No. 00-2849

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RALPH NAWROT,

Plaintiff-Appellant,

v.

CPC, INTERNATIONAL, N/K/A
BEST FOODS, INC., A CORPORATION

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Judge David H. Coar
Case No. 99 C 630

BRIEF OF AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

EQUIP FOR EQUALITY, INC.

AMERICAN DIABETES ASSOCIATION

IN SUPPORT OF REVERSAL

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

(formerly known as Certificate of Interest)

Appellate Court No: 00-2849

Short Caption: Nawrot v. CPC Int' 1

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):

Equip for Equality, Inc.

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

Equip for Equality. Inc.

American Diabetes Association

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

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

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The Court prefers the statement be filed immediately following docketing; but, the disclosure statement shall be filed with the principal brief or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. The attorney furnishing the statement must file an amended statement to reflect any material changes in the required information. The text of the statement (i.e. caption omitted) shall also be included in front of the table of contents of the party's main brief.

Attorney's Signature: /s/ Karen I. Ward Date 11/22/00

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STATEMENT OF INTEREST OF AMICI CURIAE

Equip for Equality, Inc.

Equip for Equality, Inc. ("EFE"), founded in 1985, is a non-profit organization and, under federal law, is the governor-designated protection and advocacy system for people with disabilities in Illinois. EFE serves people with a variety of diseases and disabilities, including a significant number with diabetes. EFE's mission is to advance the human and civil rights of people with disabilities in Illinois, including people with diabetes. EFE works with agencies that serve people with diabetes directly, such as the American Diabetes Association, and is in possession of substantial information about how individuals with diabetes deal with their illness and with society's perceptions thereof in a variety of situations, including the workplace.

EFE has participated as *amicus curiae* in state and federal court, including the Seventh Circuit.

American Diabetes Association

The American Diabetes Association ("Association") is a nationwide, non-profit voluntary health organization founded in 1940, and made up of persons with diabetes, health professionals who treat persons with diabetes, research scientists and other concerned individuals. The mission of the Association is to prevent and cure diabetes and to improve the lives of all people affected by diabetes.

The Association establishes, reviews and maintains the most authoritative and widely followed clinical practice recommendations, guidelines and standards for the treatment of diabetes. It also publishes the most influential professional journals concerning the treatment of diabetes and developments in diabetes research.

Presently, there are over 16,000,000 Americans with diabetes including about 4,000,000 persons who take some insulin to help control and treat their diabetes. *See Diabetes in America (2*d Ed.), National Institutes of Health (NIH Publication No. 95-1468 "Summary" ch. 1. p.1.).

The Association has participated as *amicus curiae* in the United States Supreme Court and in several Courts of Appeal including the Seventh Circuit, as well as a number of District Courts.

INTRODUCTION AND STATEMENT OF THE ISSUES

This case presents an issue of first impression in this Circuit under the Americans with Disabilities Act ("ADA"), an issue that is critical to all persons with insulin-treated diabetes who desire to participate in the workforce, and to many other employees who have significant physical and mental impairments. That issue is whether the United States Supreme Court's decision in *Sutton v. United Air Lines*, 527 U.S. 471 (1999) requires that a measure requested by an employee as a reasonable accommodation, but *which has been denied*, nevertheless must be considered when determining whether a disability is present under the ADA.

In *Sutton*, the Supreme Court held that mitigating measures used by an employee must be taken into account when determining whether a covered disability is present. *Sutton* at 492. The court below interpreted *Sutton* to require that requested, but denied, accommodations are considered when determining if a person has an ADA disability, a result it nevertheless viewed as "distorted." *Nawrot v. CPC International*, 2000 U.S. Dist. LEXIS 8973*20 (N.D. Ill. 2000). The court acknowledged that Plaintiff Nawrot had an impairment that substantially limited one or more major life activities—indeed threatened his life—when he was unable to monitor his blood sugar frequently and administer insulin as appropriate. But, the court concluded, Mr. Nawrot's condition had to be evaluated as if these measures were being utilized even though

they were unavailable to Mr. Nawrot in the workplace without a reasonable accommodation from the employer, which Plaintiff claimed had been denied. *Nawrot,* 2000 U.S. Dist. Lexis 8973, *20.

As we show below, *Sutton* does not require the "distorted result" reached by the court below, but in fact compels reversal of that decision. As we further show, affirming that result would spell disastrous consequences for employees with diabetes, many of whose very life depends upon the frequent monitoring of their blood sugar throughout the work day. It would effectively repeal the ADA for countless persons who are able to work with simple accommodations from their employers, but whose lives are threatened without such accommodations.

For years, persons living with diabetes faced job discrimination because of the belief that their illness was so disabling as to render them unable to work. However, advances in treatment as well as the enactment of anti-discrimination laws have led to increased acceptance of people with diabetes in the workplace. For those like Mr. Nawrot, who have the most severe type of diabetes, such workplace acceptance is a fiction absent reasonable accommodation to facilitate treatment. For those accommodations to be *presumed to be present,* even when they are not, when determining whether a disability exists, is to throw the baby out with the bathwater, a result not intended by Congress and not intended by the Supreme Court in *Sutton.*

This case presents a second issue that also is critical to people with diabetes: whether summary judgment is appropriate for resolving the complex questions surrounding the individualized assessment of the condition of a person with insulin-treated diabetes who is utilizing mitigating measures. For many people, accommodations that render them qualified to perform their jobs are nevertheless insufficient to mitigate their impairments completely, and

they remain substantially limited in one or more major life activities. In this case, the court below granted summary judgment for the employer, concluding, without a trial, that Mr. Nawrot did not remain substantially limited in any major life activity after considering the impact of mitigating measures. As we show below, the impact of measures used by individuals with diabetes varies widely and the measures themselves have serious consequences. For those with insulin-treated diabetes, the individualized assessment required by ADA, presents a factual question on whether a disability is present. Where the facts regarding residual limitations are disputed, a trial is required. Thus, even assuming that *Sutton* requires the denied measures to be considered, the court erred in granting summary judgment for the employer in this case.

FACTS

Amici accept the statement of facts set forth in Appellant's brief.

ARGUMENT

I. Diabetes Is A Life-Threatening Illness That Requires Individualized Daily Management

Diabetes is a non-curable, progressive, metabolic disease that affects over 16,000,000 Americans. Successful management of diabetes requires a treatment regimen that is custom-designed for each individual and is based on each individual's medical history, mental and physical capabilities and activity level. Any successful treatment regimen must be as individually tailored as possible. *See, Medical Management of Type 1 Diabetes* (3rd ed.); American Diabetes Association (1998).

Diabetes involves the uncontrolled fluctuation of an individual's blood sugar level. It results from either the failure of the beta cells of the pancreas to produce enough insulin for normal carbohydrate, protein and fat metabolism or the failure of the body to effectively utilize whatever insulin is produced. Insulin is a hormone that serves to "drive" sugar from the

bloodstream into the cells of the body where it is metabolized. Without insulin to cause sugar to cross the cell membrane, the sugar stays in the bloodstream where the kidneys attempt to eliminate it through the increased production of urine. If this increased urine production is not slowed by insulin, the person with diabetes will suffer blurred vision, eventually lose consciousness and die. *See*, *Bombrys v. City of Toledo*, 849 F. Supp. 1210, 1213-1214 (N.D. Ohio 1993); Bayler, *Dulling a Needle: Analyzing Federal Employment Restrictions on People with Insulin-Dependent Diabetes* (67 Ind. L.). 1067, 1068-1074 (1992). High blood sugar levels or "hyperglycemia" is the hallmark of untreated diabetes.

For a person who needs insulin to treat diabetes (approximately 4,000,000 Americans) the failure to take insulin through either injection or an insulin pump can result in severe acute medical problems and death. American Diabetes Association Position Statement: Insulin Administration Diabetes Care, 23:S86 (2000); Medical Management of Type 1 Diabetes, pp. 51 and 55. However, insulin is not a cure for diabetes. Insulin is a tool to *help* treat the symptoms of diabetes, lessen the acute and chronic impact of diabetes and other medical complications and try to minimize blood sugar fluctuation. Moreover**,** insulin taken in this manner can cause too much sugar to cross the cell membranes, resulting in a blood sugar level that is too low, a condition known as hypoglycemia. Hypoglycemia causes a variety of problems and symptoms ranging from tremors, palpitations and sweating, though confusion, drowsiness and mood changes, to unresponsiveness, unconsciousness or convulsions, and even death.

Thus, the goal of all diabetes management is to keep the blood sugar level within a "normal range," i.e., neither too low (to avoid hypoglycemia) nor too high (to avoid hyperglycemia). Self-monitoring of blood sugar levels is used to allow the person with diabetes to adjust the timing and amount of insulin to match different activity levels and the amount,

timing and nature of nutrition – all of which influence blood sugar levels. Self-monitoring is an integral feature of diabetes care allowing a person to adjust his insulin therapy to keep his blood sugar level within that person's "normal range". *See*, *Medical Management of Type 1 Diabetes* (3rd ed.), American Diabetes Association (1998), p. 51 et seq.

Effective management of diabetes focuses on the particular needs of each individual, from the setting of individual blood sugar level goals to the formulation of an individualized diabetes management plan. Such a management plan includes insulin therapy, blood sugar level monitoring, continuing and regular medical visits, an exercise program and a diet. All of these must be tailored to the individual's needs, condition and capacities. *See*, American Diabetes Association Position Statement, 23:S32 (2000). The effect of these, including the degree to which they mitigate the impairments caused by the illness, is a very fact-specific matter in every case.

The individual with diabetes plays the major role in management of his or her disease. However, cooperation of those with whom the individual interacts is essential to keeping the disease from quickly getting out of control, indeed to preventing death itself. The self-treatment and monitoring measures undertaken by the individual with diabetes are often insufficient to mitigate the disease. Only with the cooperation from the employer—including permitting breaks for blood sugar monitoring, permitting injection of insulin throughout the day, and permitting snacking throughout the day—are many people with diabetes even partially able to control their diabetes. Without employer-driven measures, these individual's diseases remain substantially uncorrected—with frequent and unpredictable interference with, and loss of, several major life activities, including breathing, thinking, communicating and living itself. Even with such

measures, the condition of most people with insulin-treated diabetes remains serious, and they are often substantially limited in many major activities in their lives.

II. Reasonable Accommodations That Have Been Requested And Refused May Not Be Considered As Mitigating Measures When Determining Whether A Disability Is Present Under The ADA.

Determinations under the ADA require *individualized* assessments. *Bragdon v. Abbott*, 524 U.S. 624, 641-642. (1998). This principle applies to the threshold question of whether a disability is present, which must be made on a case-by-case basis looking at the individual's own situation. *Roth v. Lutheran General Hospital*, 57 F. 3d 1446, 1454 (7th Cir. 1995).

In *Sutton v. United Air Lines*, the Supreme Court held that the "individualized inquiry" mandated by the ADA required that an individual who used mitigating measures must have his condition evaluated for a disability determination with those measures considered. *Sutton* at 482. The Court stated that a disability determination should not be based on how an uncorrected impairment usually affects those who have it, but rather on the "individual's actual condition." *Sutton* at 483.

In *Sutton*, where the applicants' actual state when they presented themselves for employment included mitigating measures (glasses) that they had available to them and were using, and where using them required no accommodation from the employer, the question of whether the applicants had a disability was determined based on that reality. This, the Court reasoned, was required by the case-by-case individualized approach generally required by the ADA. *Bragdon* at 641-642. *Sutton* at 483.

The same reasoning that lead the Supreme Court to view a person in his mitigated state when the measures that mitigate his condition could be and were accomplished outside of the place of employment, or without an accommodation from the employer, compels the opposite

conclusion when the employer controls the measure needed to mitigate the impairment. In *Sutton*, the Supreme Court emphasized that in actual disability cases (as opposed to "regarded as" or "record of " cases), the inquiry must be whether there is an impairment that substantially limits a major life activity as a practical matter, not as a theoretical matter. In the employment context, an individual's "actual condition" is his condition when he is in the workplace. *Sutton* mandates that this condition be evaluated not by considering "general information" about how certain corrective measures "usually affect individuals," but rather on how that individual actually *is*, given his impairment and given any mitigating or corrective measures that he is able to access. *Id*.

The Supreme Court in *Sutton* commented specifically about diabetes, rejecting the notion that an individual with diabetes who utilized mitigating measures, and "whose illness *does not* impair his or her daily activities," should be considered disabled "just because he or she has diabetes." *Id*. (emphasis supplied) The Court recognized, however, that without monitoring of blood sugar levels and administering of insulin, an insulin-treated person with diabetes would "almost certainly be limited in one or more major life activities." *Id*. Under this reasoning, an individual with insulin-treated diabetes, who cannot administer his insulin or monitor his blood sugar because he is prevented from doing so by his employer denying him a reasonable accommodation, is limited in "one or more major life activities." *Id*.

Where, as here, the employee needs assistance *from the employer* in order to utilize the very measure that may keep his impairment from substantially interfering with a major life activity, and the employer refuses, then for the time period affected by that decision, that refusal places the employee *back* in the unmitigated state, and the individualized assessment required by the ADA dictates that his condition must be measured by that reality. In the case of diabetes, for

many people, including the plaintiff in this case, the "mitigating measure" of insulin cannot be had without the prior activity of blood sugar testing. This is because, as we have explained, the treatment can be as dangerous or more dangerous than the disease. An individual with insulin-treated diabetes whose employer forces him to work in an environment, or under a schedule, that does not permit monitoring his blood sugar levels and administering insulin at appropriate times, is entitled to have the determination of whether he has an ADA disability, be based upon *those* facts. Any other result would be "contrary to both the letter and the spirit of the ADA." *Id.*

Accordingly, a person with insulin-treated diabetes must be viewed in his unmitigated state (without insulin in balance) when he is unable to test his blood sugar levels. When the employer—reasonably or unreasonably—prevents the employee from achieving the "mitigated" state, then the employee remains in the unmitigated state, because the *mitigated state*, not the disability, is illusory. When the *employer* controls the mitigation, by having the power to grant or deny the right to eat and the right to take breaks for glucose tests or insulin injection, then for purposes of determining whether there is a disability, the employee's actual state is without those measures *to the extent* that they are denied or made impossible by actions of the employer. That is the state *Sutton* holds is determinative. If, in this state, the employee is determined to have an ADA disability, the employer may still claim a right to withhold the mitigating measure as unreasonable or to deny as unreasonable the opportunity for the plaintiff to provide his own mitigating measure. He would be claiming, however, not that the plaintiff does not have a disability, but that he cannot provide the accommodation requested because it is not reasonable, because it would constitute an undue hardship upon the employer, or because permitting the measure would present a "direct threat" under the Act.

Any other result with respect to employer-controlled mitigating measures would defeat the fundamental purpose of Title I of the ADA—to remove arbitrary barriers to employment of people with disabilities. In *Sutton***,** the Supreme Court could not have, and did not, intend to evict from the house of ADA protection, those persons for whom mitigating measures were, in the context of the case presented, a fiction in whole or in part. Given the Court's expressed desire that the ADA be interpreted and applied to individual situations and not groups of persons or classifications of diseases, the only sensible reading of *Sutton* is that its "mitigated state" limitation on the term "impairment" does not apply where the mitigated state itself cannot be achieved without a reasonable accommodation that is unavailable.

The Court below misunderstood this aspect of *Sutton* when it concluded that unprovided measures must be considered, a result it clearly believed to be unfair:

> The rationale of *Sutton* leads to a distorted result. Although a court must consider the effect of mitigating measure when determining whether physically or mentally impaired plaintiffs are entitled to a statutory protection from discrimination, the alleged failure to accommodate can preclude a plaintiff from unitizing those mitigating measures on the job. Here, a question of material fact exists as to whether Best Foods prohibited Nawrot from controlling his diabetic condition. Yet, according to *Sutton*, this court cannot reach the question of discrimination because Nawrot is not deemed disabled when viewed in his corrected state…" *Nawrot,* 2000 U.S. Dist. Lexis 8973*20.

But, as we have shown, the court below erred in believing itself so constrained by *Sutton*. The court in *Sutton* simply was not confronted with a situation in which the mitigating measure required an accommodation from the employer, which had been denied. We ask this Court to hold that where all or part of the mitigating measure is the reasonable accommodation that is sought but denied by the employer, the determination of whether or not there is a disability must be determined by reference to the employee in his *unaccommodated* state. Thus, where, as here, a physician provides evidence that without the accommodation requested, the employee will be

substantially limited in the major life activities of living, thinking, walking, breathing, or working, then that employee has a "disability" within the meaning of the Act. To the extent that the mitigated state is achieved without an accommodation, then the employee is evaluated with that measure. If, for example, a single pill a day controlled an individual's symptoms, without side effects, and that pill was taken at home, then, under *Sutton*, no matter how debilitating the impairment would be without the pill, there would be no ADA disability.[1] Only the portion of the "mitigation" that is within the employer's control would be subtracted from the equation, and that is because it does not exist unless it is provided. Moreover, if when considered in his otherwise mitigated, but unaccommodated state, the impairment still does not substantially limit a major life activity, *Sutton* would compel the conclusion that no ADA disability was present.

Such a result is wholly consistent with the rationale of *Sutton*, which is that that Congress was not trying to fix problems that were already fixed:

> We conclude that respondent is correct that the approach adopted by the agency guidelines--that persons are to be evaluated in their hypothetical uncorrected state--is an impermissible interpretation of the ADA. Looking at the Act as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures--both positive and negative--must be taken into account when judging whether that person is "substantially limited" in a major life activity and thus "disabled" under the Act. *Sutton* at 482.

The Court went on to state 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* at 488.(Emphasis in original).

Under this analysis, when the person cannot "tak[e] measures" to correct or mitigate his impairment without an accommodation from his employer, and those measures have been

[1] Insulin-treated diabetes does not present such a situation because of the need to monitor blood

denied, then it is the correction that is "hypothetical," not the impairment. The situation that the individual "actually" faces is a situation without mitigation—because his employer has disallowed it. Under the reasoning in *Sutton*, the hypothetical must be rejected in favor of the actual, and thus any mitigating measure that the employer has put out of the employee's reach cannot be considered when determining disability.

This result would not impose upon employers the duty to provide unreasonably expensive or complicated accommodations, because the reasonableness of the accommodation sought would be evaluated, as it always is, independently of whether a disability is established and all defenses would remain available to the employer. Thus, once the threshold issue of "disability" is measured without the accommodation sought but allegedly refused, the issue of whether that measure or some other must actually be provided is determined by applying the usual accommodation analysis including, where raised, the defenses of undue hardship and direct threat. As with any case under the ADA, unless the accommodation is reasonable, the employer does not have to provide it even if it means the employee cannot work.

No disease or impairment presents a more compelling case for the holding we urge here than does insulin-treated diabetes of the seriousness experienced by Mr. Nawrot. The accommodations sought by individuals with diabetes are often minor in cost or inconvenience to the employer—short breaks for testing blood sugar, momentary privacy, permission to bring fruit to work, or to eat more frequently than is the norm. But these very accommodations form an integral part of the mitigating measures that an individual with diabetes must use—taking insulin following a high blood sugar reading, eating following a low blood sugar reading, or eating frequently. Without them, several major life activities are substantially limited, and he is at risk

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sugar and insulin levels throughout the day to avoid serious, and life threatening symptoms.

of dying. Thus, the accommodation and the mitigating measures overlap, and in some cases they may be exactly the same. To view an employee whose employer denied him these simple life-saving measures as not disabled because *with* them, he would not be substantially limited in a major life activity, turns the purpose of the ADA on its head and renders the individual focus of the ADA a nullity. There is simply nothing in *Sutton* that requires a court to pretend that a measure that is refused is in fact provided when assessing whether the impairment has been sufficiently mitigated to be rendered not a "disability." Indeed, *Sutton's* rejection of "hypothetical" unmitigated states indicates that the Court would just as readily reject a hypothetically mitigated state.

Although the issue remains unresolved in this Court, a recent decision in the Southern District of Indiana in this Circuit, provides, we submit, the proper reaction to the contention made by the employer in this case. In *Denney v. Mosey Manufacturing Co., Inc.*, 2000 U.S. Dist. Lexis 7203 (S.D. IN 2000), the plaintiff, like Mr. Nawrot in this case, contended that the employer interfered with his efforts to control his diabetes. The court ultimately concluded that the plaintiff had produced no evidence that such interference occurred, but it rejected as "inconceivable" the interpretation of *Sutton* reached by the court below

> "[Plaintiff] . . . contends his employer was trying to interfere with or prohibit his use on the job of corrective measures that were essential to his health and life, as well as to his ability to do the job. In this court's view, it is inconceivable that such actions by an employer would be entirely beyond the reach of the ADA on the theory that the employee does not have a "disability" under the ADA. (emphasis in original) *Denny*, 2000 U.S. Dist. Lexis 7203*27.

The court below found its result to be "distorted." Another court has called such a result "inconceivable." Whatever the label, the result is wrong. It is neither compelled by nor consistent with the Supreme Court decision in *Sutton*. The decision below should be reversed.[2]

III. Summary Judgment Is Inappropriate When The Effect Of Mitigating Measures And The Degree Of Residual Limitations Is Disputed.

The Supreme Court in *Sutton* recognized that mitigation is often not the end of the story for a person with a serious impairment. The Court noted that, even with mitigation, an individual may remain substantially limited in one or more major life activities, and it also recognized that the mitigating measures themselves may have side effects and consequences that may substantially interfere with a major life activity. *Sutton* at 488. Indeed, the Court's rejection of the EEOC "guidelines approach" rested in part on its belief that such an approach would preclude a finding of disability where the measures themselves caused a disability. "The guidelines approach," the Court stated, "could also lead to the anomalous result that in determining whether an individual is disabled, courts and employers could not consider any negative side effects suffered by an individual resulting from the use of mitigating measures, even when those side effects are very severe …. This result is also inconsistent with the individualized approach of the ADA." *Sutton* at 484.

When an individualized inquiry reveals that substantial limitations exist despite or because of the use of a mitigating measure**"**, an ADA disability is established. Such an

[2] Somewhat more difficult questions are presented when the mitigation is not within the control of the employer but is not used anyway, such as when the individual elects not to use the measure (due to harsh side effects or religious objections), or where the measure is theoretically available but is in fact not available due to its high cost. These situations are not presented for decision in this case. In our view, however, a sensible reading of *Sutton* would require a court to view the facts as they are, whatever the reason, and not as they could, or even as one might think they should be. *Sutton* does not speak to a duty to use corrective measures, or even a duty to provide them; it merely holds that where they are in fact used, they must be considered.

individualized approach will often require a weighing of evidence. Insulin-treated diabetes, as we have explained, requires a life-long minuet of steps designed to keep insulin in balance. These steps in themselves – involving the careful and constant monitoring of food, insulin, activity, stress, and many other factors – substantially limit the ability of the person to care for himself or herself. Moreover, people with diabetes have varying levels of success in balancing these factors. And the steps themselves, particularly insulin injections, may cause a life-threatening incident to occur. Even with the measures employed diligently, many people with diabetes experience serious consequences to mobility, to sight, and otherwise. Many lose limbs. For some, like Mr. Nawrot, control of insulin levels is especially difficult due to the severity of his disease. Even with constant monitoring, insulin levels may fluctuate, putting the individual at risk for the long and short terms consequences of high blood sugar levels or the serious short term consequences of low blood sugar levels – either of which can substantially limit the ability to care for oneself, thinking, working and other major life activities.

The frequent monitoring of glucose levels is needed to afford the information needed to attempt to keep blood sugar levels in balance, as are the breaks and snacks. With these measures, an individual with diabetes is able to work, but the measures do not cure the disease or remove the limitations on caring for oneself, eating, infection control, waste elimination, and "life itself" that a life with severe diabetes and its treatments represents. *See, Erjavac v. Holy Family Health Plus,* 13 F. Supp. 2d 737, 743 (N.D. Ill. 1998).

The individualized assessment required as to these life activities precludes summary judgment where there is a dispute of fact regarding the degree of residual or treatment-induced impairment, because the resolution of this issue is material to determining whether even with mitigating measures and reasonable accommodations, the individual has an ADA disability.

Sutton at 483, 488. Where there is a material issue of fact, summary judgment is inappropriate. *See, Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986); *Szymanski v. Rite Way Lawn Maintenance Co.*, 2000 U.S. App. Lexis 27429*5 (7th Cir. 2000) (on motion for summary judgment, a court does not resolve factual disputes or weigh conflicting evidence).

In cases involving the delicate interplay between the disease and treatment of diabetes, this will present a factual issue that should be explored at a trial, not precluded by summary judgment. *See, Schafer v State Insurance Fund*, 207 F. 3d 139, 149 (2nd Cir. 2000). In *Schafer*, the Second Circuit reviewed a decision that had been rendered prior to the Supreme Court's decision in *Sutton.* While holding that *Sutton* now precluded assessing the Plaintiff's condition without mitigating measures, it remanded for factual determination of whether plaintiff had a disability post-mitigation.

Accordingly, even when the accommodations requested by Mr. Nawrot but allegedly denied by his employer are considered, the effect of such measures on his condition, and the degree of residual limitations that he experiences even with those measures, remain at issue. The court below erred in concluding, as a matter of law, that the measures Mr. Nawrot would have used to control his diabetes would be sufficient to render him not substantially limited in a major life activity, and thus without a disability under the ADA. The decision below should be reversed.

Respectfully Submitted

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