring insulin. This requires an MEB/PEB [physical examination board]… If found fit for duty, the soldier should not deploy to areas where insulin cannot be properly stored… or appropriate medical support cannot be reasonably assured. Deployment should only follow predeployment review and recommendation by an endocrinologist." Army Regulation 40-501, "Standards of Medical Fitness," 5-13(e)(1) (January 14, 2008). This section suggests that a person can be found fit for duty, but may be limited from deploying to certain geographical areas. The requirement that an endocrinologist be involved is beneficial because an endocrinologist can provide a more in-depth and accurate assessment. Second, the list refers to diabetes treated with oral medications, stating: "Diabetes requiring oral medication for control. This requires an MEB/PEB… If found fit for duty by a PEB, the Soldier may or may not be worldwide deployable (see [included table which lists criteria to determine whether a person with diabetes is deployable])." Army Regulation 40-501, "Standards of Medical Fitness," 5-13(e)(1); 5-13(e)(2) (January 14, 2008). Again, a person with diabetes may be fit for duty, but may be limited in geographical assignment, i.e., the person would only be able to be sent to appropriate geographical areas.

The factors to determine whether a person with diabetes is deployable are included in a chart in the standard, which lists: 1) A1C; 2) monofilament discrimination; 3) autonomic neuropathy; 4) knowledge of sick day rules; 5) proliferative diabetic retinopathy; 6) macular edema; 7) severe hypoglycemia (an episode requiring another

person's assistance); 8) history of diabetic ketoacidosis in previous six months; 9) self-management skills; 10) hypoglycemia unawareness; 11) parameters of permanent profile can be followed; 12) significant co-morbidities (such as congestive heart failure, chronic kidney disease, significant coronary artery disease, poorly controlled hypertension) requiring intensive management; 13) risk of hypoglycemia is high if meals are missed or delayed; and 14) duty will place the servicemember in a location where it will be difficult to access medical care and means to monitor and support the servicemember will not be available. Army Regulation 40-501, "Standards of Medical Fitness," Table 5-1 (January 14, 2008). These standards are used to determine whether a person is deployable, but are a separate inquiry from the fitness for duty evaluation. A person may be fit for duty, but not be fit for deployment to all areas. In that situation, the person could remain in the Army, but would be limited in deployment.

Thus, people with diabetes who use any form of medication will be screened out from enlistment in the Army unless they can gain a waiver; the process for requesting and granting a waiver is unclear. People who are diagnosed with diabetes after joining the military will be individually assessed by a medical evaluation board to determine medical fitness, although there are no clearly delineated standards to be used by the medical evaluation board. In order to determine whether an active servicemember with diabetes who uses medication may be deployed, a variety of factors will be considered, and input from the MEB, the commanding officer, and an endocrinologist will be sought. An active servicemember with diabetes may be fit for duty, but not fit for worldwide deployment nor assignment to all geographical locations. In such circumstances, he or

she has the possibility of remaining in the military, but with limitations placed upon geographical assignment or deployability. A person with diabetes may be fit for deployment to all or some areas if the MEB, the servicemember's commanding officer, and an endocrinologist give their approval.

B. Medical Standards in the Air Force: No Worldwide Deployability Requirement for Active Servicemembers

The Air Force has medical standards for: 1) appointment, enlistment, and induction; and 2) retention. *See* Air Force Instruction 48-123, Volume 2, "Medical Examinations and Standards Volume 2 – Accession, Retention, and Administration" (June 5, 2006). These standards, much like the Army's standards, disqualify individuals with certain medical conditions, or require an MEB to consider whether individuals with certain medical conditions are medically qualified. There is a diabetes ban which applies to applicants. There is not a clear diabetes ban for active servicemembers; rather, they are referred to an MEB for evaluation upon diagnosis, much like the Army. Of particular note is the fact that the Air Force explicitly states that active servicemembers cannot be found medically unqualified based solely on medical limitations on worldwide deployability.

The Air Force Medical Examinations and Standards outline the various Air Force medical standards implementing the related DoD directives and instructions. Air Force Instruction 48-123, Volume 2, "Medical Examinations and Standards Volume 2 –

Accession, Retention, and Administration" (June 5, 2006) at 1. The standard for appointment, enlistment, and induction states that "current or history of diabetes mellitus… is disqualifying." Air Force Instruction 48-123, Volume 2, "Medical Examinations and Standards Volume 2 – Accession, Retention, and Administration," Attachment 3 (A3.29.2) (June 5, 2006). As a result, there is a blanket ban against Air Force military applicants with diabetes.

The standard for retention determines whether active servicemembers may continue service. Diabetes is among the conditions listed that would require "Medical Evaluation Board (MEB) processing for active duty members." Air Force Instruction 48-123, Volume 2, "Medical Examinations and Standards Volume 2 – Accession, Retention, and Administration," Attachment 2 (June 5, 2006) at 44. Specifically, the standard states that an MEB is required for: "Diabetes mellitus, diagnosed, including diet controlled and those requiring insulin or oral hypoglycemic drugs, MEB processing is done within 90 calendar days." Air Force Instruction 48-123, Volume 2, "Medical Examinations and Standards Volume 2 – Accession, Retention, and Administration," Attachment 2 (A2.17.5) (June 5, 2006). An MEB for diabetes must "[i]nclude evaluation for end organ damage (Optometry or Ophthalmology evaluation required), therapeutic history and level of control (HgA1C). Endocrinology consult for insulin dependent conditions." Air Force Instruction 41-210, "Patient Administrative Functions," 10.6.10.5 (March 22, 2006). Thus, unlike the Army, even active servicemembers with diet-controlled diabetes must go through the MEB process in the Air Force.

Active servicemembers with diabetes, although required to undergo an MEB, may be able to meet the medical standards, even if the servicemember is found unqualified for worldwide deployment. An Air Force instruction states:

> Unless noted in… *Officer Classification* or… *Enlisted Classification*, the ability to deploy is NOT a requirement to hold an AFSC [Air Force Specialty Code, i.e., Military Occupational Specialty] or serve in any component of the USAF [United States Air Force]. Unless expressly stated in these instructions, medical disqualification from an AFSC may not be based on a member's ability or inability to deploy.

Air Force Instruction 48-123, Volume 2, "Medical Examinations and Standards Volume 2 – Accession, Retention, and Administration," Ch. 4 (June 5, 2006) at 15. The fact that Air Force servicemembers can remain in the Air Force despite medical conditions that prevent them from qualifying for worldwide deployment is verified by the description of Dr. Ann Childers in Childers v. United States. In Childers, the court explains that "Dr. Childers was not qualified for World Wide Service" because of medical conditions, but that the Air Force found that "she would be able to continue her duties in her current medical condition, although with a limited profile." Childers v. United States, 81 Fed. Cl. 693, 16, 20 (Fed. Cl. 2008).

IV. CONCLUSION

Whether or not a person with diabetes is protected by the Rehabilitation Act depends upon whether the position is a civilian or military DoD position. Civilian positions are covered by federal law and regulations that prohibit employment discrimination on the basis of disability. Military positions are exempted from the protections of the Rehabilitation Act and the Army and Air Force medical standards for enlistment state that diabetes is disqualifying. The Army medical standards state that applicants can request a waiver for medical conditions, although the standards do not explain the waiver process. The Army and Air Force medical standards suggest that medical waivers and a certain amount of individualized assessment are available to active Army and Air Force servicemembers with diabetes, although they do not have any legal protection from disability discrimination in the medical evaluation process. Thus, Army applicants, active Army servicemembers, and active Air Force servicemembers with diabetes have the possibility of military employment. Unfortunately, the standards offer little predictive guidance regarding whether a particular individual's diabetes will disqualify that person from military employment.