John Lawason, Sr. v. CSX transportation, Inc.
00-1179

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
_____

No. 00-1179
_____

JOHN LAWSON, SR.,

Plaintiff-Appellant,

v.

CSX TRANSPORTATION, INC.,

Defendant-Appellee.

_____

On Appeal from the United States District Court
for the Southern District of Indiana
Indianapolis Division
_____

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT
_____

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STATEMENT OF INTEREST

The Equal Employment Opportunity Commission ("EEOC") is charged with the interpretation and enforcement of Title I of the Americans With Disabilities Act of 1990 ("ADA"), which prohibits employment discrimination based on disability. See 42 U.S.C. §§ 12117 and 12206. The district court in this case held that John Lawson presented insufficient evidence for a jury to find that his Type I insulin-dependent diabetes is a disability within ADA coverage, or that CSX Transportation, Inc. ("CSX") refused to hire him because of his disability. R60.<1> Because this case raises important questions about the proper analysis to determine whether an individual has a disability within statutory coverage, and the amount of evidence necessary to support a finding of unlawful discrimination under the ADA, the EEOC offers its views to the Court.

STATEMENT OF FACTS

John Lawson, now in his mid-thirties, has had Type I insulin-dependent diabetes from infancy. See R41, Ex2, p18. Dr. Paul Skierczynski, a Board-certified endocrinologist who has treated Lawson since 1996, described the severity and treatment of Lawson's medical condition. R58. To manage his disease, Lawson must "carefully monitor blood sugar levels" and "minimize fluctuations," R60, p8, which requires "continued vigilance" and strict adherence to "a perpetual, multi-faceted and demanding treatment regimen." R58, ¶11. "Lawson must inject insulin, follow a diet plan, exercise daily, and test his blood sugar several times a day."<2> R58, ¶12.

If a blood test indicates a drop in glucose levels, Lawson "must stop all other activities in which [he] may be engaged at the time and take in the kinds of food that will bring sugar levels back to normal." R60, p8. Unless Lawson acts quickly to raise his blood sugar, "he will experience disabling periods of dizziness, weakness, loss of mentation and concentration, and a deterioration of bodily functions." R58, ¶14. Consequently, "Lawson cannot simply eat when and where he wants to or exert himself without concern for the effect the exertion will have on his glucose levels." Id., ¶15. In contrast to "the average person" with normal metabolic function, Lawson "must always concern himself with the availability of food, the timing of when he eats, and the type and quantity of food he eats." Id. According to Dr. Skierczynski, "Lawson's eating as a fundamental, major life activity is substantially limited" due to his diabetes. Id.

Lawson has great difficulty regulating his blood sugar levels. During his youth, Lawson was "in and out of hospitals quite a bit," and had frequent "insulin reactions" which caused him to drop items, get "the shakes, headaches," and "occasionally [to] pass out." R41, Ex3, p32. Although Lawson has not been hospitalized for diabetes since 1983, he continues to experience "wildly fluctuating glucose levels with hyperglycemia and hypoglycemia," and had a "severe hypoglycemic reaction" in December 1995, when he became confused and briefly lost consciousness.<3> R58, ¶6(e)-(f); see also R60, pp7-8. Lawson's symptoms of low blood sugar, or hypoglycemia, include "slur[red] speech, profuse sweating, paleness, shaking, unsteady walk, and fruity odor breath." R41, Ex2, ¶25. "Over the long term," Dr. Skierczynski states, "Lawson's inability to properly regulate his blood sugar levels will always put his life at risk no matter now vigilantly he monitors his condition." R58, ¶13.

As a consequence of his diabetes, Lawson has developed numerous chronic or recurring symptomatic medical conditions that further complicate his treatment and prognosis.<4> R58, ¶6(c). In 1995 and 1996, Lawson required multiple laser treatments for proliferative diabetic retinopathy in each eye. Id., ¶6(g)-(h). He sought medical advice in 1995 "for fading erectile ability, a problem commonly associated with diabetes," and "continues to suffer from impotence." Id., ¶6(i). Lawson periodically experiences symptoms of "limited joint mobility syndrome," another "common medical problem associated with diabetes," which causes "swelling in [his] hands and wrists, and pain in [his] elbows, hips and feet." R41, Ex2, ¶4; see also R58, ¶6(j). Dr. Skierczynski reports that Lawson has a history of chronic "elevated A-1 C hemoglobin tests," and "proteinuria (too much protein in his urine), a condition which will likely progress over the years to renal failure." R58, ¶6(k)-(l). "Given Lawson's fluctuating glucose levels and abnormally high A-1 C hemoglobin test results," Dr. Skierczynski predicts, "he has a high risk of aggravating his already existing medical problems and developing long term complications of retinopathy, nephropathy, neuropathy and cardiopathy." Id., ¶16.

Since graduating high school in 1984, Lawson has had difficulty finding work. From 1984 through 1986, Lawson performed "a variety of 'odds and ends' work while looking for a permanent job." R41, Ex2, ¶6. Between 1985 and 1986, Lawson worked for "a small 'mom and pop' construction company," but after three weeks on the job he "had a serious insulin reaction and could no longer work." Id., ¶7. From1986 through 1998, Lawson received Social Security Disability Insurance ("SSDI") benefits. R37, pp6-7, ¶42. During this twelve-year period, Lawson had two brief periods of employment, and studied computer-aided drafting and manufacturing at Indiana Vocational College. See R40, pp5-6, ¶¶87-91. During 1997, Social Security personnel noted that Lawson's medical file showed improvement in his condition, and asked Lawson's caseworker at the Indiana Vocational Rehabilitation Agency to help him find employment. R41, Ex3, pp29-31. Lawson asked his caseworker whether he might be eligible to participate in a program offered at Cincinnati State Technical and Community College ("Cincinnati State"), to train conductors for CSX, a large railroad company.<5> Id., p58. Lawson's caseworker inquired whether "a diabetic client . . . could qualify to try to get a conductor's job," id., and Cincinnati State furnished a job description prepared by Laurie Ryan, a staffing specialist at CSX. R41, Ex2, ¶13. The job description for conductor trainee lists as required qualifications and experience: one or more years as a freight conductor or graduation from the 5-week training program offered at five schools, including Cincinnati State; high school diploma or GED; good physical condition, including vision, color vision, hearing, and the ability to lift 85 pounds; and 10th grade reading level. See R41, Ex6.

At the direction of Cincinnati State, Lawson was examined on October 15, 1997 by his family doctor, who certified that he was "in good general condition." See R.41, Ex.6. Lawson's doctor reviewed the CSX job description and found "no contraindication to [Lawson] pursuing the necessary training and doing this job on a full time basis." Id. Lawson also passed two written entrance exams -- a personality test and a mechanical aptitude test -- required for admission to the training program. R41, Ex3, pp63-64.

On December 23, 1997, Lawson was admitted to the training program at Cincinnati State. See R41, Ex6. The admission letter referenced an "understanding" between the school, Lawson, and CSX that Lawson hoped to fill an available position in Terre Haute, Indiana, and emphasized that "the future job location is a firm commitment on your part." Id. According to the letter, CSX "expects us to supply qualified candidates on a certain schedule, and changing the job location understanding after we submit our candidate information to [CSX] would seriously hinder our ability to place as many of our graduates as possible." Id. Lawson enrolled in the five-week training program in January 1998,

in a class of 14 students. R41, Ex3, p73. Lawson informed his instructors and classmates of his diabetes, and described the symptoms and treatment of hypoglycemia. Id., pp87, 123-24; R41, Ex2, ¶¶24-26. During daily class briefings, Lawson "explained the contents of [his] 'Glucagen kit' and the process of mixing medicines and injecting the Glucagen in the event of an emergency." Id., ¶22. Lawson also injected his insulin in the presence of instructors and classmates. Id., ¶26. Lawson instructed the class about his condition "for the safety of the public, classmates and possible crew members." R41, Ex3, p123. Lawson completed the training program with a running quiz average of 96.1%, and an exam average of 94.5%. R41, Ex1, p94. CSX requires a minimum score of 85% to consider a program participant for hire as a conductor trainee. Id., p31.

In February 1998, Lawson was interviewed by Laurie Ryan and Jeanie Layne, human resource managers for CSX.<6> R41, Ex2, ¶15. In response to inquiries about his work history, Lawson informed Ryan and Layne that his "lack of employment experience was the result of [his] diabetic condition and that [he] had been totally disabled for a number of years." Id., ¶¶16-17; R41, Ex3, pp85-86. Lawson explained that he had been receiving SSDI benefits since 1988, and since 1991 had assumed primary caretaker responsibilities for his two young children. Id. During the interview, Lawson also described his daily briefings to educate his classmates and instructors about the symptoms of hypoglycemia and demonstrate how to prepare and administer insulin in the event of a medical emergency. R41, Ex2, ¶¶22, 24-26; Ex3, pp87, 123-24.

CSX offered each of Lawson's classmates a job as conductor trainee, but rejected Lawson. R41, Ex2, ¶14. Ryan testified that she decided not to offer Lawson a job because of his very limited work history which, in Ryan's view, "was not solid or verifiable." R41, Ex1, pp42-43. Ryan maintained that CSX "prefer[s]" to hire candidates with a high school diploma and "a solid verifiable work history." Id., p30. She conceded, however, that CSX makes "exceptions" to hire conductor trainees who do not meet these prerequisites. Id., p70. CSX has hired applicants who do not have a "full-time, solid verifiable work history," id., pp70-71;<7> who lack a high school diploma or GED certificate, id., p74; and even those with criminal felony records. Id., pp73-74. Ryan further acknowledged that CSX had no written standards for evaluating applicants, or for making exceptions to the job prerequisites. Id., p76. Ryan maintains that she has "a certain level of discretion" in hiring, and has "made exceptions in situations where applicants provide a reasonable explanation for a work history that might not otherwise warrant a job offer; where the applicant voluntarily provides references; and where the applicant describes work, volunteer or other life experience that evidences responsibility, safety and/or dependability." R39, Ryan Aff, ¶9. In Ryan's view, "Lawson's extremely limited work history did not suffice as evidence of dependability, safety or responsibility," and "he offered no additional information to induce me to make an exception and offer him employment despite the absence of these qualities." Id., ¶12.

After CSX rejected him, Lawson "made employment inquiries" with numerous other employers, including several railroad companies, two or three employment agencies, and the Indiana State Employment Office. R41, R2, ¶27. Despite these efforts, Lawson "was not successful in finding employment through any of these sources." Id.

On August 27, 1998, Lawson filed suit, claiming CSX refused to hire him because of his disability, diabetes, in violation of the ADA. R1. In response to Lawson's suit, CSX offered him a job as a conductor trainee, "despite the fact that [his] work history did not meet CSX's expectations for this position." R37, p8, n3. Lawson accepted the job, and has worked for CSX since January 18, 1999. Id.; see R41, Ex2, ¶21. CSX moved for summary judgment in May 1999, arguing that Lawson was not qualified because "he lacked prior employment history evidencing responsibility, safety and dependability," and could not demonstrate

that CSX's reason for rejecting him was a pretext for discrimination. R37, pp1-2. CSX filed a supplemental brief in July 1999, to argue that under the standard adopted by the Supreme Court in Sutton v. United Airlines, Inc., 119 S.Ct. 2139 (1999), Lawson's diabetes is not a disability as defined by the ADA. R55.

The district court granted summary judgment for CSX on December 20, 1999. R60. The court held that Lawson had not "sufficiently shouldered his burden to identify a major life activity that has been substantially limited by virtue of his diabetes," id., p30, or to demonstrate a record of having been substantially limited by diabetes. Id., pp41-42. The court further ruled that, even assuming Lawson had met his prima facie burden, summary judgment was proper because CSX had provided "a legitimate nondiscriminatory reason for its decision not to hire him and Lawson has not shown that CSX's reason was pretextual." Id., pp42-43. This appeal followed. R62.

ARGUMENT

I. A Jury Could Find that Lawson is Substantially Limited in the Major Life Activity of Eating Because of His Diabetes.

The ADA defines "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities" of an individual; "a record of such an impairment;" or "being regarded as having such an impairment." 42 U.S.C. § 12101(2). The determination whether an individual is statutorily protected "proceeds in three steps": (1) identify a physical or mental impairment; (2) decide whether a life activity affected by the impairment is a "major life activity under the ADA"; and (3) determine "whether the impairment substantially limited the major life activity." See Bragdon v. Abbott, 524 U.S. 624, 631 (1998). The district court properly recognized that Lawson's diabetes and related medical conditions are physical impairments, R60, p29, and that eating is a major life activity. Id., p36 ("The ability to eat is a basic, daily function affecting the general population and is appropriately considered a 'major life activity.'"); accord Amir v. St. Louis Univ., 184 F.3d 1017, 1027 (8th Cir. 1999) (eating is a major life activity for purposes of ADA coverage); Erjavac v. Holy Family Health Plus, 13 F. Supp.2d 737, 746-47 (N.D. Ill. 1998) (Type I diabetes substantially limits plaintiff's major life activities of eating and waste elimination); see Bragdon, 524 U.S. at 638 (major life activities include those "central to the life process itself"); Davidson v. Midelfort Clinic Ltd., 133 F.3d 499, 505 (7th Cir. 1998) ("Major life activities include the basic functions of life . . . those rudimentary activities that the average person in the general population can perform with little or no difficulty.") (internal quotations and citations omitted). The court erred, however, in concluding, as a matter of law, that Lawson presented insufficient evidence to demonstrate that his diabetes substantially limits him in eating. See R60, pp36-38. The district court's erroneous conclusion stems from its misinterpretation of the statutory term "substantially limits," and its failure to consider both the demands of Lawson's treatment regimen and the consequences of noncompliance in assessing whether his diabetes substantially limits him in eating. The court incorrectly ruled that an individual is substantially limited in eating only if his "actual physical ability to ingest food is restricted." R60, p36; id. p38 (finding Lawson is not substantially limited in eating because evidence did not show that his "physical ability to eat is in any way restricted by his diabetes"). This construction of the statutory phrase "substantially limits" conflicts with the Supreme Court's recognition that the ADA "addresses substantial limitations on major life activities, not utter inabilities." Bragdon, 524 U.S. at 641.

In Bragdon, the Court concluded that a woman infected with HIV was substantially limited in the major life activity of reproduction because of the risk that she might transmit the infection to her sexual partner

or unborn child. Despite evidence that "antiretroviral therapy can lower the risk of perinatal transmission to about 8%," the Court was unwilling to conclude "as a matter of law that an 8% risk of transmitting a dread and fatal disease to one's child does not represent a substantial limitation on reproduction." Id. at 640-41. Thus, although "[c]onception and childbirth are not impossible for an HIV victim," the Court held that the attendant "danger[] to the public health . . . meets the definition of a substantial limitation." Id. at 641. The Court further noted the "economic and legal consequences" flowing from the "decision to reproduce," citing as examples the "added costs for antiretroviral therapy, supplemental insurance, and long-term health care for the child" who might require treatment. Id. "When significant limitations result from the impairment," the Court concluded, the statutory "definition is met even if the difficulties are not insurmountable." Id.

Under the rationale of Bragdon, and contrary to the decision of the district court, Lawson need not show that he is physically unable to ingest food to demonstrate that his diabetes substantially limits him in eating; he need only demonstrate that his condition imposes "significant limitations" on eating. Lawson presented undisputed medical testimony that he "must eat certain types and quantities of food to minimize blood sugar fluctuations," and, "[w]hen his blood sugar drops . . . 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." R58, ¶14. Further, "Lawson cannot simply eat when and where he wants to, or exert himself without concern for the effect the exertion will have on his glucose levels. . . . Unlike the average person, Lawson must always concern himself with the availability of food, the timing of when he eats, and the type and quantity of food he eats." Id., ¶15. This evidence is sufficient for a jury to find that with respect to the major life activity of eating, Lawson is "significantly restricted . . . as compared to . . . the average person in the general population." See 29 C.F.R. § 1630.2(j)(1)(ii).

The district court further erred by trivializing the nature and extent of the limitations imposed by Lawson's diabetes and its treatment. In holding, as a matter of law, that Lawson is not substantially limited in eating, the district court stated that "simple dietary restrictions alone are not sufficient to constitute a significant limitation on this activity." R60, p37. The record clearly shows, however, that Lawson faces limitations far more substantial than "simple dietary restrictions." Because of the severity of his condition, "[e]ven with insulin, Lawson's ability to regulate his blood sugar and metabolize food is difficult, erratic, and substantially limited." R58, ¶18. Lawson's doctor characterized the measures he must take to manage his disease as "a perpetual, multi-faceted and demanding treatment regimen" requiring "continued vigilance." Id., ¶12. On a daily basis, Lawson must endure the discomfort of multiple blood tests and insulin injections to monitor his blood glucose levels, and must adjust his food intake and level of exertion to correspond to fluctuations in blood sugar. Id., ¶¶12-15. A failure to adhere strictly to this demanding regimen, moreover, causes Lawson to experience debilitating, and potentially life-threatening, symptoms. Id., ¶¶8-9, 13-14.

The "perpetual, multi-faceted" demands of Lawson's treatment program, and the serious immediate and long-term consequences of any lapse in the "continued vigilance" his condition requires, distinguish Lawson's situation from those of individuals who must follow the "simple dietary restrictions" that their medical conditions may entail. See, e.g., Weber v. Strippit, 186 F.3d 907, 914 (8th Cir. 1999) (unspecified "dietary restrictions" prescribed for treatment of heart disease were "moderate limitation[]" on eating), cert. denied, 120 S.Ct. 794 (2000); Land v. Baptist Medical Center, 164 F.3d 423, 425 (8th Cir. 1999) (child with peanut allergy was not substantially limited in eating "because, as

her doctor stated, [her] allergy impacts her life only 'a little bit'" and only prohibited her from eating foods containing peanuts or their derivatives); Ingles v. Neiman Marcus Group, 974 F. Supp. 996, 1001-02 (S.D. Tex. 1997) (person who managed non-insulin-dependent diabetes with oral medications and "a 'normal, good, healthy diet'" with meals "at regular intervals" was not substantially limited in eating). The demands of Lawson's treatment regimen, and the effects of noncompliance, moreover, differentiate his case from Sutton. In contrast to Lawson, the myopic plaintiffs in Sutton needed only to wear corrective lenses -- a simple and painless treatment -- to completely ameliorate their vision impairments, and encountered no disabling symptoms or life-threatening consequences. See 119 S.Ct. at 2143. Unlike the facts presented in Sutton, Lawson's "perpetual, multi-faceted and demanding treatment regimen" enables him to survive and function, but by no means fully controls or eliminates the recurring symptoms or debilitating effects of his disease.

The Supreme Court in Sutton made clear that "[t]he use or nonuse of a corrective device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual with an impairment actually faces are in fact substantially limiting." Sutton, 119 S.Ct. at 2149. The Sutton Court further indicated that, in making that determination, courts should "consider any negative side effects suffered by an individual resulting from the use of mitigating measures." Id. at 2147; see also Krocka v. City of Chicago, 203 F.3d 507, 513 (7th Cir. 2000) (to determine ADA coverage, "the individual must be evaluated taking into account the ameliorating, or aggravating, effects of the measures on his ability to perform a major life activity") (emphasis added); Christian v. St. Anthony Medical Center, 117 F.3d 1051, 1052 (7th Cir. 1997) ("[I]f a medical condition that is not itself disabling nevertheless requires, in the prudent judgment of the medical profession, treatment that is disabling, then the individual has a disability within the meaning of the [ADA]."), cert. denied, 118 S.Ct. 1304 (1998); Disabling Corrections and Correctable Disabilities: Why Side Effects Might be the Saving Grace of Sutton, 109 Yale L.J. 1161, 1163-64 (March 2000) (suggesting Sutton "could . . . be read to exclude from the ADA's protections only those individuals with conditions that are truly minor and easy to correct, like nearsightedness, and to include most individuals with more serious conditions, such as epilepsy and diabetes, which often require disabling treatments").

As Dr. Skierczynski explained, Lawson's diabetes results from his body's inability "to produce enough insulin for normal carbohydrate, protein and fat metabolism." R58, ¶8. Absent sufficient insulin, Lawson cannot eliminate sugar from his blood stream and develops hyperglycemia, which causes blurred vision, loss of consciousness, and death. Id. The prescribed treatment for Lawson's diabetes requires, among other things, multiple daily insulin injections, but even when he adheres to his treatment regimen, Lawson remains unable to regulate his blood sugar levels and experiences both hyperglycemia and hypoglycemia. Id., ¶6(e). Due to his persistent inability to stabilize his blood glucose levels, the insulin Lawson must take to treat his illness itself causes symptoms of hypoglycemia, id., ¶9, including "slur[red] speech, profuse sweating, paleness, shaking, unsteady walk, and fruity odor breath." R41, Ex2, ¶25. "When his blood sugar drops, Lawson 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." R58, ¶14. The evidence thus shows that the insulin Lawson must take to treat his illness itself causes debilitating symptoms that can only be ameliorated by immediately eating certain foods. From this evidence, a jury could find that the prescribed treatment Lawson must take to survive with diabetes causes symptoms that substantially limit his major life activity of eating.

Finally, the district court erred by ignoring the EEOC's regulation

listing factors relevant to the determination of whether an individual is substantially limited. See 29 C.F.R. § 1630.2(j)(2). Although this Court has approved these factors in evaluating whether an individual has a disability within ADA coverage, see, e.g., Davidson, 133 F.3d at 506 n.3, the district court neither cited nor applied them in deciding that Lawson is not substantially limited in eating. See R60, pp26-38. With respect to the first regulatory factor, the "nature and severity of the impairment," 29 C.F.R. § 1630.2(j)(2)(i), the undisputed medical testimony supports finding that Lawson's impairment is serious and severe. Lawson has a life-long medical history of Type I diabetes, accompanied by numerous chronic symptomatic medical conditions, and has variously required hospitalization, surgery, and a panoply of drug therapies. Even with constant vigilance and a demanding treatment regimen, Lawson experiences both hyperglycemia and hypoglycemia, conditions with debilitating symptoms and potentially life-threatening consequences. See R58, ¶6(e).

The second listed factor, the "duration or expected duration of the impairment," 29 C.F.R. § 1630.2(j)(2)(ii), also favors a finding that Lawson's diabetes is substantially limiting. Lawson was diagnosed with Type I diabetes before his first birthday, and his disease is incurable. See R58, ¶10 ("Diabetes is a noncurable, progressive metabolic disease."). Finally, Lawson's prognosis supports the conclusion that his diabetes is a substantially limiting impairment. See 29 C.F.R. § 1630.2(j)(2)(iii) ("permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment"). "Given Lawson's test results and extensive history of medical complications related to his diabetes," Dr. Skierczynski predicted "to a reasonable degree of medical certainty that even with continuous medical treatment and monitoring of his disease, Lawson has not been able to properly control his blood sugar levels for several years . . . and his medical condition will continue to deteriorate over time as a direct consequence of his diabetes." R58, ¶19. Thus, with respect to each of the three factors that "should be considered in determining whether an individual is substantially limited in a major life activity," 29 C.F.R. § 1630.2(j)(2), the evidence supports finding that Lawson's diabetes is an impairment that substantially limits his major life activity of eating.

II. A Jury Could Find that Lawson Has a Record Indicating that His Diabetes Has Substantially Limited Him in Working.

The district court erred in holding that Lawson had presented insufficient evidence to establish statutory coverage under 42 U.S.C. § 12102(2)(B), by showing he has a record of a substantially limiting impairment. See R60, pp41-42. This prong of the "disability" definition is intended "to ensure that people are not discriminated against because of a history of a disability," and coverage is established "if a record relied on by an employer indicates that the individual has or has had a substantially limiting impairment." 29 C.F.R. Pt. 1630, App. § 1630.2(k). Many types of records, including education, medical, or employment records, could potentially contain such information. Id. Lawson testified that during the 1970s and early1980s, he was "in and out of hospitals quite a bit," and had frequent "insulin reactions" which caused him to drop items, get "the shakes, headaches," and "occasionally [to] pass out." R41, Ex3, p32. While Lawson was last hospitalized for diabetes in 1983, the year before he graduated high school, he continues to experience hyperglycemia and hypoglycemia, including a "severe hypoglycemic reaction" in 1995, when he became confused and briefly lost consciousness. R58, ¶6(e)-(f). Lawson also presented evidence of numerous chronic or recurring medical conditions symptomatic of his diabetes, including retinopathy, requiring multiple laser surgeries in each eye; limited joint mobility syndrome, causing pain and swelling in his hands, wrists, elbows, hips, and feet; and a history of attempted suicide and ongoing depression. Id. at ¶6(c),(h),(j).

For two years following his high school graduation in 1984, Lawson did

"a variety of 'odds and ends' work while looking for a permanent job." R41, Ex2 ¶6. During that time, between 1985 and 1986, he had to quit his job with a small construction company when he "had a serious insulin reaction and could no longer work." Id. ¶7. In August 1986, Lawson's application for SSDI benefits was granted, and he continued to receive total disability benefits through November 1998. R39, p7, ¶45. During that 12-year period, Social Security reviewed Lawson's medical condition every two years and determined that his benefits should continue. Id., ¶45. Despite repeated efforts to find employment during this time, Lawson testified, he held only a seasonal job in the summer of 1988 for a moving company, and a three-month stint in 1991 working part-time for a salvage company. R40, pp5-6, ¶¶88-91.

When questioned about his work history during his job interview with CSX, Lawson disclosed that his "lack of employment experience was the result of [his] diabetic condition and that [he] had been totally disabled for a number of years." See R41, Ex2, ¶¶16-17; Ex3, pp85-86. Lawson further explained to interviewers Ryan and Layne that he had been receiving SSDI benefits since 1988. Id. Ryan expressly relied on Lawson's employment record in deciding to reject him for the conductor trainee position. See R41, Ex1, pp42-43. This evidence is sufficient for a jury to find that Lawson has a record indicating his diabetes has substantially limited his ability to work, and "that [CSX] was aware of the record in question." See Davidson,133 F.3d at 510 n.8 (citing 29 C.F.R. Pt. 1630, App. § 1630.2(k)).

The award of SSDI benefits to Lawson over a 12-year period is evidence that could support a jury finding that diabetes has in the past substantially limited his ability to work, and that he therefore has a record of a disability within ADA coverage. The Social Security Act ("SSA") provides income replacement to an individual who "is under a disability," defined as an "inability to engage in any substantial gainful activity by reason of any . . . physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). To obtain an award of SSDI benefits, Lawson had to demonstrate that he has an impairment "of such severity that he is not only unable to do his previous work, but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . . ." 42 U.S.C. § 423(d)(2)(A).

The EEOC agrees with the district court's observation that the "definitions of disability" in the SSA and the ADA "are not synonymous," R60, p41; consequently, a determination of "disability" or an award of benefits under the SSA is not dispositive of coverage under the ADA. See 29 C.F.R. Pt. 1630, App. § 1630.2(k) ("The fact that an individual . . . is classified as disabled for other purposes does not guarantee that the individual will satisfy the definition of 'disability' under part 1630."). However, the statutory prerequisites for an award of SSDI benefits are sufficiently similar to the EEOC's regulatory definition of "substantially limited" in the context of "working," to permit a reasonable inference that an individual who presented evidence supporting an award of SSDI benefits for a dozen years has a record of a disability within ADA coverage. See 29 C.F.R. § 1630.2(j)(3) (substantially limited in working "means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities"). Lawson's medical history and complications, which supported the award of SSDI benefits, could thus likewise support a jury's finding that he has a record that diabetes has substantially limited him in working.

The district court cited Cleveland v. Policy Management Systems Corp., 119 S.Ct. 1597 (1999), in holding that Lawson's receipt of SSDI benefits for 12 years was an insufficient evidentiary basis for a jury to find he has a record of diabetes substantially limiting him in working.

Yet the issue before the Supreme Court in Cleveland was whether receipt of SSDI benefits precluded the recipient from demonstrating that she is a qualified individual under the ADA, id. at 1599-1600; there was no dispute in Cleveland that an individual who had been awarded SSDI benefits could establish that she had a disability within ADA coverage. Indeed, this Court has repeatedly recognized that an award of disability benefits, and the statements of a claimant or his physician in support of a benefits application, are probative evidence that an individual has a disability under the ADA. See, e.g., Weigel v. Target Stores, 122 F.3d 461, 467-468 (7th Cir. 1997) (representations of employee or physician in support of disability benefits application "are relevant evidence of the extent of a plaintiff's disability"); Overton v. Reilly, 977 F.2d 1190, 1196 (7th Cir. 1992) (SSA's "determination of disability may be relevant evidence of the severity of [claimant's] handicap" under Rehabilitation Act). Because Lawson's evidence, taken as a whole, is sufficient for a jury to find he has a record of diabetes substantially limiting his ability to work, summary judgment was improper on this ground.

III. Lawson Presented Sufficient Evidence for a Jury to Find that CSX Refused to Hire Him Because of His Disability.

The evidence is sufficient to demonstrate that CSX discriminated against Lawson in violation of the ADA either: (1) by rejecting him because of his disability, or (2) by failing to provide a reasonable accommodation by making an exception to a selection criterion that Lawson could not meet because of his disability. See Wright v. Ill. Dept. of Corrections, 2000 WL 210195, *3 (7th Cir., Feb. 24, 2000) ("There are two types of disability discrimination claims under the ADA: disparate treatment claims and failure to accommodate claims."). Disparate treatment claims under the ADA are analyzed under the traditional burden-shifting framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and its progeny. See Sieberns v. Wal-Mart Stores, 125 F.3d 1019, 1022 (7th Cir. 1997). Under this framework, Lawson's evidence is sufficient to establish both a prima facie case of disability discrimination, and that CSX's explanation for rejecting him is pretextual. Lawson provided evidence from which a jury could find that: he has a disability; CSX was aware of his disability; he was qualified for the job of conductor trainee;<8> and he was rejected for a position CSX anticipated he would fill upon successful completion of the training course, while all of his classmates were hired. This evidence is sufficient to demonstrate a prima facie claim of discrimination under the ADA. See Weigel, 122 F.3d at 465. Lawson also presented evidence that CSX's proffered reason for rejecting him, i.e., his lack of a "solid, verifiable work history," is pretextual. The evidence showed that such a work history was not among the prerequisites listed on CSX's job description for conductor trainee, R41, Ex6; that CSX had no guidelines defining that unstated qualification, R41, Ex1, p76; and that CSX routinely made "exceptions for persons with limited or unskilled employment experience, applicants whose employment could not be verified, applicants without a high school diploma or GED, and even applicants with criminal records including unresolved felony convictions." R60, pp43-44. These undisputed facts raise a material factual dispute whether a "solid, verifiable work history" is a genuine requirement for the job of conductor trainee, and are therefore sufficient circumstantial evidence of discrimination to preclude summary judgment. See McCoy v. WGN Continental Broadcasting Co., 957 F.2d 368, 371 n.2 (7th Cir. 1992) (employee can prove age was determining factor with "circumstantial evidence that the employer's proffered justification is pretextual, such as evidence that the proffered justification is not a genuine job requirement").

By way of explanation, Ryan asserted that she has "discretion" to make exceptions when, in her subjective judgment, a job applicant provides "a reasonable explanation for a work history that might not otherwise

warrant a job offer" or "describes work, volunteer or other life experience that evidences responsibility, safety and/or dependability." R39, Ryan Aff, ¶9. Such unguided discretion to make employment decisions based on admittedly subjective selection criteria is further evidence from which a jury could infer intentional discrimination. See Giacoletto v. Amax Zinc Co., 954 F.2d 424, 427-28 (7th Cir. 1992) ("Although relying on subjective factors is not per se illegal, the jury may, under some circumstances, reasonably consider subjective reasons as pretexts for discrimination.").

Lawson's testimony that he informed Ryan and Layne that he had previously been unable to work because of his diabetes and had been receiving SSDI benefits for 12 years, moreover, establishes a direct link between his record of disability and the very reason CSX gave for rejecting him, i.e., his lack of prior work experience. Where an employer fires an employee, or rejects an otherwise qualified applicant, for a reason that is caused by or directly related to his disability, the ADA has been violated. See, e.g., Christian, 117 F.3d at 1052 ("If Christian's employer fired her because the indicated medical treatment for her condition would have required that she have this extra time off, the employer would be violating the ADA, at least prima facie . . . ."); Gilday v. Mecosta County, 124 F.3d 760, 765 (6th Cir. 1997) (evidence that "diabetes was the reason [plaintiff] engaged in the rudeness that precipitated his discharge . . . might itself support his claim of discrimination under the [ADA]"); Barnett v. Revere Smelting & Refining Corp., 67 F. Supp.2d 378, 392 (S.D.N.Y. 1999) ("[W]here an employer asserts excessive absenteeism as a non-discriminatory justification of an employee's termination, that justification cannot analytically be considered apart from the alleged disability causing the absenteeism.").

CSX's willingness to hire individuals who, in Ryan's words, offered "a reasonable explanation for a work history that might not otherwise warrant a job offer," R39, Ryan Aff, ¶9, while refusing to hire an otherwise qualified candidate who explained that his limited work history was the consequence of a long-term disability, would permit a jury to find that Lawson's disability was the reason for his rejection. Alternatively, a jury could find that CSX discriminated against Lawson by failing to provide a reasonable accommodation. Where an otherwise qualified individual is unable to meet a qualification standard because of disability, an employer may be required, as a reasonable accommodation, to grant an exception to the requirement. See 42 U.S.C. §§ 12111(9)(B) ("reasonable accommodation" defined to include "appropriate adjustment or modifications of examinations, training materials or policies"); 12113(a) (employer may defend allegedly discriminatory application of qualification standard that screens out an individual because of disability by showing the standard is "job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation"). Given the frequency with which CSX grants exceptions to its alleged qualification criteria, including its preference for a solid work history, it would seem an eminently reasonable accommodation to make an exception to hire an otherwise qualified candidate who, because of disability, had a history of being unable to work. Finally, to the extent CSX had a legitimate interest in hiring candidates who demonstrated responsibility, dependability, and safety, a jury could find that Lawson in fact demonstrated these qualities when he described for Ryan and Layne his daily class briefings on the nature and treatment of his condition.

CONCLUSION

Because Lawson presented sufficient evidence for a jury to find that he has a disability within ADA coverage, and that CSX refused to hire him because of his disability in violation of the ADA, the EEOC urges this Court to reverse the summary judgment for CSX and remand this case for trial.

Respectfully submitted,

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RULE 32(a)(7)(C) CERTIFICATE OF COMPLIANCE

I certify that this brief contains 6,994 words. The brief was prepared in the WordPerfect 8 word-processing system, using 12-point proportionally spaced type.

_____
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March 23, 2000

CERTIFICATE OF SERVICE

I, Dori K. Bernstein, hereby certify that I served two copies of the foregoing Brief, and one copy of the foregoing brief on digital media, this 23rd day of March 2000, by first-class mail, postage pre-paid, to the following counsel of record:

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1 Record references to numbered entries on the district court docket are denoted "R__."

2 Every day, Lawson tests his blood four to six times, and administers three insulin injections. See R41, Ex3, pp11-12.

3 Dr. Skierczynski described the cause and symptoms of diabetic hypoglycemia:

Too much insulin can cause hypoglycemia, a condition where the level of glucose in the blood is too low. Hypoglycemia can also occur when a person has not eaten enough food or has exercised without extra food. A person with hypoglycemia may be nervous, shaky, weak or sweaty and experience headaches and blurred vision. R58, ¶9.

4 To treat these related conditions, Lawson must take "a lot" of other medications "on top of" his multiple insulin injections. R41, Ex3, pp12-13. Every day, Lawson takes three 50 mg. tablets of Captopril, "a blood pressure and a kidney medication"; two daily doses of Lindoe, an arthritis medication; Serzone twice a day to treat depression; a dose of Liptoril each evening for cholesterol; and two different types of insulin. Id., pp13, 16-17. According to Dr. Skierczynski, Lawson's "history of attempted suicide and ongoing current depression . . . makes glucose control difficult." R58, ¶ 6(c).

5 CSX hires successful graduates of the Cincinnati State training program as conductor trainees, R37, p5, ¶¶20-21, with the expectation that they will be promoted to the job of conductor. Id., p3, ¶8. A railroad conductor at CSX "coordinates activities of train crews engaged in transporting freight," and "supervises the activities of switch engine crews engaged in switching railroad cars within a yard or industrial plant to facilitate the loading and unloading of cars and the making up and breaking up of trains." Id., pp3-4, ¶¶9-10. Although CSX does not own or operate the Cincinnati State training program, or select program participants, CSX provides training materials and CSX employees have served as instructors. Id., p5, ¶¶25-27.

6 During the conductor training program, CSX interviews participants in good standing to fill job openings as conductor trainees. See R37, p5, ¶30. Job offers are "contingent upon successful completion of the railroad conductor course." Id., p6, ¶32. While "CSX does not guarantee a job offer to every applicant who successfully completes Cincinnati State's railroad conductor training course," id., ¶33, CSX hires approximately 98 percent of successful program participants. R41, Ex1, p27.

7 During discovery, CSX produced the applications of successful candidates who listed only a few months of unskilled part-time work experience, including the following representative examples: Philip Robinson worked 3 ½ months part time moving and assembling furniture; Jonathan West worked one month part-time as a lawn service "helper", one month part-time as a busboy/dishwasher, and two months part-time as a dishwasher; Eric Oberholtzer worked 10 months part-time driving a bread delivery truck; Ray Moore worked full time one summer as a flagman on a road crew; Clinton Josey worked one month full-time on a farm, and one month part-time as a supermarket stocker; and Lance Johnson worked four months full-time stocking groceries. See R41, Ex5.

8 Lawson's satisfaction of all the qualification criteria listed on CSX's job description for the conductor trainee position, and his successful performance as a conductor trainee since January 1999, demonstrate that he is qualified within the meaning of the ADA. See 29 C.F.R. Pt. 1630, App. § 1630.2(m).