BOTH "TOO SICK AND NOT SICK ENOUGH": BUILDING ON ADA DECISIONS INVOLVING PLAINTIFFS WITH DIABETES

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I. Setting the Stage: Defining the Conundrum and Other Preliminary Issues

A. Causes of the Conundrum: *Sutton* and *Toyota*, and more

1. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999)

The Court ruled 7-2, in an opinion by Justice O'Connor, with Justices Stevens & Breyer dissenting, that "mitigating measures" must be taken into account in determining whether an ADA plaintiff has a "disability." Thus, whether a worker is "substantially limited in a major life activity" must be evaluated in light of medications taken, medical devices used, and an individual's own ability to compensate for an impairment.

It follows that under *Sutton*, workers may be treated unequally based on an actual, past or perceived impairment (*i.e.,* because their employer considers them **"too sick"**), so long as "mitigating measures" cause them to be at most limited, but not "substantially limited" in a major life activity (*i.e.,* they were **"not sick enough"**). In *Sutton*, United Airlines considered plaintiffs vision-impaired due to their use of eyeglasses, and thus, unable to fly intercontinental routes, and yet also claimed plaintiffs could not challenge this policy as discriminatory (*i.e.,* on grounds they were qualified to do the job, with or without "reasonable accommodation"), because their impaired vision was sufficiently mitigated by their glasses that plaintiffs did not have a "disability": "too sick and not sick enough."

The *Sutton* Court declined to follow a contrary "Interpretative Guidance" of the EEOC, similar guidance by the U.S. Departments of Justice and Transportation, and many years of court decisions under the Rehabilitation Act of 1973 (and regulations issued pursuant to it), which Congress expressly identified as the model for the ADA. *See* 42 U.S.C. § 12201(a). The Court also ignored contrary statements by the House and Senate that enacted the ADA. *See* S. Rep. No. 101-116, p.23 (1989) ("whether a person has a disability should be assessed without regard to the availability of mitigating measures"); H. R. Rep. No. 101-485, Pt. III, pp. 28-29, 52 (1990). *Sutton*, 527 U.S. at 495-503 (Stevens, J., dissenting).

Sutton involved corrective devices used to mitigate vision impairment. Companion cases decided the same day reached the same result in regard to medications, *Murphy v. United Parcel Service*, 527 U.S. 516 (1999) (affirming dismissal of ADA claim by UPS driver

because he had no "disability," as the drug he used largely controlled his high blood pressure, even though he was discharged for using such medication), as well as "measures undertaken, whether consciously or not, with the body's own systems," *Albertson's Inc. v Kirkingburg,* 527 U.S. 555, 565-66 (1999) (affirming, unanimously, dismissal of ADA claim by grocery-store-chain truck driver, who was discharged because of his "monuocular vision," but who lower courts said could not show an ADA "disability," as he had learned to compensate for his vision impairment). Thus, all plaintiffs in the "*Sutton* Trilogy" were deemed "too sick" to handle jobs which they sought to perform, but "not sick enough" to rely on ADA protections.

2. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002)

Justice O'Connor once again penned the Court's (this time unanimous) endorsement of more stringent criteria for an ADA "disability." The Court staked out still greater room for employers to find an employee "too sick" to perform a certain job, safe in the knowledge that the employee is likely to be found "not sick enough" to invoke the ADA. (Significantly, private counsel for the petitioner in *Toyota* was John G. Roberts, Jr.)

Toyota involved the question whether lower courts erred in evaluating Ella Williams' "carpal tunnel syndrome." Ms. Williams claimed she was dismissed from an assembly-line position in the "Quality Control" department because of her "disability," consisting of a substantial limitation in her ability to "perform manual tasks." 534 U.S. at 187-93.

In general, the Court declared that the terms making up ADA's test of "disability – "substantially limited" in a "major life activity" – "need to be interpreted strictly to create a demanding standard for qualifying as disabled." 534 U.S. at 197. This conclusion rested in part on Congressional findings that "some 43,000,000 Americans have one or more physical or mental disabilities." *Id.* at 197-98. While the ADA's drafters – perhaps mistakenly – thought this would encourage courts to interpret the ADA broadly, to protect a vast population clearly exposed to disability bias (in addition to others who might not have actual disabilities, but who might nonetheless face bias because of a "record of" disability or because they might be "regarded as" having a disability), the Court took precisely the opposite tack, opining that Congress intended to protect only a narrow range of persons with severe impairments that still allowed them to work.

Toyota built on *Sutton* in narrowing the class of persons protected by the ADA. While the Court referred to EEOC regulations setting out criteria for a "substantially limiting" impairment, the Court also deviated from the text of the rule, requiring in Ms. Williams' case "an impairment that prevents or *severely* restricts the individual from doing activities that are of central importance to more people's daily lives." 534 U.S. at 198 (citing 29 C.F.R. § 1630.2(j)(2)(ii)-(iii); *compare id.* (requiring an impairment "that prevents or *significantly* restricts" individuals from performing major life activities, by comparison with the average person in the general population) (emphasis supplied). Thus, *Toyota* made it much more likely employees are "not sick enough" to be covered by the ADA.

See Fenney v. Dakota, Minnesota & Eastern R. Co., 327 F.3d 707, 714-15 (8th Cir. 2003): "There are at least two ways to interpret *Toyota's* holding. One way is to assume-as the EEOC … has-that *Toyota's* analysis is limited to ADA cases that deal with the 'substantial limitation' of the specific 'major life activity' of performing manual tasks. At least one of our sister circuits has so assumed. *See Rakity v. Dillon Companies, Inc.,* 302 F.3d 1152, 1158-60 (10th Cir. 2002) … . If we were to accept this interpretation, we would then apply the less-restrictive EEOC definition. 29 C.F.R. § 1630.2(j)(1) (2002). We decline to do so."

"Another way to interpret *Toyota* is to assume-as Dakota has … that *Toyota* 's analysis applies no matter the specific class of major life activity one is claiming. … our sister circuits, who have addressed this issue, agree. *Mack v. Great Dane Trailers,* 308 F.3d 776, 781 (7th Cir. 2002) … ; *EEOC v. United Parcel Service, Inc.,* 306 F.3d 794, 802-803 (9th Cir. 2002) … *Mulholland v. Pharmacia & Upjohn, Inc.,* ...52 Fed.Appx. 641, 644-45 (6th Cir. 2002) … ; *cf. Waldrip v. General Electric Co.,* 325 F.3d 652, 655 n. 4 (5th Cir. 2003), *available at* 2003 WL 1204429, at *2 … . This interpretation results in 'a higher threshold for the statute than some had believed it contained.' *Dvorak v. Mostardi Platt Assoc. Inc.,* 289 F.3d 479, 484 (7th Cir. 2002)."

Following the same reasoning, the *Toyota* Court also concluded, "'major life activities' … refers to those activities that are of central importance to daily life." 534 U.S. at 197. On remand, the trial court was to ask if Williams' condition limited her in "performing manual tasks" *outside the workplace* as well as on the job. *Id.* at 201-02. Hence, *Toyota* mandated new grounds for finding an employee "not sick enough" to invoke the ADA. This is especially so because lower federal courts have generally extended the duty to look outside the workplace for proof of disability beyond the major life activity of 'performing manual tasks." In some instances, however, this may provide an opportunity for plaintiffs: i.e., to present additional sources of evidence showing an ADA disability.

* * * *

A classic example: In *Branham v. Snow*, an Indiana federal court considered ADA employment claims by an IRA revenue agent with insulin-treated diabetes, who applied to be a criminal investigator, which would require him to work "irregular hours" and react appropriate in "in an emergency or crisis." The IRS rejected Branham on grounds his condition would pose "an extreme risk" to himself, colleagues and the public. Yet the IRS also took "the position that Mr. Branham was not disabled under the Rehabilitation Act." The IRS also asserted Branham was not qualified to perform "the job without creating a safety threat to himself or others." The trial court granted summary judgment ruled for the IRS. *Branham v. Snow*, 392 F.3d 896, 901 (7th Cir. 2006).

The 7th Circuit later reversed, reasoning that Branham presented fact issues whether he was substantially limited in the major life activity of eating and qualified to serve without posing a "direct threat." However, the Court of Appeals acknowledged: "The [district] court noted that Mr. Branham faced a "double-bind": On the one hand, in order to qualify as disabled under the Rehabilitation Act, the Plaintiff emphasizes those portions of the record, ... which tend to show the gravity of his condition; but to demonstrate that

he is nonetheless medically qualified and does not present a threat of harm, he does a 180-degree turn and points to ... his diabetes as being under excellent control." *Id.* n.3.

A more concise classic: Janice Nordwall had treated her diabetes with insulin since age 4, and had worked 18 years for Sears when she was terminated, in her view for reasons related to difficulties with her condition brought on by a greater workload and related stress. She lost her suit against Sears, and the 7th Circuit ultimately found her too sick and not sick enough. "From the evidence before us, it would appear that Nordwall is only unable to perform her job because of her diabetes when it becomes highly stressful. The inability to handle a sizeable workload or a stressful workplace environment does not establish a substantial limitation on a plaintiff's ability to work for purposes of the ADA." *Nordwall v. Sears Roebuck & Co.,* 46 Fed. App'x 364, 367 (7th Cir. 2002).

A very recent result, hopefully an anomaly: *EEOC v. Schneider National, Inc.,* 2007 WL 841035, *1 (7th Cir. 2006) (per Posner, J.) (emphasis supplied): "The Commission[] … relies … on statements by a nurse who heads Schneider's occupational health unit and believes that anyone with Hoefner's condition should be disqualified from driving Schneider's trucks": *i.e.,* the employer concluded plaintiff was **too sick** to keep working.

Yet the 7th Circuit declared Schneider's belief about plaintiff's condition precluded a finding of "disability": that is, the reason for Schneider's belief was "that two years before Hoefner's fainting spell another driver …, Michael Kupsky, whom Schneider had hired shortly after [he] had been diagnosed with neurocardiogenic syncope while driving for another trucking company, had driven a Schneider truck off a bridge and been killed. … . The incident precipitated the company's adoption of a 'zero tolerance' policy for drivers with neurocardiogenic syncope. The nurse stated that .... '[W]e don't know what caused that accident. …Schneider is not going to take the chance that ... [it] happens to anybody else.' The executive who fired Hoefner echoed what the nurse had said … .
…
No doubt the risk that a person afflicted with this disorder will faint while driving is small, as otherwise Hoefner wouldn't be allowed to drive big trucks, as he is, for the trucking company that with full knowledge of his medical history hired him after Schneider fired him. **But Schneider is entitled to determine how much risk is too great for *it* to be willing to take.** '[A]n employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment-such as one's height, build, or singing voice-are preferable to others, just as it is free to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job.' *Sutton v. United Air Lines, Inc.,* … 527 U.S. at 491… .

<u>*Schneider* is at odds with precedent declaring a "blanket ban" on employees with certain conditions – even in a safety-sensitive line of work such as law enforcement – ineligible for employment</u>. *See Kapche v. City of San Antonio*, 304 F.3d 493 (5th Cir 2002) (reversing judgment against police officer applicant with insulin-treated diabetes).

B. Are There Means to Avoid the Conundrum Altogether?

1. Maybe So, Under More Plaintiff-Friendly State Laws

   a. Some state disability discrimination laws are stronger than the ADA in ways that may allow employees to avoid the "Too sick and not sick enough" **("**TSNSE") conundrum:

      i. in CA & NY, for example, an employee need only show a "limitation in a major life activity," not a "substantial" limitation, a cause of some ADA claimants being "not sick enough," *see Toyota*;

      ii. in MA, for example, an employee need only show a "disability" NOT taking into account "mitigating measures," *see Sutton*.

      iii. But be sure to consider other differences between state laws and the ADA, some positive (*e.g.,* no caps on monetary damages caps) and some negative (*e.g.,* shorter complaint filing deadlines).

2. Maybe So, If Your ADA Case is Really an FMLA Case

   a. If the FMLA is relevant, *i.e.,* an employee with a physical or mental impairment requires leave, it is a stronger law, whose terms do not pose the "conundrum" of "too sick and not sick enough." Under the FMLA, for instance, there is:

      i. no need to show a "disability," but rather only a duty to show a "serious medical condition";

      ii. no need to show an employee is a "qualified individual" with a "disability" by showing that at the relevant time s/he could perform "essential functions of the job," which raises many issues (evidentiary and interpretive); the FMLA generally only requires a claimant to show the employer and employee each meet specific objective criteria (e.g., # of employees & # of hours worked in a year);

      iii. no need to show a request for leave is a proposal that the employer afford a "reasonable accommodation," as required under the ADA, because the FMLA includes an entitlement to up to 12 weeks of leave for qualifying employees; and

      iv. no need to make a special showing to justify a reinstatement remedy, as under the ADA FMLA

generally entitles an employee to return to the same or an equivalent job after leave is completed.

C. Is the Conundrum Worse Than You Think?

1. Maybe So, If Your Client Also Applies for Other Income Support

Under *Cleveland v. Policy Management Systems Corp.,* 526 U.S. 795 (1999), an ADA plaintiff forfeits the right to press discrimination claims by securing federal Social Security Disability Insurance benefits (SSDI) based on factual allegations inconsistent with the ADA's requirement that an aggrieved worker be a "qualified" individual with a disability. *Id.* at 806 ("a plaintiff's sworn assertion in an application for disability benefits that she is, for example, "unable to work" will appear to negate an essential element of her **ADA** case-at least if she does not offer a sufficient explanation").

Yet the Court also ruled that merely applying for SSDI cannot not preclude pursuing an ADA claim; further, receiving SSDI does not necessarily preclude pursuing an ADA claim. Nor does careful pursuit of SSDI: that is, "despite the appearance of conflict that arises from the language of the two statutes, the two claims do not inherently conflict to the point where courts should apply a special negative presumption [against an ADA claim being pursued by an SSDI recipient] like the one applied by the Court of Appeals here. That is because there are too many situations in which an SSDI claim and an ADA claim can comfortably exist side by side." *Id.* at 802-03 (*e.g.,* when an SSDI applicant or recipient asserts s/he could work with "reasonable accommodation," a factor not taken into consideration in the process of determining SSDI eligibility).

Similar examples exist of courts precluding plaintiffs pursuing ADA employment discrimination claims because they also have sought and/or obtained compensation to which they are entitled as a person with a disability unable to work under private disability insurance policies or other social insurance programs. See Kohrman, Daniel B. & Berg, Kimberly J., *Reconciling Definitions of "Disability:" Six Years Later, Has Cleveland Policy Management Systems Lived Up to Its Initial Reviews as a Boost for Workers' Rights?*, 7 Marquette Elder's Advisor 29 (Fall 2005).

2. Maybe So, As Other Cases With Similar Facts May Not Help

See Branham v. Snow, (7th Cir. 2006), (explaining that, in effect, *Sutton* requires each ADA plaintiff to negotiate the conundrum anew): "The determination whether a particular person with an impairment is substantially limited must be individualized; in other words, we may not declare that all individuals who suffer from a particular medical condition are disabled for the purposes of the Rehabilitation Act. *See Sutton* ... 527 U.S. [at] 483-84 … . Underlining the specificity that is required in making an individualized determination of disability, the Supreme Court has noted that it would be contrary to the language of the ADA to find "all diabetics to be disabled," regardless of whether an individual diabetic's condition actually impaired his daily activities. *Id.* at 483 … . Thus, we emphasize that, even though this court has determined on two separate occasions that a person with Type I diabetes can be substantially limited with respect to one or more major life activities, *see Nawrot [v. CPC International,],* 277 F.3d [896,]

905 [(7th Cir. 2003)]; *Lawson [v. CSX Transportation Inc.],* 245 F.3d [916,] 926 [(7th Cir. 2001)], neither of those cases dictates the outcome here."

This raises the question: how best to build on positive results like *Branham* (& *Lawson* & *Nawrot*) & others? One answer is to scrutinize these decisions for the *kind of evidence* they deem persuasive and *the logic they employ* in crediting such proof. In this way favorable decisions provide guidance for structuring a case and precedent for applying the ADA, even if they are not direct authority favoring plaintiffs with similar conditions.

II. The Conundrum in the Courts: Problems

A. "Not Sick Enough": Implications for Plaintiffs of the Supreme Court's Insistence on a High Standard of Proof of Disability

1. *Sutton*: Trouble May Arise If Strong Proof of "Disability" Does Not Issue from the Mouth of the Claimant

> "Pride cometh before a fall."
> -- "There is nothing I can't do!"

Collado v. United Parcel Service, Co., 419 F.3d 1143, 1156 (11th Cir. 2005) (affirming JMOL reversing jury verdict favoring insulin-using delivery driver) (emphasis supplied).

Q. [Y]our diabetes does not in any way affect your ability to drive a vehicle? A. No.
Q. And you can walk? A. Yes. Q. You can run? A. Yes.
Q. You can see? A. Yes. Q. You can eat. A. Of course.
Q. You can digest food? A. Yes, as long as I am taking my insulin.
Q. Exactly. *And your diabetes doesn't affect your ability to work?* A. *Correct.*
Q. *Or to care for yourself?* A. *Correct.*
Q. *In fact, your diabetes hasn't affected your lifestyle in any way; correct?* A. *Correct.*
Q. *And with proper self monitoring, you are in no way limited by your diabetes in what you do during the day or how you do it; correct?* A. *Yes, that's true.*

* * *

In this excerpt from the plaintiff's deposition, cited by the court as an admission that he had no "substantially limiting" ADA "disability," Collado answered carefully a question about the impact of his condition on his "digest[ion]," but then gave away the store.

> The last thing you need is a stoic for a client, and "Minnesota [or Oregon, or Arkansas] nice" won't cut it.
> -- "It really wasn't so bad."

Didier v. Schwan Food Co., 387 F.Supp. 2d 987 (D. Ark. 2005), aff'd, 465 F.3d 838 (8th Cir. 2006) (dismissing ADA claim, on grounds of failure to show a "disability," brought

by route sales manager asserting unjust termination and refusal to afford reasonable accommodation relating to plaintiff's allegedly "permanently broken right arm"). The 8th Circuit said that "in [his] affidavit, and in his deposition testimony, [plaintiff] essentially admits that he is not disabled. Though he has difficulty with shaving and other grooming activities, he learned to do these things left-handed. Didier can also dress himself, tie his shoes, write, dial the phone, wash dishes, and prepare meals with one or both hands." 465 F.3d at 842. Thus, plaintiff could not "meet the rigorous *Toyota* standard." Id.

The district court opinion in *Didier* also quoted from plaintiff's deposition, in which:

"Plaintiff admitted … that he has learned to shave and comb his hair and "pretty much does everything else" with his left hand. … . Plaintiff stated that he cannot mow his lawn but does wash dishes by hand. … . Plaintiff further testified:

Q. Are you able to shave? A. Yes, sir.
Q. Your hair also looks good, at least as good as mine. Are you able to set your hair yourself? A. Yes, sir.
Q. Were you able to dress yourself to appear today?
A. Yes, sir. I learned to shave and comb my hair and everything left-handed.
Q. Okay. You can tie your own shoes? A. Yes, sir.
Q. ...as far as the household chores, do you occasionally take the trash out? A. Yes.
Q. Cook dinner? A. Yes.
Q. Do any of the washing? And I'm talking either loading the dishwasher, the washing machine. A. No. I don't do the-I do the dish washing, because I like soaking my wrist in the hot water.
Q. … you can use a weed eater with limited use or full use? A. Limited.
Q. Okay. A. We've got a strap on it.
Q. And when you've got a shoulder strap, you're able to use it? A. Yeah, for a little while, not very long.

Id. at 991.

This kind of examination may be difficult to avoid even in potentially strong ADA cases. The key is to place in context, and to make sure the record contains other evidence answering, such select statement by the plaintiff that can be used to suggest an admission of no disability. For instance, in *Fraser v. US Bancorp*, the trial court cited, in granting summary judgment for the employer, that the plaintiff with diabetes testified to the effect that "as long as her blood glucose level is under control and she is not having a bad day, 'I don't have a tremendous amount of limitations' and 'there really are no limitations on what [I] can do.' 168 F. Supp.23 1188, 1192 (D. Or. 2001). However, the 9th Circuit reversed, based on findings that the record showed plaintiff had a substantial limitation in the major life activity of "eating." *Fraser v. Goodale,* 342 F.3d 1032 (9th Cir. 2003).

2. Evidence from Outside the Workplace

Toyota: "Too Sick [at Work] and Not Sick Enough [at Home]."

Nordwall v. Sears Roebuck & Co., 46 Fed. App'x364, 367-68 (7th Cir. 2002): "the evidence does not present a fact question as to whether Nordwall is substantially limited in the major life activity of caring for herself. It is undisputed that [she] feeds herself, attends to her personal hygiene, maintains her household, [footnote omitted] drives, cares for her son and husband, exercises, and carries out many other routine activities."

Also: "So far as the record reveals, neither Nordwall's 'blackouts,' her bouts of dizziness or lightheadedness, nor any other aspect of her diabetes prevent or severely restrict her ability to care for herself. Evidently, she is able to attend to all aspects of not only her own care, but her family's as well. To the extent that she is incapacitated during blackouts or periods of lightheadedness, the record does not reveal the incapacitation to be anything more than fleeting, and Nordwall has identified no aspect of her own care that she cannot handle on a regular basis due to these episodes. She points out, for example, that she once experienced a blackout while driving her car … ; and yet, the record reflects no restrictions on her driver's license other than the need to wear eyeglasses … and there is no evidence that Nordwall has stopped driving [footnote omitted] or curtailed any other aspect of her daily activities in anticipation of such episodes. Again, we do not mean to be obtuse. It is easy to imagine ways in which such episodes, if severe and/or frequent enough, might impose substantial limitations on the person who experiences them. But there is no evidence that Nordwall's periods of altered consciousness in fact have this effect. In the absence of such evidence, we simply cannot assume that such moments impose substantial limitations on Nordwall's ability to care for herself. *See Dugan v. Smerwick Sewerage Co.,* 142 F.3d 398, 402 (7th Cir.1998) ("our obligation to examine the record in a light favorable to the nonmovant 'extends no further than the record before us' "), quoting *Davidson v. Midelfort Clinic, Ltd.,* 133 F.3d 499, 505 (7th Cir.1998).

3. *Sutton* & *Toyota* Misapplied

a. *Sutton* Misapplied: Potential Non-Mitigation

The trial court ruled that plaintiff's diabetes was "mitigated" and her ADA claim thus was premised on "speculation" as to her unmitigated condition: *Fraser v. US Bancorp*, 168 F. Supp.23 1188, 1194 (D. Or. 2001), *reversed, Fraser v. Goodale,* 342 F.3d 1032 (9th Cir. 2003) (district court found no genuine issue of fact whether plaintiff with diabetes was disabled, based on conclusion that plaintiff "gave only 'generalities and speculation concerning how she *might have been affected* if her blood glucose level was not well-controlled, but … failed to produce specific, admissible evidence that she was, in fact, substantially limited during the relevant period of time."

The 9th Circuit later reversed, discounting defendant's assertions that Fraser's diabetes was potentially "well-controlled," and the trial court's ruling that Fraser relied solely on hypothetical difficulties with her mitigated diabetes: "Not all mitigating measures cure a person of an underlying impairment. We therefore review the effectiveness of the mitigating measure at preventing or ameliorating the underlying impairment. Further, the effectiveness of a mitigating measure is not always static. Like Fraser, a person could be just as faithful to a treatment regimen, and yet be more impaired at some times than others." 342 F.3d at 1039.

b. *Toyota* Misapplied:

See Collado v. United Parcel Service, Co., 419 F.3d 1143, 1156 (11th Cir. 2005) (citing plaintiff's deposition regarding all the things he "could do" outside the workplace).

See Fraser v. US Bancorp, 168 F. Supp.23 1188, 1192 (D. Or. 2001) (quoting, in summary judgment for employer on grounds plaintiff was not disabled, deposition of treating physician), *reversed, Fraser v. Goodale,* 342 F.3d 1032 (9th Cir. 2003).

Q. She can walk.
A. Yeah, she can walk.
Q. Can she see?
A. She can see.
Q. Can she hear?
A. She can hear.
Q. Can she speak?
A. She can speak.

c. "failure to control a controllable condition"

Fraser v. US Bancorp, 168 F. Supp.23 1188, 1192-4 (D. Or. 2001), *reversed, Fraser v. Goodale,* 342 F.3d 1032 (9th Cir. 2003) (" It appears from the evidence, in particular Dr. Lockwood's testimony and chart notes, that historically, plaintiff has had significant difficulty controlling her blood glucose levels, at least in part because at times she failed to follow his advice and drank alcohol, did not exercise, did not monitor her blood glucose as instructed, and did not use insulin as instructed.").

The district court also quoted from plaintiff's treating physician's deposition:

Q. (by defense counsel): Now, if Ms. Fraser had taken the steps that you outlined to me to have a regular diet, proper insulin injections, and proper monitoring of her blood glucose levels, would she have been substantially limited in any of the following major life activities: Caring for herself?
A. No.
Q. Performing manual tasks?
…

A. … *Could she do virtually any manual task that any other person like her could do? For now, sure. She at this point in her life is not limited for that.* But could she do it for, you know, for six hours? Probably not.
…
Q. And can she learn?
A. She can learn. Now, learning and speaking and seeing at least all can be affected if the sugars are high or low.
Q. But if her blood glucose is properly controlled.
A. If it's normal at this point, she can do all those things. But what I'm saying is doing those things could potentially affect her ability to keep that sugar normal.

168 F. Supp.23 at 1192.

The Court of Appeals reversed, noting that "[s]imply having the means to control an illness does not make controlling the illness easy." *Fraser v. Goodale*, 342 F.3d at 1042.

Rodriguez v. ConAgra Grocery Products Co., 2004 WL 2085491, *2 (N.D. Tex. 2004) (summary judgment for defendant-employer), *rev'd,* 436 F.3d 468, 475 (5th Cir. 2006) (entering summary judgment for plaintiff employee, and finding ConAgra's "failure to control" argument "a red herring"):

"Even assuming that Rodriguez has adequately demonstrated ConAgra regarded him as disabled, however, the Court concludes that **Rodriguez has failed to present any evidence tending to demonstrate that his employment offer was withdrawn because of the fact that he had diabetes, as opposed to the fact that his diabetes was not controlled**. … . This is a distinction with a difference. As ConAgra points out, numerous courts have concluded, albeit on differing grounds, that an employer's adverse action in response to a plaintiff's failure to control an otherwise controllable illness does not give rise to a disability-discrimination claim. *See … Burroughs v. City of Springfield,* 163 F.3d 505, 507-09 (8 Cir.1998); *Van Stan v. Fancy Colours & Co.,* 125 F.3d 563, 570 (7 Cir.1997); *Siefken v. Village of Arlington Heights,* 65 F.3d 664, 666 (7 Cir.1995); [citations to district court decisions omitted]."

Each of the precedents relied on by the *Rodriguez* district court are flawed and/or plainly distinguishable. *Burroughs* involved a police recruit with diabetes who was terminated after suffering "two hypoglycemic episodes" and becoming "disoriented and dysfunctional while on duty"; although plaintiff likely posed a "direct threat" to himself and the public, the court upheld defendant's alleged decision to fire him "because he failed to control his controllable disease." 163 F.3d at 506, 509.

In *Siefken*, the appeals court (Judges Posner and Manion, joining Judge Kanne) affirmed the district court's grant of defendant's motion to dismiss ADA claims by another probationary police officer with insulin-treated diabetes who was fired for driving his patrol car "erratically" through residential areas. Plaintiff asked the court to grant him "another chance" to permit him "to change his monitoring technique." But the court found the plaintiff's irresponsible behavior fell below his employer's "legitimate job expectations" and posed "a significant potential for harm to others in the workplace."

Yet the court went on say that plaintiff also failed to state an ADA claim "due to his failure to control a controllable disability." 65 F.3d at 667-67; *see also Van Stan*, *supra,* 125 F.3d at 570 (following *Siefken*).

The 7th Circuit's ruling, limited to its facts, is quite narrow; to the extent ADA defendants are tempted, from time to time, to cite its broader language, that approach is wholly unfounded, on several grounds: first, the *Siefken* court relied on *Chandler v. City of Dallas,* 2 F.3d 1385 (5th Cir. 1993), *cert denied*, 511 U.S. 1011 (2004), which the 5th Circuit disavowed in *Kapche v. City of San Antonio*, 304 F.3d 493 (5th Cir. 2002); second, the court approved grounds for summary dismissal that seem utterly at odds with *Swierkiewicz v. Sorema, N.A.,* 534 U.S. 506 (2002)(reversing FRCP 12 (b)(6) dismissal of Title VII case, and reaffirming employment discrimination complaint need not plead *prima facie* case, but rather, only minimal fact assertions affording notice of nature of claims); and finally, the notion that diabetes generally, or any particular individual's impairment is a "controllable disability" is utterly at odds with *Sutton*, which makes clear that under the ADA, "[t]hose who discriminate take their victims as they find them." *Nawrot v. CPC International*, 277 F.3d 896, 904 (7th Cir. 2002).

Another angle: <u>the *Rodriguez* district court misapplied decisions that a worker's poorly managed diabetes arguably posed a "direct threat" to himself and/or others, and miscited them to concoct a new, unfounded defense</u>: that an employer can rebut a worker's evidence of "substantial limitations" constituting a "disability" by trying to show that the employee could have prevented those limitations or made them less than "substantial."

B. Other Dangers for Plaintiffs Posed by the Conundrum

1. Plaintiffs' Treating Physicians

Nordwall v. Sears Roebuck & Co., 46 Fed. App'x 364, 365 (7th Cir. 2002):
"For the last twenty years, Nordwall has relied on the supervision of Mark Heymann, M.D. … a specialist in diabetes, to help her control her illness. … . According to Dr. Heymann, besides having diabetic complications during her pregnancy … , along with mild background retinopathy … , Nordwall has experienced no severe diabetic complications … . Heymann testified that he has never restricted her from performing any task, nor does he believe that her illness limits any of her life activities."

Compare Lawson v. CSX, 245 F.3d 916, 918 (7th Cir. 2001):
"According to the affidavit of his physician, [footnote omitted] in order to manage his disease, Mr. Lawson must monitor carefully blood sugar levels and minimize fluctuations in his blood sugar. This monitoring requires 'continued vigilance' and strict adherence to 'perpetual, multi-faceted and demanding treatment regime.'

2. Plaintiffs' Expert Physicians

Rodriguez v. ConAgra Grocery Products, Co., 2004 WL 2085491, *2 (N.D. Tex. 2004), rev'd, 436 F.3d 468 (5th Cir. 2006): "Rodriguez's own medical experts admit that

diabetes is generally controllable with proper diet, medication, and regular monitoring. … As a result, [defendant's] withdrawal of Rodriguez's job offer due to [its] belief that his diabetes was not controlled does not give rise to a disability-discrimination claim … ."

3. Plaintiffs' Vocational Experts; Failure to Show Jobs Plaintiff Cannot Do, in Supporting a "Disability" in the Major Life Activity of "Working"

Duncan v. WMATA, 240 F.3d 1110, 1115-17 (D.C. Cir. 2001) (*en banc*) ("we hold that the ADA requires a plaintiff in Duncan's position to produce some evidence of the number and types of jobs in the local employment market in order to show he is disqualified from a substantial class or broad range of such jobs; that is, the total number of such jobs that remain available to the plaintiff in such a class or range in the relevant market must be sufficiently low that he is effectively precluded from working in the class or range. … the evidentiary burden we place on plaintiffs is not onerous. They need not necessarily produce expert vocational testimony, although such evidence might be very persuasive. In the proper case simple government job statistics may suffice.").

C. "Too Sick"

1. Plaintiff Unable to Make Compelling Presentation

Rodriguez v. ConAgra Grocery Products, Co., 2004 WL 2085491 (D. Tex. Sept. 16, 2005) (ruling plaintiff's "uncontrolled" diabetes, and his poor attitude toward controlling his condition, as related to contact physician in post-offer medical exam, justified rescinding offer of employment, and did not amount to disability bias), *reversed,* 436 F.3d 468 (5th Cir. 2006).

Darnell v. Thermafiber, Inc., 417 F.3d 657 (7th Cir. 2005 (affirming judgment that plaintiff's "uncontrolled" diabetes rendered him a "direct threat" to himself and others in the workplace).

III. Ways out of the Conundrum

A. *Sutton*

Fraser v. Goodale, 342 F.3d 1032, 1039 (9th Cir. 2003) (emphasis supplied):

Not all mitigating measures cure a person of an underlying impairment. We therefore review **the effectiveness of the mitigating measure** at preventing or ameliorating the underlying impairment. Further, the effectiveness of a mitigating measure is not always static. Like Fraser, a person could be just as faithful to a treatment regimen, and yet be more impaired at some times than at others.

Nor should we overlook **the side effects of the mitigating measure**, as these can also be impairing. *See Murphy v. United Parcel Serv., Inc.,* 527 U.S. 516, 521 … (1999) (negative side effects of hypertension medication might substantially limit a major life

activity, but not reaching the issue because the petitioner did not seek certiorari on this question); *Sutton,* 527 U.S. at 488 … (observing that petitioners concede that they "do not argue that the use of corrective lenses in itself demonstrates a substantially limiting impairment").

We must also consider **the burden of the mitigating measure**, as this bears directly upon the impact of the underlying physical impairment. For instance, the burden of following a healthy diet is slight, whereas the brittle diabetic's burden of a perpetual treatment regime demanding a careful balance of blood sugar, food intake, and activity levels is greater. *Lawson v. CSX Transp., Inc.,* 245 F.3d 916, 924 (7th Cir.2001) (comparing simple dietary restrictions to what the insulin-dependent diabetic plaintiff must endure).

Fraser, following *Lawson* and *Nawrot v. CPC Internat'l,* 277 F.3d 896, 904-05 (7th Cir.2002), is particularly strong in effectively articulating how "the burden of mitigating measures" may establish a "disability":

Fraser's diabetes regimen is perpetual, severely restrictive, and highly demanding. Fraser must test her sugar several times daily, each test is painful, and takes close to five minutes to complete. She must vigilantly monitor what and how much she eats. She must time her daily shots and meals so carefully that it is not safe for her to live alone. (She could end up in the ambulance if she took too long a nap between a shot and breakfast.) She must always have certain foods available in case her blood sugar drops or skyrockets. She must always be able to take time to eat or give herself injections to balance her blood sugar levels. She cannot put a morsel of food in her mouth without carefully assessing whether it will tip her blood sugars out of balance. She cannot skip or postpone a snack or meal without cautiously studying her insulin and glucagon levels. She must constantly, faithfully, and precisely monitor her eating, exercise, blood sugar, and other health factors, and even this is no guarantee of success. *See Lawson,* 245 F.3d at 924-25(concluding that similar evidence raised a jury question as to whether diabetes substantially limited Lawson's major life activity of eating); *Nawrot v. CPC Internat'l,* 277 F.3d 896, 904-05 (7th Cir.2002) (addressing a brittle diabetic's substantial limitations on the major life activity of thinking and caring for himself).

Unlike a person with ordinary dietary restrictions, Fraser must monitor much more than what and how much she eats. Unlike a person with ordinary dietary restrictions, she does not enjoy a forgiving margin of error. While the typical person on a heart-healthy diet will not find himself in the emergency room if he eats too much at a meal or forgets his medication for a few hours, Fraser does not enjoy this luxury.

As in *Lawson,* even when taking insulin, her ability to "regulate h[er] blood sugar and metabolize food is difficult, erratic, and substantially limited." *Lawson,* 245 F.3d at 924. Even when followed with utmost skill and faithfulness, Fraser's treatment regimen does not completely save her from the havoc her diabetes wreaks on her ability to eat normally:

Q: [Counsel] mentioned several risks that Miss Fraser might face. Would those risks be significantly diminished if she followed a strict regimen of diet, closely monitoring her blood glucose levels, and properly administering her insulin?

A: [Dr. Lockwood] To a certain extent, they would be aggravated by that ... [I]f a person is in really what we call tight control, really good control, where her sugars are running down in the low hundreds most of the time, then her margin of error is reduced. So if ... she broke down her car and she couldn't get food, she would actually be closer to being in trouble than-than not.... And so the tight control in one way requires you to be really much more rigid in terms of your activity, and your margin of error is less.

Again, Dr. Lockwood explained:

A: the closer you get to good control, the more problems you're going to have with reactions....[I]t's impossible, since we're giving, you know, insulin in sort of an artificial way, we are just trying to guess and-and anticipate what her needs are going to be. ... [E]very meal is a little bit different and every day is slightly different in activity, even with the best of intentions. So the diabetic is going to have wider swings, *no matter what they do,* than you or I....

(Emphasis added). Dr. Lockwood then clarified further:

there was a study that came out several years ago that showed improving control with multiple injections and monitoring a lot reduces the long-term complications. But that study also shows that when you do that, you increase the numbers of insulin reactions and hypoglycemic reactions. Because as you get down towards that target, you're going to have some times when your blood sugar goes too low.

In short, Fraser presented evidence that the major life activity of eating is substantially limited because of her demanding and highly difficult treatment regimen.

Lawson v. CSX Transp., Inc., 245 F.3d 916, 924-25 (7th Cir. 2001):

" … the district court's characterization of the impact that Mr. Lawson's diabetes has on his ability to eat, … as requiring 'simple dietary restrictions,' … belies the severity of the restrictions that he must follow if he is to avoid dire and immediate consequences. On a daily basis, Mr. Lawson must endure the discomfort of multiple blood tests … . He also must adjust his food intake and level of exertion to take into account fluctuations in blood sugar. When his blood sugar drops, he 'must stop all other activities and find the kinds of food that will bring his levels back to normal or he will experience disabling episodes of dizziness, weakness, loss of mentation and concentration, and a deterioration of bodily functions.' … Mr. Lawson's physician characterized the[se] measures … as "a perpetual, multi-faceted and demanding treatment regime" requiring "continued vigilance." …. If Mr. Lawson fails to adhere strictly to this demanding regimen, the consequences could be dire: he could experience debilitating, and potentially life-threatening, symptoms. This evidence is sufficient for a jury to find that Mr. Lawson is

substantially limited with respect to the major life activity of eating. *See, e.g., Sutton,* 527 U.S. at 491 … .

"These … considerations-the demands of the regimen and the effects of noncompliance-… make this case quite unlike the situation before the … Court in *Sutton.* The wearing of corrective lenses to neutralize the effects of myopia, at issue in *Sutton*, …, involves none of the coordination of multifaceted factors or the constant vigilance that, according to this record, Mr. Lawson must demonstrate on a daily basis. Moreover, in *Sutton,* the Supreme Court noted that 'any negative side effects suffered by an individual resulting from the use of mitigating measures' must be taken into consideration. *Id.* at 484

B. *Toyota*

Fraser v. Goodale, 342 F.3d 1032, 1038) (9th Cir. 2003) (declaring, in applying *Toyota*: "As to the type of eating that Fraser alleges, it is a major life activity and certainly falls within those activities that are of central importance to most people's daily lives. Not only must she not eat certain foods, but she must carefully assess her blood sugar before putting anything into her mouth. It is the physical activity of eating in general that she argues is impaired, and we agree that this activity is a major life activity under the ADA.

C. "Failure to Control a Controllable Disease"

What matters, under *Sutto*n, is not "potential" mitigation, but rather, "actual" mitigation.

Branham v. Snow, 392 F.3d 896, 903 (7th Cir. 2006):

"[t]he use ... 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,* 527 U.S. at 488 … (emphasis in original). A court determining whether a plaintiff's impairment substantially limits a major life activity must consider "the plaintiff's condition as it exists after corrective or mitigating measures used to combat the impairment." *Lawson,* 245 F.3d at 925. Therefore, we must also take into account "any negative side effects" that Mr. Branham suffers "from the use of mitigating measures." *Sutton,* 527 U.S. at 484 ….

Nawrot v. CPC International, 277 F.3d 896, 904 (7th Cir. 2002):

"This is not, however, license for courts to meander in 'would, could, or should-have' land. We consider only the measures actually taken and consequences that actually follow. *Cf. Sutton,* 527 U.S. at 482-84 … (reasoning that an "approach [that] would often require courts and employers to speculate about a person's condition and would, in many cases, force them to make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition" is 'contrary to the letter and the spirit of the ADA'). Those who discriminate take their victims as they find them.

More specifically, Nawrot identified various aspects of his condition that precluded some sort of theoretical ideal mitigation. Thus, *id.* at 904-05: "as a consequence of his diabetes, [Nawrot] must inject himself with insulin approximately three times a day and must test his blood sugar level at least ten times a day. In addition, although he is able to manage his diabetes with constant monitoring and insulin injections (itself a substantial burden), this hardly remedies all the other adverse effects of his diabetes.

"Despite the most diligent care, Nawrot cannot completely control his blood sugar level. He suffers from unpredictable hypoglycemic episodes, of such extreme consequence that death is a very real and significant risk. On the occasions he suffers from such an episode, his ability to think coherently is significantly impaired, as well as his ability to function. He has lost consciousness and fallen several times. In addition, his ability to express coherent thoughts is impaired, causing him to make nonsensical statements. He suffered three diabetic episodes at work in the two years before his termination. And aside from full-blown diabetic episodes, Nawrot has had "close calls," where he felt the onset of an episode but was able to avert a serious, debilitating attack."

Fraser v. Goodale, 342 F.3d 1032, 1039 (9th Cir. 2003) (reversing district court finding of no genuine issue of fact whether plaintiff with diabetes was disabled, based on conclusion that plaintiff "gave only 'generalities and speculation concerning how she *might have been affected* if her blood glucose level was not well-controlled).

The 9th Circuit discounted assertions Fraser's diabetes was potentially "well-controlled": "Not all mitigating measures cure a person of an underlying impairment. We therefore review the effectiveness of the mitigating measure at preventing or ameliorating the underlying impairment. Further, the effectiveness of a mitigating measure is not always static. Like Fraser, a person could be just as faithful to a treatment regimen, and yet be more impaired at some times than others." 342 F.3d at 1039.

Rodriguez v. ConAgra Grocery Products Co., 436 F.3d 468, 475 (5th Cir 2006):

"ConAgra's argument that Rodriguez's "failure to control" his diabetes obviates the protection of the ADA is a red herring. This case is not about "failure to control"; rather, it is a garden variety "regarded as disabled" case. In such cases, the question of control is never relevant: Any rule requiring that a plaintiff exercise some level of control over his impairment-assuming *arguendo* that such a rule even exists-is relevant and applies only in an *actual disability* case. At its core, this case is about the … ADA's emphasis on treating impaired job applicants *as individuals*. ConAgra's blanket policy of refusing to hire what it characterizes as "uncontrolled" diabetics violates this fundamental tenet of ADA law; it embraces what the ADA detests: reliance on "stereotypes and generalizations" [footnote omitted] about an illness when making employment decisions.