UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

UNITED STATES OF AMERICA

Plaintiff

5. CIVIL ACTION NO.: 3:00CV377BN

MISSISSIPPI DEPARTMENT OF PUBLIC SAFETY

Defendant

UNITED STATES' MEMORANDUM IN OPPOSITION TO THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

In 1993, Ronnie Collins arrived at the Mississippi Department of Public Safety (MDPS) Highway Patrol Training Academy (the Academy) to fulfill his life-long goal of becoming a Trooper. At that time, he had served in law enforcement for 13 years, and resigned his position as a police officer and as a correctional officer for this opportunity. Knowing that Mr. Collins had insulin-dependent diabetes and used food and insulin to manage his diabetes, MDPS had medically qualified him for the Academy. Nonetheless, during the two first days at the Academy, MDPS denied or interfered with three requests by Mr. Collins for food-related accommodations.

As a consequence, two days after starting at the Academy, Mr. Collins was found sitting on his bunk, in a state of profound hypoglycemia (low blood sugar). Because of his illness, he was disoriented and unable to comply with orders from the training officers that he go to physical training. When an officer touched his shoulder to turn him around, Mr. Collins – in a

responsive gesture – allegedly grabbed the shirt of the training officer. MDPS immediately terminated Mr. Collins and put him in a car to drive home, even though he was confused and experiencing memory loss from hypoglycemia.

MDPS claims that its termination of Mr. Collins was justified, because it has a right to dismiss a cadet for misconduct, even if the conduct is caused by a disability. Defendant's argument is fatally flawed, however, because it ignores its own failure to reasonably accommodate Mr. Collins. MDPS deprived Ronnie Collins of the only reasonable accommodation he needed and asked for – extra food. MDPS cannot lawfully deprive an individual of the "medication" that he needs to control his diabetes (i.e. food) and then terminate him when he becomes ill due to lack of accommodation.

II. APPLICABLE LAW

A. Summary Judgment Standard

Summary judgment should be rendered only "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). The district court must not "resolve factual disputes by weighing conflicting evidence...since it is the

province of the jury to assess the probative value of the evidence." Kennett-Murray Corp. v. Bone, 622 F.2d 887, 892 (5th Cir. 1980). Summary judgment is improper where the court merely believes it unlikely that the non-moving party will prevail at trial. National Screen Serv. Corp. v. Poster Exchange, Inc., 305 F.2d 647, 651 (5th Cir. 1962).

B. Americans With Disabilities Act Standards

The ADA prohibits an employer from discriminating against a qualified individual with a disability, who is an employee or applicant, because of his or her disability. 42 U.S.C. § 12112(a).

"Discrimination" under the statute includes:

> not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity. 42 U.S.C. §12112(b)(5)(A).

Disability is defined in the statute as:

1. a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
2. a record of such an impairment; or
3. being regarded as having such an impairment.[1]

[1]42 U.S.C. § 12102(2); See also Sutton v. United Airlines, 527 U.S. 471 (1999) (plaintiff's impairment must be evaluated in light of her mitigating measures).

To establish a *prima facie* case of disability discrimination under the ADA, the United States must demonstrate that the Charging Party: (1) is an individual with a disability; (2) is otherwise qualified to perform the job requirements, with or without reasonable accommodation; and (3) suffered an adverse employment action because of his disability.[2]

III. DISPUTES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT

A. There Is a Dispute of Material Fact As To Who Was Responsible for Mr. Collins' Hypoglycemia at the Academy

[2] Rizzo v. Children's World Learning Centers, 213 F.3d 209, 215-216 (5th Cir. 2000); Frazier v. Simmons, 254 F.3d 1247, 1256 (10th Cir. 2001).

In 1987, Ronnie Collins was diagnosed with diabetes, and in 1988, Mr. Collins began the painful, lifelong process of injecting himself with insulin every day. (Ex. 1, Walt Med. Rec. USID00249, US00298, US00300.) Because of his diabetes, Mr. Collins overhauled his eating habits and began the constant task of regulating his food based upon his insulin and activity level. (Ex. 2, Collins Dep. at 134; Ex. 3, Linda Collins Aff.) While Defendant asserts that Mr. Collins did not possess an adequate understanding of diabetes self-care, (Def.'s Br. at 3), in fact, Dr. Frank Vinicor, M.D., M..P.H.,[3] one of the nation's leading experts on diabetes care, has stated that Mr. Collins' diabetes treatment in 1993 was at an appropriate and acceptable standard of care, and Mr. Collins had a sound understanding of how to manage his diabetes at that time.[4] (Ex. 4, Vinicor Dep. at 15, 21-22, 84-85; Ex. 2, Collins Dep. at 9, 12-13, 17-19.)

In 1993, Mr. Collins managed his diabetes with insulin and food, taking into consideration his activity level, and when necessary, adjusting how much and when he ate. He always had to think about eating, and as he explains, he "basically has to eat constantly, it seems, on a regular basis just in order to feed it... I have to feed it so that way it won't consume me."

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[3]Dr. Frank Vinicor, is the Director of the Division of Diabetes Translation, National Center for Chronic Disease Prevention and Health Promotion, Centers for Disease Control.

[4] Although Mr. Collins, who received his diabetes care from a general internist in Cleveland, Mississippi, did not have access to all of the latest research and medical trials that were being conducted at academic medical centers in larger cities, he received acceptable diabetes care. Diabetes treatment changed quite dramatically after the publication of results from the Diabetes Control and Complications Trial (DCCT) on September 30, 1993. Diabetes Control and Complications Trial Research Group, *The Effect of Intensive Treatment of Diabetes on the Development and Progression of Long-term Complications in Insulin-Dependent Diabetes Mellitus*, 329 New Eng. J. Med. 977 (1993), attached at Ex. 5. This 10-year study presented the first consistent and convincing evidence that intensive diabetes therapy could mitigate the long-term serious complications of diabetes. Following the publication of this study, diabetes doctors, for the first time, had clear evidence of the importance of instructing their patients to maintain tight control of their blood sugar through daily blood sugar testing, multiple shots of insulin per day, and regular contact with their physician and other experts such as nurses, dietitians and diabetes educators. (Ex. 5, DCCT Study; Ex. 4, Vinicor Dep. at 19, 62-64.)

(Ex. 2, Collins Dep. at 137.) Because of his diabetes, Mr. Collins no longer has the choice of whether to eat or not to eat. He must carefully monitor not only the types of foods he eats, but also the portion size, how often he eats, and when he eats. (Ex. 2, Collins Dep. at 13, 134.) If Mr. Collins deviates from his required diet, he will "pay for it dearly" with either the uncomfortable symptoms of hyperglycemia (high blood sugar), or the potentially life threatening symptoms of hypoglycemia (low blood sugar). (Ex. 2, Collins Dep. at 134, 136.)

From his diagnosis through 1993, Mr. Collins' blood sugar levels tended to run high. (Ex. 4, Vinicor Dep. at 71; Ex. 6, Walt Dep. at 37.) As directed, Mr. Collins periodically tested his urine to determine whether his sugar level was too high. (Ex. 7, Vinicor Expert Rep. at US00333.) Mr. Collins did not test his blood sugar level for "lows" because he was easily able to feel his symptoms of low blood sugar, which included sweating, hunger, tingling of the fingertips and lips, and quivering leg muscles, and to correct them with food. (Ex. 2, Collins Dep. at 11, 31.) When Mr. Collins experienced initial symptoms of hypoglycemia, he would immediately eat a peppermint candy (which he routinely carried with him), drink a cola, or take some other available simple sugar, and then stop what he was doing to get more substantial food. (Ex. 2, Collins Dep. at 12, 131; Ex. 4, Vinicor Dep. at 77.) That Mr. Collins never had a major hypoglycemic episode until he attended the Academy, (Ex. 2, Collins Dep. at 90-91), is further evidence of his ability to accurately recognize and correct the symptoms of hypoglycemia, when he has access to food.

With very hard work, regular attention to his food intake, exercise, and insulin use, Mr. Collins successfully worked in law enforcement for 13 years before attending the Academy. (Ex. 8, Collins MDPS Application at USID00224.) He worked as a full-time Correctional Officer for

the Mississippi Department of Corrections in Parchman and as a full-time police officer for Drew, Mississippi, working both jobs simultaneously at times. (Id.) In 1990, Mr. Collins successfully completed the "quasi-military" training academy required by his position as a Drew police officer. (Ex. 9, Robinson Aff.) His supervisors, at both Drew and Parchman, respectively describe him as an "excellent police officer" and as "one of the best employees I ever had." (Id.; Ex. 10, Armstrong Aff.)

In 1993, Mr. Collins was accepted to the MDPS Academy Class 48, conditioned upon his successful completion of their pre-employment procedures, including a medical examination. (Ex. 11, Stewart Dep. at 14-16.) Mr. Collins was thrilled to be accepted to the Academy – becoming a Mississippi State Highway Patrol Trooper was his "chosen career," the goal of his lifetime. (Ex. 12, Parchman Resignation Letter; Ex. 2, Collins Dep. at 112.) At the medical exam, Mr. Collins advised Dr. Mark Brooks (a contract physician who performed the applicant medical examinations in 1993) and Lt. Col. Stewart (the MDPS personnel director and "ADA Coordinator," who was present at Mr. Collins' medical exam) that he had diabetes and used insulin. (Ex. 2, Collins Dep. at 15.) The purpose of the exam was to evaluate whether each applicant was medically qualified to attend the Academy and to work as a trooper. (Ex. 13, 30(b)(6) Dep. at 56.) At the medical exam, applicants listed their medications and health conditions, and among other things, had their blood sugar tested. (Id. at 56-57.) Dr. Brooks was directed to screen out applicants with health conditions which made them unfit. (Id. at 63-64.) It was his responsibility, when necessary, to request further information from the applicant's physician, and to advise MDPS staff of any potential health issues. (Id. at 64, 66-68.) Dr. Brooks noted that Mr. Collins' blood sugar was high and discussed Mr. Collins' diabetes with

him and Lt. Col. Stewart. (Ex. 11, Stewart. Dep. at 19-20.) Dr. Brooks approved Mr. Collins as medically qualified to attend the Academy.

Although Mr. Collins told Dr. Brooks and Lt. Col. Stewart (himself a graduate of the Academy) that he used insulin and food to control his diabetes, neither MDPS representative advised Mr. Collins that the Academy had rules and practices which would curtail Mr. Collins' access to food. (Ex. 2, Collins Dep. at 141-142; Ex. 11, Stewart Dep. at 20-21, 46.) More specifically, neither Lt. Col. Stewart nor Dr. Brooks ever advised Mr. Collins that, among other things, he would be barred from using the vending machines at the Academy, requesting a larger portion size from the cafeteria workers, or going through the cafeteria line a second time to request more food. (Id.; Ex. 14, Haskins Aff., Mangum Aff.) In fact, the only mention of food at the medical examination was when Lt. Col. Stewart asked Mr. Collins if he needed "special food" while at the Academy. Mr. Collins replied that he did not need "special food," and that he could eat the "regular food" at the Academy, as he had when he went through basic training at the same facility. (Ex. 11, Stewart Dep. at 45-46; Ex. 2, Collins Dep. at 108.) In addition, neither Dr. Brooks nor Lt. Col. Stewart discussed with Mr. Collins the timing, intensity or duration of the physical activities required at the Academy. (Ex. 13, 30(b)(6) Dep. at 58-59.)

Contrary to Defendant's allegations, Mr. Collins could not have been aware of the Academy's rules and policies relating to food (which it claims are contained in the Cadet Manual) before arriving at the Academy. (Def.'s Br. at 5.) The only written information that he recalls receiving before arriving at the Academy was a list of items to bring included with his acceptance letter. (Ex. 2, Collins Dep. at 19.) And, in answering interrogatories, MDPS stated that the Manual "is believed to have been distributed on August 29, 1993 during cadet

orientation." (Ex. 15, Def.'s Response to Pl.'s Interrog. 13.) Even if Mr. Collins received the Cadet Manual before arriving, it did not explain that cadets may not get a second portion at meal time; nor did it state that cadets cannot ask for – and that cafeteria workers are not supposed to give – extra portions. (Ex. 16, Cadet Manual at 7-8; Ex.14, Haskins Aff., Mangum Aff.)

Defendant argues that "[b]y reading the Cadet Manual, Collins obtained a basic understanding of the exercise... arrangements at the training academy," and he should have adjusted his insulin dosage accordingly. (Def.'s Br. at 5, 22.) To the contrary, the United States maintains that it was not common in 1993 for an individual to self-adjust his insulin, and that the Manual did not contain the detailed information (as to the intensity, timing, and duration of exercise) that an individual would require to manipulate his insulin dosage. (Ex. 4, Vinicor Dep. at 31-32, 107; Ex. 16, Cadet Manual at 4, 20.) Further, Mr. Collins' doctor had not recommended that Mr. Collins manipulate his insulin. (Ex. 1, Walt Med. Rec. at US00298.)

Training officers at the Academy, who supervise the cadets, are experienced troopers who volunteer and are selected by MDPS to be assigned to "temporary duty" as the "TAC officers" for the Academy. (Ex. 17, McCain Dep. at 9-10.) Being a training officer (or "TAC officer") is an honor and a privilege at the Highway Patrol. (Ex. 18, Shelbourn Dep. at 13.) MDPS did not, however, provide any specific instruction with respect to being a TAC officer at the Academy. (Ex. 19, White Dep. at 14; Ex. 17, McCain Dep. at 9.) Nor did MDPS educate its training officers about the ADA or the obligation to provide reasonable accommodations. (Ex. 11, Stewart Dep. at 25; Ex. 17, McCain Dep. at 27; Ex. 18, Shelbourn Dep. at 23; Ex. 20, Brown Dep. at 26.) Rather, the officers were provided only one policy on the ADA, which lacks any procedure for requesting or responding to reasonable accommodations. (Ex. 21, Order 00/07;

Ex. 13, 30(b)(6) Dep. at 7-8.)

B. There Are Disputes Of Fact As To Whether Mr. Collins Requested Food-Related Accommodations At The Academy And Whether MDPS Denied Them

For Cadet Class 48, Capt. Lee Shelbourn was serving as the lead "Training Officer" in charge for his first time. (Ex. 18, Shelbourn Dep. at 15.) Also, several of the training officers, including Sgt. McCain, Trooper Brown, and Trooper White, were working at the Academy for their first time. (Ex. 19, White Dep. at 6; Ex. 20, Brown Dep. at 19; Ex. 17, McCain Dep. at 13.) And while a number of incumbent troopers have diabetes, Mr. Collins may have been one of the first cadets with insulin-dependent diabetes to attend the Academy. (Ex. 11, Stewart Dep. at 11-12; Ex. 22, Claiborne Dep. at 36.)

The atmosphere at the Academy was intimidating and hierarchical. (Ex.19, White Dep. at 8-9; Ex. 18, Shelbourn Dep. at 6.) The program was a rigorous, paramilitary Academy, governed by strict rules and regulations. (Ex. 18, Shelbourn Dep. at 45; Ex. 23, Marlow Dep. at 46, 48.) Cadets were not permitted to initiate conversations with TAC officers unless necessary, and as a general rule, were not to challenge TAC officers' instructions. (Id. at 22; Ex. 17, McCain Dep. at 30; Ex. 19, White Dep. at 21-22.) When a trooper had a notable interaction with a cadet, he was instructed to reduce it to writing in a "Student Contact Form" or "TAC report." (Ex. 17, McCain Dep. at 28.)

On August 29, 1993, Cadet Class 48 reported to the Academy at noon. Mr. Collins, like most cadets, just wanted to blend in and not be noticed. (Ex. 2, Collins Dep. at 143-144; Ex. 17, McCain Dep. at 30.) The first day at the Academy was grueling as the cadets engaged in drilling ceremonies, intensive exercise and orientation to the Academy. (Ex. 23, Marlow Dep. at 47.)

Nicknamed "the longest day" by the Training Officers, the 29th included a quick dinner in the barracks (a packaged tuna-fish sandwich and unsweetened iced tea) and lasted until 2:00 a.m. when the Cadets were finally permitted to go to the barracks to sleep. (Id.) Some time that evening, Col. Clark, the Chief of the Highway Patrol, advised several TAC officers that Mr. Collins had diabetes, and that they should keep "an eye on [him]." (Ex. 2, Collins Dep. at 29-30.)

Mr. Collins made his first request for a reasonable accommodation at approximately 2:00 a.m. on August 30th, when he entered the training officers' office (know as the TAC shack) and requested to use the vending machines to get additional food. (Ex. 2, Collins Dep. at 33-35; Ex. 24, TAC Rep. at USID00244; Ex. 23, Marlow Dep. at 36-37; Ex. 17, McCain Dep. at 37.) Mr. Collins explained that he had diabetes, that he had not had enough food that day, and that his blood sugar was low. (Ex. 2, Collins Dep. at 34; Ex. 24, TAC Rep. at USID00244; Ex. 17, McCain Dep. at 38.) Officers Marlow and McCain refused his request to use the vending machines, although they had the authority to allow him access. (Ex. 23, Dep. Marlow at 41-42.) Instead, Sergeant Marlow gave Mr. Collins two packaged tuna-fish sandwiches. (Id. at 41; Ex. 17, Dep. McCain at 38.)

There is a factual dispute as to whether Mr. Collins' request to use the vending machine was a request for a reasonable accommodation and whether MDPS' action constituted a denial of his request. MDPS' only stated reason for disallowing Mr. Collins' request is that vending machine use "is a privilege that's granted somewhere in the training...there's no magic date...the vending machines are downstairs and when we – a cadet class is upstairs...we're isolating ourselves from the other training that's going on at the academy..." (Ex. 23, Marlow Dep. at 38.)

Although the sandwiches raised Mr. Collins' blood sugar sufficiently for that night, by denying him access to the vending machines, MDPS precluded him from buying non-perishable snacks to keep for a later time. Moreover, by its refusal, the Academy foreclosed the vending machine as an additional source of calories for Mr. Collins during his time there. (Ex. 2, Collins Dep. at 145-147.) Marlow did not ask Mr. Collins if the sandwiches were an adequate substitute for the vending machines. (Id. at.146; Ex. 24, TAC Rep. at USID00244; Ex. 23, Marlow Dep. at 42.)

Mr. Collins' second reasonable accommodation request came on the afternoon of August 30th, as the cadets engaged in intense physical exercise on the "skid pad." Because Mr. Collins felt his blood sugar falling, he put a peppermint candy in his mouth, as he routinely did. (Ex. 2, Collins Dep. at 41.) Rather than permitting him to eat the candy and continue with the exercise, Capt. Shelbourn and another TAC officer shouted at Mr. Collins and ordered him to spit the candy out. (Id. at 41-42; Ex. 18 Shelbourn Dep. at 44-45.) According to two TAC reports, Mr. Collins explained that he needed the candy to raise his blood sugar for his diabetes, and Capt. Shelbourn told him to keep the candy in his mouth, but to show the candy to him periodically. (Ex. 24, TAC Rep. at USID00239, USID00242; Ex. 18, Shelbourn Dep. at 44-49.) The directive to periodically show Capt. Shelbourn the candy made no sense to Mr. Collins, since he obviously needed to eat up the candy to get its benefit. (Ex. 2, Collins Dep. at 42.) Although Mr. Collins was permitted to keep the candy, he was also ordered to drop and do pushups. (Id.; Ex. 18, Shelbourn Dep. at 45-46; Ex. 23, Marlow Dep. at 51-52.) The push-ups likely undermined the effect that the peppermint would have had in raising Mr. Collins' blood sugar. (Ex. 4, Vinicor Dep. at 77-78.) As a result of this hostile encounter, Mr. Collins was intimidated from openly eating his peppermints to supplement his sugar. (Ex. 2, Collins Dep. at 147.)

Mr. Collins made his third request for accommodation during dinner in the cafeteria. Cadets were prohibited from speaking at meals, other than to say grace. (Ex. 17, McCain Dep. at 44; Ex. 16, Cadet Manual at 12.) Contrary to Defendant's assertion (Def.'s Br. at 8), cadets were not permitted to ask the cafeteria workers for more of any particular food and they, in turn, were told to serve measured portions and not to talk with the cadets. (Ex. 14, Haskins Aff., Mangum Aff.; Ex. 2, Collins Dep. at 47-48.) During dinner and while several other cadets were still in the cafeteria, Mr. Collins approached Sgt. Marlow and asked him "if he could get another plate of food...[stating] that because of his diabetic condition he felt he needed more food." (Ex. 2, Collins Dep. at 48-49; Ex. 24, TAC Rep. at USID00238.) Defendant disputes that it denied this request for a reasonable accommodation. (Def.'s Br. at 1.) In his own words, Sgt. Marlow told Mr. Collins that he "should get enough food on the first trip thru [sic] the line," and instead gave him a couple of pieces of fruit, despite his authority to permit Mr. Collins to get another plate of food. (Id.; Ex. 2, Collins Dep. at 48-49; Ex. 23, Marlow Dep. at 54.) Sgt. Marlow also told Mr. Collins "not to bother him again." (Ex. 2, Collins Dep. at 48.) Just like the evening before, Mr. Collins requested specific, available food for his diabetes and MDPS denied it and Sgt. Marlow did not ask if his substitution – the fruit – would be sufficient. The fruit was inadequate to maintain Mr. Collins' blood sugar at a safe level. (Id. at 55; Ex. 4, Vinicor Dep. at 81.) Mr. Collins took the fruit with him to his barracks and ate it before going to bed. (Ex. 2, Collins Dep. at 55.)

On the evening of August 30th at around 10:00 p.m., the cadets were sent to the barracks for the night and the last thing that Mr. Collins recalls was sitting up in his bunk, grabbing a towel to wipe profuse sweat off his forehead. (Ex. 2, Collins Dep. at 53-56.) The next event that

Mr. Collins recalls is sitting in the TAC shack with Capt. Shelbourn screaming in his ear that he had disobeyed an order. (Id. at 56-58.) Mr. Collins recalls that he asked what had happened, received no explanation, and was completely at a loss to understand what was occurring.

C. There Are Disputed Issues of Material Fact As To Whether MDPS Knew Or Should Have Known That Mr. Collins Was Hypoglycemic On August 31st

On the morning of August 31, 1993, as Defendant concedes, Mr. Collins was hypoglycemic. (Def.'s Br. at 10.) Based upon the written reports and testimony, the events of August 31, are as follows. At approximately 5:00 a.m., TAC officers woke the cadets and told them to report to the gym. Shortly thereafter, Trooper White noticed that Mr. Collins was "slow getting up," and told him "to get up and get dressed, get to P.T.," and Mr. Collins responded that "he would [and] it wouldn't happen again." (Ex. 19, White Dep at 32.) Trooper White checked in with Mr. Collins a second time and noticed that Mr. Collins "had sat back down on his bunk" and Trooper White told Mr. Collins "again to get up and get dressed." (Id. at 33.) Mr. Collins again told Trooper White that he would get up. (Id.) On his way out of the barracks, Trooper White found Mr. Collins still sitting on his bunk. (Id.) Trooper White told Mr. Collins a third time that "he needed to get up and go [sic] PT and get his clothes on." (Id.) Mr. Collins "just sat there" in response to Trooper White's request. (Id.) Trooper White went to get assistance. (Id.)

At that time, Sgt. McCain entered the barracks. According to Sgt. McCain, he asked Mr. Collins "what the problem was" and Mr. Collins responded that "there was no problem" and "that he was getting it together." (Ex. 17, McCain Dep. at 51-52.) Mr. Collins' behavior was unusual. (Id. at 55.) When Trooper White returned with Shelbourn, they found Mr. Collins still by his bunk. (Ex. 18, Shelbourn Dep. at 52.) Capt. Shelbourn ordered Mr. Collins to "get his clothes on and go to P.T." (Id. at 53; Ex. 24, TAC Rep. at USID00240-USID00241; Ex. 19,

White Dep. at 34.) Mr. Collins did not go to the gym as ordered, but was not argumentative. (Ex. 18, Shelbourn Dep. at 54; Ex. 24, TAC Rep. at USID00240-USID00241.) At no time did Mr. Collins state that he did not want to go to P.T. or that he wanted to quit; he simply did not get up. (Ex. 17, McCain Dep. at 59; Ex. 19, White Dep. at 54; Ex. 18, Shelbourn Dep. at 62.) When Mr. Collins finally stood, he turned toward his locker, perhaps to get something. (Id. at 54; Ex. 24, TAC Rep. at USID00240-USID00241.) It was "very unusual" for a Cadet to turn away from a training officer. (Ex. 18, Shelbourn Dep. at 56.) Perhaps, by turning away from Capt. Shelbourn, and not following his direction, Mr. Collins angered Shelbourn and the other officers.

While Mr. Collins had his back to Capt. Shelbourn, he put his hand on Mr. Collins' shoulder to turn him around. (Ex. 24, TAC Rep. at USID00240-USID00241; Ex. 17, McCain Dep. at 52.) In a reaction that the United States maintains was caused by his hypoglycemia, Mr. Collins "grabbed" Capt. Shelbourn "by the shirt." (Ex. 24, TAC Rep. at USID00240; Ex. 7, Vinicor Expert Rpt. at US00334-US00335.) Immediately thereafter, Sgt. McCain and Trooper White escorted Mr. Collins to the TAC shack to terminate him "for failing to obey a direct order." (Ex. 25, Exit Statement; Ex. 24, TAC Rep. at USID00240-USID00241.) At no time did any of the TAC officers feel threatened by Mr. Collins. (Ex. 17, Shelbourn Dep. at 56; Ex. 19, White Dep. at 45.) Mr. Collins failed to sign his exit statement and failed to write in a reason for his departure. (Ex. 25, Exit Statement.) While being processed out, Mr. Collins recalled that Trooper White said "oh, you're a diabetic? Then we don't need you..." (Ex. 26, EAB Transcript USID00152.)

Capt. Shelbourn testified that if Mr. Collins had said "yes sir, and then not responded, obviously a red flag would have gone up," and he would have ensured Mr. Collins received

medical attention. (Ex. 18, Shelbourn Dep. at 88.) Although the TAC reports and testimony show that this is precisely what happened, Capt. Shelbourn did not seek medical assistance for Mr. Collins but instead terminated him. (Ex. 25, Exit Statement.)

Trooper Brown – who was unaware of the earlier events – escorted Mr. Collins to the barracks to pack his belongings. He noted that Mr. Collins appeared "totally disoriented" while helping him pack and escorting him to his car. (Ex. 24, TAC Rep. at USID00237.) Two Rankin County officers were called to escort Mr. Collins off the Academy grounds. (Ex. 24, TAC Rep. at USID00241.) While driving off the Academy grounds, Mr. Collins stopped his car and asked the officers for directions because he could not recall which way he should drive to go home. (Ex. 2, Collins Dep. at 58-59.) During that interaction, one of the officers told Mr. Collins that a TAC officer had said "that they don't understand or see how [he] managed to get in due to the fact that [he] was a diabetic." (Id. at 126.) Mr. Collins drove off the Academy grounds and recalls being at a fast food restaurant, ordering a breakfast sandwich and juice. (Id. at 59-61.) Mr. Collins recalls that the drive-through window looked "so distant," and his memory was going in and out. (Id. at 61.) Along the way home, Mr. Collins pulled his car to the shoulder of the road and fell asleep. (Id. at 63.) He was awakened when a truck passing by shook his vehicle. (Id.) Mr. Collins arrived home and called his doctor because he was very upset that he did not know what had happened at the Academy and did not recall his drive home.[5] (Id. at 64.)

When Mr. Collins arrived at Dr. Walt's office he was, according to Dr. Walt,

[5] As Dr. Vinicor testified, "brain hypoglycemia, is not an all-or-none phenomenon. It doesn't affect every single function of brain, nor does it constantly and persistently affect all function in the brain. There is with hypoglycemia, and the studies would support this, a fluctuation or waxing and waning of blood sugars all within the low blood sugar range.... parts of brain function can be not working and other parts working fine.... you may... be able to drive a car and still be hypoglycemic in terms of your ability to think, to react, to understand." (Ex. 4, Vinicor Dep. at 88-89.)

"confused," "had a clouded memory" and was "talking in circles." (Ex. 6, Walt Dep. at 17-18; Ex. 1, Walt Med. Rec. at USID00247.) Mr. Collins' blood sugar was measured at a level of 39, which is very low. (Id.) Dr. Walt forced Mr. Collins – who initially refused – to drink a Coke in order to immediately raise his blood sugar. (Id.; Ex. 6,Walt Dep. at 19.)

Based upon expert testimony and the TAC officers' written description of the events of that morning, it is evident that Mr. Collins was disoriented, hypoglycemic, and unable to fully comprehend what was going on between 5:00 and 5:30 a.m, on August 31st, when MDPS terminated him. (Ex. 7, Vinicor Expert Rep. at US00334-US00335; See Facts, Supra at 12-14.) As a result of his severe hypoglycemia, Mr. Collins experienced "cognitive dissonance." (Ex. 4, Vinicor Dep. at 47.) The condition of cognitive dissonance, which is a consequence of progressively severe hypoglycemia, is characterized by a lack of higher cognitive function. (Id.) While an individual may appear to be awake and alert, in fact, he is not truly aware because his brain is starved for sugar. (Id.) While he was in that impaired state that morning, none of the four MDPS officers who encountered him offered Mr. Collins food or medical assistance. While Defendant concedes that Mr. Collins experienced hypoglycemia, it contends that the hypoglycemia was caused by Mr. Collins' poor diabetes care. (Def.'s Br. at 10, 22.) The United States disagrees, and contends that Mr. Collins' hypoglycemia was caused by MDPS' failure to allow him to access the available foods that he requested from them.

In the final analysis, it was Defendant's obligation – under the ADA as well as its own standards – to ensure that the TAC officers had a sufficient understanding of diabetes to enable them to properly respond to Mr. Collins' requests for food, and to recognize his hypoglycemia. It is the *foremost* obligation of the training officers to protect the health and safety of the cadets.

(Ex. 23, Marlow Dep. at 18-19; Ex. 27, BLEOST Manual §27.4.1 & §44.1.3.5 at US00488, US00532-US00533.) Second, the MDPS has itself identified the ability to recognize "a person as disturbed (mentally, emotionally, etc.) or incapacitated (drunk, epileptic, etc.)" as an essential job task of a highway patrol trooper. (Ex. 29, State Trooper Task List at 24.) Third, all MDPS troopers are required to annually update their Red Cross First Aid certification, which, in 1993, included training about recognizing and understanding diabetes. (Ex. 30, Red Cross Training Manual.) Despite these job requirements, the TAC officers failed to protect Mr. Collins' health and safety and failed to recognize or acknowledge his hypoglycemia. Instead, MDPS terminated him because of his diabetes.[6]

[6] There is a factual dispute as to whether MDPS was required to provide Mr. Collins an impartial hearing before dismissing him, and if it was required, why they did not. (Ex. 27, BLEOST at US00478; Ex.13, 30(b)(6) Dep. at 46.) The Mississippi Board on Law Enforcement Officer Standards and Training ("BLEOST") sets standards that govern all law enforcement Academies in the state. (Ex. 27, BLEOST at US00382, US00384, US00386; Ex. 13, 30(b)(6) Dep. at 42-43.) Those standards state that: "prior to dismissal for disciplinary reasons, a student should be afforded the opportunity to have a hearing before an impartial review board." (Ex. 27, BLEOST at US00478 §24.7.2; Ex. 13, 30(b)(6) Dep. at 46; See also Ex. 16, Cadet Manual at 25-28.) Mr. Collins was not afforded such a hearing. (Ex. 13, 30(b)(6) Dep. at 47-48.) Lacking such a procedure, Mr. Collins appealed his termination to the State of Mississippi Employee Appeals Board ("EAB"). He ultimately was provided no recourse from that tribunal. Without deciding his case on the merits, the Board ruled that as a Cadet, Mr. Collins was not an employee of the State and that he was not entitled to the Appeals Board process. (Ex. 28, EAB Ruling.)

IV. MDPS IS NOT ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW

A. MDPS Has Not Shown That It Met Its Legal Duty To Reasonably Accommodate Mr. Collins' Diabetes

An employer violates the ADA when it fails to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability" unless the employer can demonstrate that the accommodation will impose an undue hardship.[7] After an employee requests an accommodation, and makes known his disability and its limitations, it is the employer's obligation to respond to the request, including, if necessary, initiating an informal, interactive process to identify the appropriate accommodation.[8] While the employer is not required to provide the exact accommodation requested, the employer must provide an accommodation that enables the employee to perform the job. If the accommodation provided is not effective, then the employer has not met its obligation.[9] Once an accommodation is properly requested, the employee and employer share responsibility for fashioning the appropriate accommodation.[10] A reasonable accommodation is one that is feasible for the employer, and once a request is made, it is the employer's burden to show that the

[7] 42 USC §12112(b)(5)(A).

[8] Taylor v. Principal Financial Group, Inc., 93 F.3d 155, 163-165 (5th Cir. 1996); 29 CFR § 1630.2(o)(3) (EEOC Title I regulations.)

[9] US Airways v. Barnett, 535 U.S. 391, 400 (2002); Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1285-86 (11th Cir. 1997); Hankins v. The Gap, Inc., 84 F.3d 797, 800-801 (6th Cir. 1996).

[10] Principal Financial Group, 93 F.3d at 165; Loulseged v. Akzo Nobel Inc., 178 F.3d 731, 736 (5th Cir. 1999).

accommodation causes an undue hardship.[11]

Before Mr. Collins arrived at the Academy, MDPS knew that he had diabetes, and during the Academy, many of the TAC officers were informed that Mr. Collins had diabetes. (See Facts, Supra at 6-7, 9-12.) Mr. Collins properly requested a reasonable accommodation on three occasions during his two days at the Academy, and each time his requested accommodation was denied or he was punished for the request. Specifically, Mr. Collins requested to go to the vending machine, to eat a peppermint candy while on the skid pad, and to get a second serving of food in the cafeteria at dinner. On each instance, Mr. Collins identified the problem he was having (low blood sugar), its connection to his diabetes, and the accommodation he needed to remedy the problem (access to the vending machines, a peppermint candy, a second portion of dinner food). (See Facts, Supra at 9-12.)

[11] US Airways, 535 U.S. at 401-402.

To the extent that Defendant acknowledges these requests, it argues that Mr. Collins' accommodation requests were insufficient because they were ad hoc, on-the-spot requests, directed to different training officers and did not include necessary information about his limitations. (Def.'s Br. at 21.) The contemporaneous TAC reports disprove these contentions because they show that each request was made to a training officer with supervisory responsibility for the cadets, and contained all necessary information to be permissible under the ADA.[12] (See Facts, Supra at 9-12.) Reasonable accommodation requests can be made when an employee learns of his need for the request – they do not need to be made in advance.[13]

In a case presenting strikingly similar issues, EEOC & Landers v. Wal-Mart, 99-CV-453, 2001 WL 1725300 (W.D.N.Y. Sept. 28, 2001), the court denied summary judgment to an employer who terminated a diabetic employee for misconduct when he took an unauthorized lunch break. There, the employer claimed that none of its managers knew that the employee had diabetes, and terminated the employee for insubordination**.** Although the defendant argued that the plaintiff never requested an accommodation, the plaintiff alleged that the employer directed him not to take a lunch break, while knowing that he had diabetes and needed a regular lunch break, thus denying him a reasonable accommodation. The court, in denying summary judgment, found that if, as plaintiffs contended, the store manager (who directed the employee

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[12] See, EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Requesting Reasonable Accommodation, Question 1 and 3(2002); <http://www.eeoc.gov/docs/accommodation.html> (Reasonable accommodation requests do not need to be in writing, do not need to use the words "reasonable accommodations," and can be made to any supervisor.); See also Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 313-314 (3d Cir. 1999); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1172 (10th Cir. 1999) (en banc).

[13] See EEOC Guidance, Question 4; See also Ralph v. Lucent Technologies, Inc., 135 F.3d 166, 172 (1st Cir. 1998) (The obligation to provide a reasonable accommodation is a continuing one.)

not to take a lunch break) was aware of his diabetic condition, a jury could conclude that the employer was aware that he needed such an accommodation and denied it.

Although an employer need not give an employee exactly what he requests, the employer is obligated to engage in an interactive process to arrive at an appropriate accommodation.[14] An employer cannot drag its feet when the need for the accommodation is immediate.[15] The TAC officers admitted that Mr. Collins' requests were not burdensome and that they had the ability to grant them.[16] (See Facts, Supra at 10-12.) Yet those same TAC officers – none of whom had greater knowledge of diabetes than Mr. Collins – responded to Mr. Collins' requests by substituting their judgment for Mr. Collins'. Those substitutions were not effective. (Ex. 4,

[14]See Phoenixville, 184 F.3d at 317 (the employer should "offer and discuss available alternatives when the request is too burdensome.")

[15]Loulseged, 178 F.3d at 737 n.6.

[16]Defendant has not argued, and cannot argue that it would have been an *undue hardship* to permit Mr. Collins to get another plate of food in the cafeteria, use the vending machine, or eat a peppermint without punishment, because none of these requests would have caused MDPS difficulty or expense. 42 U.S.C. §12111(10).

Vinicor Dep. 81.) When Mr. Collins was told not to bother them about food again, MDPS ended the discussion on the matter, thereby, arguably terminating the interactive process.[17] In the hierarchical structure of the Academy, Mr. Collins was not permitted to challenge an officer, and cannot be responsible for failing to get the additional food that he needed.[18] (See Facts, Supra at 9.)

MDPS cannot show as a matter of law that it engaged in a discussion (or interactive process) to determine what would have been an effective accommodation for Mr. Collins after any of his three requests. A jury could find, based on the record, that when the TAC officers denied Mr. Collins' use of the vending machines, they denied his ability to purchase additional snacks later without engaging in any discussion. A jury could also find that MDPS denied his request (or discouraged future requests) for an accommodation when: (1) Capt. Shelbourn yelled at Mr. Collins and ordered him to do push-ups for eating candy (which likely undermined the benefit that the candy would have on Mr. Collins' blood sugar level); and (2) when two TAC officers drafted reports noting the incident as a "Conduct" issue. (See Facts, Supra at 11-12.) Finally, an issue exists as to whether, when Sgt. Marlow substituted fruit for dinner food and told

[17] See Loulseged, 178 F.3d at 738 ("A clear declaration by an employer that no reasonable accommodation will be forthcoming might indeed be seen as terminating the interactive process and removing any duty the employee had to speak up").

[18] See Phoenixville, 184 F.3d at 312, 317-318 (an employer who acts in bad faith in the interactive process will be liable if the jury can reasonably conclude that the employee would have been able to perform the job with accommodations).

Mr. Collins not to bother him again for food, MDPS denied Mr. Collins an accommodation and precluded further discussion. (See Facts, Supra at 12). Defendant has not offered any evidence that it met its legal burden to engage in the interactive process in order to determine an appropriate accommodation. (See Facts, Supra at 10-12.)

Rather, Defendant tries to escape liability for its actions by arguing that the officers were "placed in the impossible position of trying to propose food related accommodations without having the relevant information." (Def.'s Br. at 22.) To the contrary, Mr. Collins made it easy for them by requesting a specific accommodation: for example, to go through the cafeteria line a second time, and Sgt. Marlow had the authority to allow him to do so. (See Facts, Supra at 12.)

Defendant also argues that Mr. Collins was responsible for his hypoglycemia because he was not measuring his blood sugar and was injecting an "overly large dosage of insulin." (Def.'s Br. at 22.) However, Mr. Collins was monitoring his low blood sugar as he typically did, by sensing symptoms of low blood sugar (tingling, hunger), and seeking additional food when those symptoms occurred.[19] In addition, self-adjustment of insulin was not common in 1993 outside of academic medical centers, Mr. Collins' doctor had not recommended self-adjustment for him, and in any event, and a cadet would have had inadequate information at the Academy on which to do so. (See Facts, Supra at 7-8.) Hence, Mr. Collins' only remedy for the low blood sugar he developed at the Academy was to ingest additional calories.[20] In addition, Dr. Brooks, whose

[19] Even if Mr. Collins had measured his glucose with urine strips while at the Academy, his actions would have been the same – he would have requested additional food to raise his glucose level. In any event, urine strips are not capable of measuring *low* glucose levels, they only measure highs.

[20] While, unfortunately, like most diabetics, Mr. Collins was not able to perfectly manage his diabetes, any problem with Mr. Collins' food regimen, as noted by Dr. Walt, was that it caused his blood sugar to run too high. (Ex. 6, Walt Dep. at 36-37.)

job was to screen out individuals who had physical conditions or took medicines that made them medically unqualified, expressed no concern about Mr. Collins' diabetes care, and unconditionally approved him. (See Facts, Supra at 5.)

B. MDPS Was Not Entitled As A Matter Of Law To Terminate Mr. Collins For Alleged "Misconduct" Resulting From His Hypoglycemia

The practices at the Academy restricted the cadets' access to food. Food was critical to Mr. Collins diabetes management. When MDPS interfered with Mr. Collins' ability to obtain enough food to raise his blood sugar, he became severely hypoglycemic. (Ex. 4, Vinicor Dep. at 108-109.) Mr. Collins had never before experienced severe hypoglycemia, because he had never had his access to food restricted. (See Facts, Supra at 5.) He had successfully performed as a police officer, a correctional officer, and a cadet in the police academy, while having insulin-dependent diabetes. Because of diabetes-related hypoglycemia, Mr. Collins became cognitively impaired in the early morning of August 31st, and was unable to respond to the officers' directions to go to P.T. (See Facts, Supra at 13-14.) Mr. Collins' hypoglycemia also caused his alleged misconduct, i.e. grabbing the shirt of Capt. Shelbourn. Mr. Collins does not recall that incident and can neither admit nor deny it. Assuming, however, that the incident occurred as the TAC officers reported it, it was not a permissible reason for terminating Mr. Collins.

Defendant argues that it may lawfully terminate Mr. Collins for "misconduct," and cites to cases where an employer terminated an employee for misconduct that may have been related to a disability. (Def.'s Br. at 16-20.) Defendant misses the point, however, by neglecting to factor in its own culpability. In this case, not only was Mr. Collins' alleged "misconduct" a result of his disability, it was *caused* by Defendant's failure to accommodate Mr. Collins. Mr.

Collins' situation is easily distinguishable from those in the "misconduct" cases cited by Defendant because, in **all** of those cases, the plaintiff alone was responsible for his misconduct and it was not caused by the employer's failure to accommodate.[21] For example, in Siefken v. Village of Arlington Heights, 65 F.3d 664, 667 (7th Cir. 1995), the plaintiff, who had insulin-dependent diabetes, and became hypoglycemic on the job, did not need nor ask for an accommodation and was properly terminated for "fail[ing] to meet the employer's legitimate job expectations," when he failed to control his diabetes. By contrast, Mr. Collins needed, and requested, reasonable accommodations, and it was MDPS' denial of his simple requests that caused Mr. Collins' hypoglycemia. None of the cases cited by Defendant involves the unusual scenario Mr. Collins faced where the employer interfered with the measures by which he mitigates his disability.[22] Mr. Collins' case, by contrast, is more analogous to an employer forcing an employee to turn down the volume on his hearing aid and then terminating him because he failed to understand the employer's instructions. See also EEOC & Landers v. Wal-Mart, 99-CV-453, 2001 WL 1725300, supra at 20.

There is a question of material fact as to whether, if MDPS had granted Mr. Collins'

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[21] See Robertson v. Neuromedical Ctr., 161 F.3d 292 (5th Cir. 1998) (neurologist with ADHD, who had control over whether or not to take his medication, admitted he was unable to safely care for patients); Jones v. American Postal Workers Union, 192 F.3d 417 (4th Cir. 1999) (employee with schizophrenia and post traumatic stress syndrome threatened to kill his supervisor); Hamilton v. Southwestern Bell, 136 F.3d 1047 (5th Cir. 1998) (employee with post traumatic stress disorder violated employer's workplace violence policy in an unprovoked outburst at work); Palmer v. Circuit Court of Cook Co., 117 F.3d 351 (7th Cir. 1997) (employee with depression and delusional disorder threatened to kill her supervisor).

[22] Although the Supreme Court recently touched on the issue of workplace conduct rules in Raytheon Co., v. Hernandez 2003 WL 22843597 (U.S. Dec. 2, 2003), that case is not factually or legally analogous. In Raytheon, the employer applied a no re-hire policy to an employee who had been lawfully forced to resign for violating his employer's drug policy. Further, the employee, who use illegal drugs, was not a qualified individual with a disability under the ADA. See 42 U.S.C. § 12114(a).

requests for additional food, he would have become hypoglycemic, failed to get off his bunk, and responsively grabbed Capt. Shelbourn's collar in the midst of his cognitive dissonance. Defendant cannot permissibly terminate Mr. Collins because of conduct that it caused by denying him a reasonable accommodation and interfering with the measures he uses to control his disability.

C. A Reasonable Jury Could Conclude that MDPS Knew Or Should Have Known That Mr. Collins Was Experiencing Hypoglycemia When It Terminated Him

The United States maintains that the TAC officers knew or should have known that Mr. Collins' disorientation and strange conduct was the result of his diabetes. (See Facts, Supra at 13-14.) Each of the officers who denied Mr. Collins food knew that he had diabetes and knew that it could cause low blood sugar. Officers Marlow, McCain, and Shelbourn had each spoken to him directly about his diabetes and need for additional food. The TAC officers slept in a common barrack, ate together, and routinely discussed the events of each day. (Ex. 18, Shelbourn Dep. at 20-22.) Capt. Shelbourn also routinely reviewed all of the contact forms each morning. (Id. at 80-81.) While the three officers who encountered him in the barracks, on the morning of August 31st, claim that Mr. Collins did not appear "ill" or exhibit signs of hypoglycemia, it was clear to Trooper Brown, who had no previous contact with Mr. Collins, that he was acting "totally disoriented." (See Facts, Supra at 15.) Hence, as Dr. Vinicor testified, the officers should have known that Mr. Collins was hypoglycemic on the morning of August 31st, and should have gotten him medical attention.[23] Also, if MDPS' own rules were followed, and he were given a hearing before he was summarily terminated, MDPS would have certainly discovered that Mr. Collins was ill and perhaps, Mr. Collins could have successfully completed the Academy. (See Facts,

Supra at 16.)

[23] Dr. Vinicor's opinion is that: "To my way of thinking, in this particular case it was known that Mr. Collins was a law officer, certainly, in other capacities; that he certainly made it known that he had diabetes and took insulin; and certainly they sensed that he was different than when he came into the academy or else they wouldn't have discharged him. And I think those things together, knowing that he had diabetes, knowing that he took insulin, knowing that several times he indicated to the officers that he had diabetes and was taking insulin, et cetera, that that would have been sufficient to indicate in my judgment, my personal clinical judgment, to people to have known that something could be going on ... and should have been recognized as the possibility that this was hypoglycemia." (Ex. 4, Vinicor Dep. at 39-40.)

Additionally, if the TAC officers did not know how to properly respond to Mr. Collins' situation, it was not because he failed to make his diabetes known, request accommodations or try to engage in the interactive process. Instead, it is because MDPS failed to train its TAC officers about the ADA, reasonable accommodations and how to serve as supervisors. (See Facts, Supra at 8-9.) Compounding this lack of education was the fact that the four TAC officers who encountered Mr. Collins on the morning that MDPS terminated him were serving in their capacities for their first time. Contrary to the conjecture of an inexperienced officer, Mr. Collins gave no indication that he wanted to quit the Academy. (Def.'s Br. at 10; See Facts, Supra at 13.)

D. A Reasonable Jury Could Conclude That Ronnie Collins Was "Qualified" to Perform the Job of a Highway Patrol Cadet

Evidence in the record supports that Mr. Collins is a "qualified individual with a disability" – that is, "an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodations, can perform the essential functions of such position."[24] A reasonable jury could find that with reasonable accommodations related to his food intake, Mr. Collins could have successfully completed the Academy. He passed all of the pre-employment requirements and tests to be a cadet, including MDPS' pre-employment medical examination. (See Facts, Supra at 6-7.) Unlike many other cadets who voluntarily quit the MDPS Academy because they lacked the requisite physical fitness, Mr. Collins was in top physical shape when he entered the Academy and his doctor had no reservations about his ability to succeed at the Academy. (Ex. 2, Collins Dep. at 22-23; Ex. 6,

[24] 29 CFR §1630.2(m).

Walt Dep. at 35-36.) Prior to going to the MDPS Academy, Mr. Collins had also successfully completed three other academies, one after he was diagnosed with insulin-dependant diabetes. (See Facts, Supra at 5-6.)

In 1993, Mr. Collins also had five years of experience as a police officer which required many of the same job tasks as a highway Trooper.[25] (See Facts, Supra at 5-6.) In all his years as a police officer and a correctional officer, Mr. Collins' diabetes never interfered with his ability to perform his job. (Id.) Former superiors have only praise for Mr. Collins and claim that he was one of the best employees they ever had. (Id.)

E. A Reasonable Jury Could Find That Ronnie Collins Is an Individual with a Disability

Defendant acknowledges that "there is evidence in the record that raises a legitimate question as to whether Mr. Collins was 'disabled' under the ADA" (Def.'s Br. at 16.), thereby conceding that Summary Judgment is not proper on this issue. Notwithstanding Defendant's concession, the United States will set forth the legal and evidentiary basis for Mr. Collins' coverage as a individual with a disability. The United States alleges that Mr. Collins has a disability for purposes of the ADA because, at the time he was terminated, Mr. Collins' diabetes substantially limited him in the major life activities of eating, thinking, and caring for himself.[26] Contrary to Defendant's assertion, the United States does not contend – and has never

[25] See, e.g. Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997) (Court held that plaintiff was qualified for and could perform the essential functions of the police officer position because he had the necessary educational background, valid motor vehicle license, physical fitness, correctable vision, and nine years of successful performance as a police officer).

[26] Contrary to Defendant's assertion (Def.'s Br. in Supp. of Summ. J. at 16.), the United States stated, in answering Defendant's Interrogatories, that when MDPS terminated Mr. Collins, he was substantially limited in several major life activities, including, but not limited to thinking and eating.

contended – that Mr. Collins is substantially limited in working or exercising.

The determination of whether an individual has a "disability" – a physical or mental impairment that substantially limits one or more of the major life activities – involves a three step process:

> First, we consider whether [the individual's claimed disability] was a physical **impairment**. 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.[27]

[27] Bragdon v. Abbott, 524 U.S. 624, 631 (1998) (emphasis added).

Major life activities are those basic activities that the average person in the general population can perform with little or no difficulty, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.[28] A substantial limitation of a major life activity is present when "an individual [has] an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."[29] Whether an impairment is substantially limiting includes consideration of "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."[30]

1. Diabetes is a Physical Impairment

[28]29 C.F.R. § 1630.2(i); Appendix to Part 1630-Interpretive Guidance on Title I of the ADA, 29 C.F.R. § 1630.2(i); See also Bragdon v. Abbott, 524 U.S. at 638. ("...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.")

[29]Toyota v. Williams, 534 U.S. 184, 198, 196-197 (2002) ("Substantially" in the phrase "substantially limits" suggests "considerable" or "to a large degree"... and "precludes impairments that interfere only in a minor way..."). See also 29 C.F.R. § 1630.2(j)(1).

[30]See 29 C.F.R. §1630.2(j)(2).

Diabetes is a physical impairment,[31] and Defendant concedes that Mr. Collins had insulin-dependent diabetes in 1993. (Def.'s Br. at 2.) Diabetes is a serious, lifelong condition that has adversely affected and limited Mr. Collins in several ways. Mr. Collins must constantly balance his food, exercise, and insulin so as to avoid the serious complications of high blood sugar and low blood sugar. Mr. Collins is always at risk of developing hypoglycemia, even to the point of losing consciousness or death. Despite his efforts, Mr. Collins has experienced serious, irreversible, long-term complications of diabetes, including kidney damage, heart disease, vision loss, and high blood pressure. (Ex. 6, Walt Dep. at 39.) His diabetes has also caused him to suffer from sexual dysfunction. (Id. at 41-42.) Diabetes is a permanent condition and while its symptoms and complications may vary in their intensity from day to day, the risks always remain.

2. Ronnie Collins Was Substantially Limited In The Major Life Activity of Eating At The Time Of His Termination

Mr. Collins is substantially limited in eating because he must exercise constant vigilance with regard to his diet to manage his diabetes or he will suffer serious health consequences, such as heart disease, kidney failure, blindness, neuropathy and foot amputation. (Ex. 7, Vinicor Expert Rep. at US00332; See Facts, Supra at 4-5.) Like many diabetics who use insulin, Mr. Collins must take extreme care with what, when, and how much he eats. Food, for him, is like

[31] See 29 C.F.R. §1630.2(h)(1) (a physical impairment is 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 and lymphatic, skin, and endocrine.")

medicine, and if taken in the wrong types or quantities, or not taken at all, can make him very ill. (See Facts, Supra at 4-5.) Mr. Collins must be very careful to always have some kind of calories on him to alleviate the first symptoms of hypoglycemia. (Id.) When he feels those symptoms, he typically eats a peppermint candy immediately, and then gets additional food. (Id.) To Mr. Collins, it feels like he has to eat constantly to control his diabetes. (Id.)

Equally burdensome, Mr. Collins is limited in the quantity and choice of what he eats, and he cannot eat many of the kinds of foods he ate before he was diagnosed with diabetes. (Id.; Ex. 3, Linda Collins Aff.) He must stay away from cakes, other sweets, and starches generally because they cause his blood sugar to go too high – which causes frequent urination, irritability, dry mouth, and leads to serious long term complications. (See Facts, Supra at 4-5.) He also cannot eat large quantities of food, no matter how tasty, because that will cause his blood sugar to go too high, and he must have regular and frequent meals. (Id.) These restrictions are constant, daily, and carry severe consequences if ignored – possibly loss of consciousness or even death. Mr. Collins must also time his meals carefully around his insulin shot. In 1993, he was taking one shot a day in the morning, and he had to eat breakfast within 30-60 minutes of taking his shot, or else he would begin to suffer the symptoms of hypoglycemia from the effect of the insulin. (Ex. 2, Collin Dep. at 154-155.)

Eating is a major life activity.[32] As the 5th Circuit stated in Waldrip v. General Electric Co., 325 F.3d 652, 655 (5th Cir. 2003), "[b]y any measure, eating is of central importance to daily life and the life process." Several courts have found that individuals who have insulin-

[32]Waldrip v. General Electric Co., 325 F.3d 652, 655 (5th Cir. 2003); Fraser v. Goodale, 342 F.3d 1032, 1040 (9th Cir. 2003); Amir v. St. Louis Univ., 184 F. 3d 1017, 1027 (8th Cir. 1999).

dependent diabetes may be substantially limited in eating.[33]

3. Ronnie Collins Was Substantially Limited In Thinking And Caring For Himself – Both Of Which Are Major Life Activities – At The Time Of His Termination

[33] See Fraser v. Goodale, 342 F.3d 1032, 1041 (9th Cir. 2003) (plaintiff with type 1 diabetes may be substantially limited in eating because her "diabetes regimen is perpetual, severely restrictive, and highly demanding."); Lawson v. CSX Transportation, Inc., 245 F.3d 916, 924-926 (7th Cir. 2001) (applicant with insulin-dependent diabetes may be substantially limited in eating because his ability to metabolize food is difficult and erratic, he must exercise constant vigilance to control his blood sugar, and he must always concern himself with the availability of food, the timing of when he eats, and the type and quantity of food he eats.); Erjavac v. Holy Family Health Plus, 13 F.Supp.2d 737, 746-747 (N.D. Ill. 1998) (even in its treated form, plaintiff's insulin-dependent diabetes may substantially limit the major life activities of eating and elimination of waste because plaintiff must eat constantly to prevent blood sugar fluctuations; must stop all other activities and pursue food when her blood sugar drops; must urinate frequently; and self-inject insulin several times a day.)

As Defendant acknowledges, on the morning of August 31, 1993, Mr. Collins was experiencing severe hypoglycemia. (Def.'s Br. at 10.) As a result of his severe hypoglycemia, Mr. Collins experienced "cognitive dissonance" and became substantially limited in thinking and caring for himself. Mr. Collins' severe hypoglycemia was demonstrated by, among other things, his symptoms of low blood sugar leading up to that morning, his disorientation, his unusual behavior, his lack of memory of many of the events of that morning, and his blood sugar measurement of 39 later that day. (Ex. 7, Vinicor Expert Rep. US00334-US00335.) Dr. Vinicor can find no explanation for these factors other than that Mr. Collins was experiencing severe hypoglycemia.[34] (Id.)

On the morning that MDPS terminated him, Mr. Collins was unable to comprehend and follow the orders being given him. When he was told to go to P.T. – many times, and by three officers – he just sat on his bunk. (See Facts, Supra at 13-14.) Even though he may have verbally responded to their orders (with a "passing" verbal response, as one with Alzheimers disease may do), he was unable to understand those orders.[35] (See Facts, Supra at 16.)

[34] The United States does not concede that MDPS's designated expert, Dr. Frederick Carlton, who practices emergency medicine, and has no specialized training or experience in diabetes, is qualified to testify as an expert on all of the issues in this case.

[35] See, e.g., Nawrot v. CPC Int'l, 277 F.3d 896, 901 (7th Cir. 2002) (when plaintiff was introduced to a new employee, he was suffering from hypoglycemia, and his offensive statement, "I would shake your hand but I just went to the bathroom and did not wash my hands," was a product of his disorientation from the hypoglycemia.)

A number of courts have acknowledged that an individual experiencing a severe hypoglycemic episode is substantially limited in a major life activity because they were unable to think, care for themselves, see, hear, or speak during these episodes.[36] Mr. Collins was substantially limited when he was terminated because, at that time, he was *unable* to think and understand or to respond cognitively. Thus, his hypoglycemia "severely restrict[ed him] from doing activities that are of central importance to most people's daily lives."[37] Because of his diabetes, Mr. Collins is always and permanently at risk of experiencing hypoglycemia that may substantially limit his ability to think and care for himself. While Mr. Collins' mitigating measures – food, insulin, and exercise – allow him to avoid the danger of severe hypoglycemia most of the time, the denial of a mitigating measure such as necessary food will always cause

[36]See Nawrot v. CPC Int'l, 277 F.3d at 905 (finding plaintiff was substantially limited in his ability to think and care for himself because the plaintiff, who had insulin-dependent diabetes, suffered from hypoglycemic episodes, during which "his ability to think coherently is significantly impaired, as well as his ability to function.... [and] his ability to express coherent thoughts is impaired, causing him to make nonsensical statements."); McCusker v. Lakeview Rehabilitation Center, No. Civ. 03-243-JD, 2003 WL 22143245, at *1,*3 (D. N.H. Sept. 17, 2003) (plaintiff may be substantially limited in major life activities during his occasional hypoglycemic episodes when he is unable to communicate, concentrate, control his movements, or care for himself); EEOC & Landers v. Wal-Mart, 99-CV-453, 2001 WL 1725300, at *5 (W.D.N.Y. Sept. 28, 2001) (plaintiff may have been substantially limited in major life activities, such as seeing, hearing, and working, based on one episode at work when he passed out due to hypoglycemia.).

him to become substantially limited in thinking and caring for himself.

[37] See Toyota v. Williams, 534 U.S. 184, 198 (2002).

While the Fifth Circuit has not yet reached the question of whether thinking is a major life activity, the four Courts of Appeals that have addressed this issue have held or assumed that it is.[38] Caring for one's self has also been widely recognized as a major life activity within the meaning of the ADA.[39] To determine whether Mr. Collins was substantially limited in thinking and caring for himself in 1993, his condition must be evaluated at the time of his termination.[40]

In the final analysis, the evidence of Mr. Collins' food restrictions, and limitations in thinking and caring for himself when hypoglycemic, are sufficient for a jury to find that with respect to the major life activities of eating, thinking, and self care, Mr. Collins is "significantly restricted...as compared to..the average person in the general population." See 29 C.F.R. §1630.2(j)(1)(ii). At the time MDPS terminated him from the Academy, Mr. Collins had a "disability" within the meaning of the ADA, because he was substantially limited in thinking and caring for himself. Were it not for MDPS' restrictions on food and denials of Mr. Collins'

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[38]See Nawrot v. CPC Int'l, 277 F.3d at 905 (plaintiff, a person with insulin-treated diabetes, "has sufficiently demonstrated that his diabetes substantially limits his ability to think and to care for himself, which are both major life activities."); EEOC v. Sara Lee Corp., 237 F.3d 349, 353 (4th Cir. 2001); Doyal v. Okla. Heart, Inc., 213 F.3d 492, 496 (10th Cir. 2000); Taylor v. Phoenixville Sch. Dist.,184 F.3d 296, 307 (3d Cir.1999); see also Mulholland v. Pharmacia & Upjohn, Inc., 4:99-CV-98, 2001 WL 311241, at *4 (W.D. Mich., Feb. 15, 2001), and EEOC v. Voss Electric Co., 257 F. Supp. 2d. 1354, 1359 (W.D. Okla. 2003).

[39] Nawrot v. CPC Int'l, 277 F.3d at 905; Fenney v. Dakota, Minn. & E. R.R. Corp., 327 F.3d 707, 714 (8th Cir. 2003); Peters v. Baldwin Union Free Sch. Dist., 320 F.3d 164, 168 (2d Cir. 2003) (Rehabilitation Act); McCusker v. Lakeview Rehabilitation Center, No. Civ. 03-243-JD, 2003 WL 22143245, at *3 (D. N.H. Sept. 17, 2003). See also regulations to ADA and Rehabilitation Act, each listing "caring for one's self" as an example of a major life activity, 29 CFR §1630.2(i); 28 CFR §41.31(b)(2); Bragdon v. Abbott, 229 U.S. at 638 (the ADA must be construed to be consistent with the Rehabilitation Act regulations).

[40]Nowak v. St. Rita High School, 142 F.3d 999, 1003 (7th Cir. 1998) (The determination as to whether an individual is a "qualified individual with a disability" must be made as of the time of the employment decision); Frazier v. Simmons, 254 F.3d 1247, 1256 (10th Cir. 2001) (same); Voss Elec. Co., 257 F. Supp. 2d at 1358 ("The Court must consider the extent of [plaintiff's] impairment at the time the employment decision was made...").

requests for additional food while at the Academy, he would not have become severely hypoglycemic. MDPS may not deny Mr. Collins the reasonable accommodation that he needs to control his diabetes and then escape liability by claiming that Mr. Collins is not entitled to the protections of the ADA because he is not an individual with a disability.[41]

For all the foregoing reasons, the United States respectfully requests that Defendant's Motion for Summary Judgment be denied.

[41] See Denney v. Mosey, No IP 98-852-C, 2000 WL 680417, at *10 (S.D. Ind. Mar. 20, 2000) (an employer cannot interfere with or prohibit the use on the job of corrective measures essential to the employee's health and life and then escape liability under the ADA on the theory that the employee does not have a disability.)

Respectfully submitted,

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