No. 06-3108

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v.

SCHNEIDER NATIONAL, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
For the Eastern District of Wisconsin, No. 04-875
The Honorable William C. Griesbach

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 06-3108

Short Caption: EEOC v. Schneider National, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(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 item #3):

American Diabetes Association, Inc.

Epilepsy Foundation of America, Inc.

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:

Rosenthal & Greene, PC

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

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

Not applicable

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Not applicable

Attorney's Signature: Michael A. Greene Date: May 10, 2007

Attorney's Printed Name: Michael A. Greene

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** _____

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RULE 35(b)(1) STATEMENT

The *Amici Curiae* are the American Diabetes Association, the Epilepsy Foundation and Equip for Equality (collectively "*Amici*"). The *Amici* file this brief in support of the Equal Employment Opportunity Commission ("EEOC") Petition for Rehearing *En Banc* for the following reasons:

1. The panel opinion completely ignores and does not follow both U.S. Supreme Court and Seventh Circuit cases, which require an individualized assessment of a person's ability to safely perform a job under the Americans with Disabilities Act ("ADA"). Specifically, the panel opinion directly conflicts with the individual assessment mandates in *Sch. Bd. of Nassau County v. Arline,* 480 U.S. 273 (1987); *Bragdon v. Abbott,* 524 U.S. 624 (1998); *Sutton v. United Airlines, Inc.,* 527 U.S. 471 (1999); *Chevron U.S.A., Inc. v. Echazabal,* 536 U.S. 73 (2002); *Knapp v. Northwestern Univ.,* 101 F.3d 473 (7th Cir. 1997); *Dadian v. Vill. of Wilmette,* 269 F.3d 831 (7th Cir. 2001); *Emerson v. N. States Power Co.,* 256 F.3d 506 (7th Cir. 2001); and, *Branham v. Snow,* 392 F.3d 896 (7th Cir. 2004). These cases require that the determination of whether a person with a disability presents a direct threat must be individually assessed. Under F.R.A.P. Rule 35(a)(1) this Circuit should rehear this case to preserve the uniformity of its precedent.

2. The panel opinion creates a question of exceptional importance to millions of working Americans with disabilities who are now potentially barred from jobs for which they are otherwise qualified. This panel opinion potentially eviscerates the employment opportunity for working Americans with disabilities based solely upon a diagnosis without regard to an individual's ability to effectively and safely perform a particular job. It undermines a principal purpose of the ADA: to provide a framework to allow persons with disabilities to be gainfully employed in jobs that

they are qualified to do. This panel opinion presents a question of exceptional importance under F.R.A.P. Rule 35(a)(2). This Circuit should rehear this case to protect the employment opportunities for millions of working Americans.

FACTUAL CONTEXT

Amici defer to the factual background in the EEOC Petition for Rehearing. The panel opinion allows an employer, without regard to objective facts, to declare a risk too great to allow employment. Schneider's decision was based only upon a hypothetical possibility of a problem, without regard to how the disease impacted Jerome Hoefner or whether there was any reasonable accommodation to minimize and manage any risk.

The significance of this panel opinion is clear for anyone with a chronic disease. Substitute "diabetes" or "epilepsy" for "neurocardiogenic syncope," and the over 24 million Americans with diabetes or epilepsy can now be prevented from working for any employer based solely on their diagnosis and the employer's hypothetical concern that people with diabetes or epilepsy may sometimes have problems which may sometimes impair their ability to safely work. One can substitute a host of other common medical conditions in place of neurocardiogenic syncope to see the broad sweep and disastrous impact of the panel opinion. This opinion will also dramatically affect the employment market and the economic well-being of many American families who have the misfortune of having a breadwinner with a disability that will now automatically disqualify that worker from employment.

Using a baseball analogy, this panel opinion does not allow a person with a disability to leave the dugout with a bat in their hand. A person with a disability cannot go to the plate to try to show that he or she is otherwise qualified to do the job. The bat is taken out of the hands of a person with a

disability regardless of batting average or on-base percentage. This panel opinion undermines the basic concept of equal employment opportunity for qualified American workers.

ARGUMENT[1]

The individualized assessment of a person with a disability is the *sine qua non* of the ADA. As Senator Harkin stated when Congress passed the ADA:

> "The thesis of the Americans with Disabilities Act is simply this: That people with disabilities ought to be judged on the basis of their abilities; they should not be judged nor discriminated against based on unfounded fear, prejudice, ignorance, or mythologies; people ought to be judged on the relevant medical evidence and the abilities they have.[2]

The failure of the panel opinion to do any individual assessment of risk is the epitome of illegal stereotyping, *i.e.*, if one person with a particular disability is a risk then any person with that disability is automatically too risky to employ.

A. Rehearing *en banc* is required because the panel opinion did not follow Seventh Circuit law and ignored Supreme Court precedent on the necessity of making an individualized assessment to determine any direct threat under the ADA.

The employer in this case (Schneider) "believes that anyone with Hoefner's condition [neurocardiogenic syncope] should be disqualified from driving Schneider's trucks 'as a matter of

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[1] The panel upheld summary judgment for Schneider on two separate grounds: (1) Hoefner is not protected by the ADA because Schneider did not regard him as someone with a disability; and, (2) Schneider is entitled to adopt a zero risk policy to disqualify an individual protected by the ADA from a job based wholly on diagnosis and without any individual assessment. These are two separate holdings. For the purposes of assessing the panel's determination on the second ground, the panel assumed that Hoefner is protected by the ADA. *Amici* submit that the panel was incorrect in its determination on both grounds, but is only addressing the latter one in this brief.

[2] 136 Cong. Rec. S 7422-03, 7347 (daily ed. June 6, 1990).

safety and direct threat.'"[3] Yet this Circuit has made it abundantly clear that if an employer believes an employee would create a risk to anyone on the job, the employer must plead – and prove – a direct threat defense.[4] But, Schneider specifically waived a direct threat defense. That means, under *Branham* and abundant other precedent, Schneider simply cannot prevail on the issue of whether Hoefner can be denied the job in question because he creates too great of a risk to himself or others.

Rather than follow well-established precedent, the panel opinion created a new approach which allows an employer to prohibit all employees with a particular medical condition from working in a given job because it wishes to adopt a "zero risk" policy. To the contrary, EEOC regulations explicitly state what an employer must show when it claims an employee covered by the ADA is too risky for a given job.

> Direct threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. **The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.** In determining whether an individual would pose a direct threat, the factors to be considered include: (1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence

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[3] *EEOC v. Schneider National, Inc.*, ___ F.3d. ___, 2007 WL 841035 (7th Cir. March 21, 2007).

[4] "This court has stated that 'it is employer's burden to show that an employee posed a direct threat to workplace safety that could not be eliminated by a reasonable accommodation.' *Dadian v. Vill. of Wilmette,* 269 F.3d 831, 841 (7th Cir. 2001) (citing *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1283-84 (7th Cir. 1995)) . . . Thus, in order to prevail on its summary judgment motion asserting that [the employee] posed a direct threat to himself and others, the [employer] must show that the evidence on the question of direct threat is so one-sided no reasonable jury could find for [the employee]." *Branham,* 392 F.3d at 306.

of the potential harm. (Emphasis added.)[5]

The U.S. Supreme Court in *Chevron USA v. Echazabal* upheld this regulation and made it clear that any direct threat of a person with a disability in an employment situation must be based

> . . .upon an expressly "individualized assessment of the individual's present ability to safety perform the essential functions of a job," reached after considering, among other things, the imminence of the risk and the severity of the harm portended.[6]

In addition to the clear requirement of an individual assessment, Schneider's blanket ban on all people with a given diagnosis was, according to the panel, "no doubt" based on a "small" risk – one that certainly does not meet the clearly-established standards for assessing this defense. As stated by this court in *Branham:*

> **The key inquiry when considering whether an employee is a direct threat is 'not . . . whether a risk exists, but whether it is significant.'** *Bragdon,* 524 U.S. at 649, 118 S. Ct. 2196. The assessment of risk 'must be based on medical or other objective evidence' and the determination that a significant risk exists must be objectively reasonable. *Id.* At 649-50, 118 S. Ct. 2196. (Emphasis added.)[7]

Under both Supreme Court and Seventh Circuit precedent the assessment of any direct threat must be individual and objective, not hypothetical and subjective. The ADA sets the standard for how risk averse an employer can be: only as risk averse as it takes to meet the direct threat standard. There is simply no discretion for an employer to be more risk averse than what is "objectively reasonable." It is difficult to understand how the panel opinion could overlook such abundantly clear Supreme Court and Seventh Circuit authority.

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[5] 29 CFR § 1630.2(r).

[6] 536 U.S. 73, 86 (2002). *See also Bragdon v. Abbott,* 524 U.S. 624; (1998); *Sch. Bd. of Nassau County v. Arline,* 480 U.S. 273 91987).

[7] 392 F.3d at 906.

B. Rehearing *en banc* is necessary because the panel opinion created a question of exceptional importance to millions of working Americans with disabilities who are now potentially disqualified from ADA protection.

A serious potential consequence of the panel opinion is that persons with disabilities within the Seventh Circuit no longer must be individually assessed by an employer but rather can be assessed solely on a diagnosis, hypothetical circumstances, and the mythology of that diagnosis. Hard science, medicine, and other objective evidence are now superfluous. The panel opinion is a gigantic step backwards in the ability of persons with disabilities to be gainfully employed.

On the flip side of the individual assessment coin, the panel opinion approves a "blanket ban" which allows an employer to restrict employment solely on the diagnosis of certain medical conditions. This opinion permits an employer to unilaterally decide not to employ someone who has diabetes or epilepsy simply because of the diagnosis rather than on whether that individual could adequately and safety perform a particular job. Would the Seventh Circuit allow an employer to say that a black person could not be employed in a particular job because of prior problems with other black persons in that job? Would the Seventh Circuit allow an employer to refuse a woman with children a particular job because prior experience with other women with children in that job was a problem? Of course not! Yet, this is exactly the impact of this panel opinion on persons with disabilities such as diabetes or epilepsy, to name only two of the long list of many common disabilities prevalent in the workplace.

The panel opinion makes protection under the ADA depend on a diagnosis rather than on the person's true ability to effectively and safely perform the job. This opinion turns disability protection upside down and eviscerates the employment protection of working Americans with many, varied disabilities.

CONCLUSION

A rehearing should be granted *en banc* in this case in order to secure or maintain uniformity of the Seventh Circuit's case law, and because the issues raised by the panel opinion involve questions of exceptional importance to many millions of working Americans.

DATED this 10th day of May, 2007.

RESPECTFULLY SUBMITTED,

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RULE 32 CERTIFICATE OF COMPLIANCE

I, Michael A. Greene, the attorney of record in this matter, do hereby certify that this brief complies with the type-volume limitation for briefs established by the Federal Rules of Appellate Procedure and the Rules of the United States Court of Appeals for the Seventh Circuit. The word count is 1,761.

Michael A. Greene

CERTIFICATE OF SERVICE

I, Michael A. Greene, hereby certify that one original and thirty paper copies along with one electronic copy of the Brief of the *Amicus Curiae* in Support of Petition for Rehearing *En Banc* were sent this 10th day of May, 2007, via overnight commercial carrier to:

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